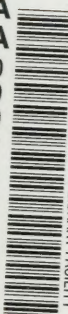


A
A
0
0
0
7
9
8
4
2
8
9



UC SOUTHERN REGIONAL LIBRARY FACILITY



THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

LAW LIBRARY

STANDARD
ENCYCLOPÆDIA *of*
PROCEDURE

EDWARD W. TUTTLE
EDITOR

Vol. XXI

LOS ANGELES
L. D. POWELL COMPANY
CHICAGO

✓
T
St 241
1911

COPYRIGHT, 1919
BY L. D. POWELL COMPANY

CITE THIS VOLUME

21 STANDARD PROC.

TABLE OF TITLES

PARTNERSHIP	1
PARTY WALLS	111
PASSENGERS	113
PATENTS	170
PAUPERS	227
PAWNBROKERS	241
PAYMENT	243
PENALTIES, FORFEITURES AND FINES	257
PENSIONS AND BOUNTIES	306
PERJURY	311
PERSONAL ACTIONS	335
PERSONAL PROPERTY	337
PETITIONS	349
PHYSICAL EXAMINATION	352
PHYSICIANS AND SURGEONS	365
PIRACY	388
PLEADING	390
PLEAS	434
PLEAS IN EQUITY	441
PLEDGES	455
POST OFFICE	466
POWERS	481
PRAECIPE	487
PRAYER	490
PRELIMINARY EXAMINATION	493
PRINCIPAL AND AGENT	530
PRINCIPAL AND SURETY	572
PRISONS AND PRISONERS	598

PRIVATE AND TOLL ROADS	610
PRIVILEGE	619
PRIZE FIGHTING	639
PROBATE COURTS	641
PROCEEDINGS IN REM	675
PROCESS	680
PROFANITY	798
PROHIBITION	800
PROSTITUTION	827
PROVINCE OF JUDGE AND JURY	831
PUBLIC CHARITIES	865
PUBLIC DRUNKENNESS	872
PUBLIC LANDS	875
PUBLIC SERVICE CORPORATIONS	893
PUIS DARREIN CONTINUANCE, PLEAS OF	960
PURE FOOD LAWS	969
QUIA TIMET	991
QUIETING TITLE	994

PARTNERSHIP

By the Editorial Staff.

I. ACTIONS OR SUITS BETWEEN PARTNERS OR THEIR REPRESENTATIVES, 6

A. *Actions at Law*, 6

1. *Transactions Involving an Account*, 6
 - a. *Generally*, 6
 - b. *Pleading Such Matters Defensively*, 10
2. *Transactions Not Involving an Account*, 10
3. *Single Unadjusted or Specially Segregated Item*, 11
4. *Partnership Limited to a Single Transaction*, 11
5. *Possession of Partnership Property*, 12
6. *Non-Partnership or Individual Transactions*, 12
 - a. *Generally*, 12
 - b. *Preliminary Contracts*, 12
 - c. *Failure To Pay Debts Assumed*, 13
 - d. *Set-Off or Counterclaim*, 13
7. *Breach of Partnership Agreement*, 13
8. *Action for Agreed Salary*, 14
9. *Torts*, 14
10. *Parties*, 15
11. *Pleadings*, 15
12. *Trial and Subsequent Proceedings*, 16
13. *Provisional Remedies*, 17

B. *Suits in Equity*, 17

1. *Generally*, 17
2. *Specific Performance*, 18
3. *Injunction*, 18

C. *Proceedings for Dissolution, Accounting and Settlement*, 18

1. *In What Forum*, 19
 - a. *At Law*, 19
 - b. *In Equity*, 20
 - c. *Probate Court*, 23
 - d. *Bankruptcy Court*, 23
 - e. *Admiralty Courts*, 23
 - f. *Justice's Court*, 24
2. *Place of Bringing Suit*, 24
3. *Parties*, 24

- a. *Who May Maintain Suit*, 24
 - (I.) *Partners*, 24
 - (II.) *Transferee, Assignee or Mortgagee, etc.*, 25
 - (III.) *Personal Representative of Deceased Partner*, 25
 - (IV.) *Heirs, Legatees or Devisees of Deceased Partner*, 26
 - (V.) *Creditor*, 27
- b. *Necessary and Proper Parties*, 27
 - (I.) *Generally*, 27
 - (II.) *Partners and Their Representatives*, 28
 - (III.) *Transferee, Assignee or Mortgagee, etc.*, 29
 - (IV.) *Creditors*, 29
- c. *Change in Parties Pendente Lite*, 30
- 4. *Process and Appearance*, 30
- 5. *Provisional Remedies*, 30
 - a. *Attachment*, 30
 - b. *Sequestration*, 31
 - c. *Arrest*, 31
 - d. *Injunction*, 31
 - e. *Receiver*, 32
- 6. *Pleadings*, 34
 - a. *Bill or Complaint*, 34
 - (I.) *Form and Sufficiency*, 34
 - (II.) *Joinder of Causes*, 36
 - (III.) *Prayer*, 37
 - (IV.) *Amendment*, 38
 - b. *Defensive Pleadings*, 38
 - (I.) *Generally*, 38
 - (II.) *Set-Off, Counterclaim and Recoupment*, 38
 - (III.) *Cross-Bill*, 39
- 7. *Issues, Proof and Variance*, 40
- 8. *Dismissal of Bill*, 41
- 9. *Trial*, 42
 - a. *Jury Trial*, 42
 - b. *Disposition of Matters in Bar*, 42
- 10. *Reference To Take Account*, 43
 - a. *In General*, 43
 - b. *Form of Report*, 43
 - c. *Effect of Report*, 44
- 11. *Determination and Decree*, 44
- 12. *Costs*, 46

II. ACTIONS OR PROCEEDINGS BETWEEN PARTNERS AND THIRD PERSONS, 47

A. *Jurisdiction and Venue*, 47

- B. *Attachment*, 48
 - 1. *Of Firm Property*, 48
 - a. *For What Claims*, 48
 - b. *Grounds for Attachment*, 49
 - 2. *Of Individual Property for Partnership Debt*, 50
 - 3. *Affidavit*, 50
 - 4. *Bond*, 50
 - 5. *Writ of Attachment*, 50
 - a. *Form and Contents*, 50
 - b. *Levy*, 51
 - c. *Quashal or Vacation of Writ*, 51
- C. *Garnishment*, 51
- D. *Parties*, 52
 - 1. *Generally*, 52
 - 2. *Actions Ex Contractu*, 55
 - a. *Plaintiffs*, 55
 - (I.) *In General*, 55
 - (II.) *Upon Assigned Claim*, 56
 - (III.) *By Indorsee*, 57
 - (IV.) *Where Claim Severed*, 57
 - (V.) *Partner as Trustee*, 58
 - (VI.) *Contracts in Name of Partner*, 58
 - b. *Defendants*, 58
 - (I.) *In General*, 58
 - (II.) *Joint and Several Liability*, 59
 - (III.) *Assumption by Partner of Firm Indebtedness*, 60
 - (IV.) *Contracts Made With Individual Member*, 60
 - 3. *Actions Ex Delicto*, 60
 - a. *Plaintiffs*, 60
 - b. *Defendants*, 61
 - 4. *Where Common Members*, 62
 - 5. *Changes in the Firm Before Suit*, 63
 - a. *Dissolution in General*, 63
 - b. *Admission of New Partner*, 65
 - 6. *Bankruptcy or Insolvency*, 65
 - 7. *Change in the Firm Pendente Lite*, 66
 - a. *In General*, 66
 - b. *Bankruptcy or Insolvency*, 67
 - 8. *Objections as to Parties*, 67
 - a. *In General*, 67
 - b. *Waiver of Defect*, 68
- E. *Process*, 68
 - 1. *Form of Process*, 68
 - 2. *Service*, 69

3. *Return*, 71
4. *Amendments*, 71
- F. *Appearance*, 71
 1. *In General*, 71
 2. *Waiver of Defects*, 72
- G. *Pleading*, 72
 1. *Declaration, Complaint or Petition*, 72
 - a. *Form of*, 72
 - b. *Contents*, 72
 - (I.) *Existence of Partnership*, 72
 - (A.) *Necessity of Alleging*, 72
 - (B.) *Sufficiency of Allegation*, 74
 - (II.) *Names of Partners*, 74
 - (III.) *Nature and Purpose of Partnership*, 75
 - (IV.) *Allegation of Filing Certificate of Fictitious Name*, 75
 - (V.) *Prayer*, 76
 2. *Plea or Answer*, 76
 - a. *Denial of Partnership*, 76
 - b. *Denial of Liability*, 77
 - c. *Filing Certificate of Fictitious Name*, 77
 - d. *Separate Pleas by Partners*, 78
 3. *Replication or Reply*, 78
 4. *Verification*, 78
 5. *Amendments*, 78
- H. *Issues, Proof and Variance*, 79
 1. *Existence of Partnership*, 79
 2. *As to Liability*, 80
- I. *Trial*, 81
 1. *Separate Trials*, 81
 2. *Dismissal, Discontinuance and Nonsuit*, 81
 3. *Province of Court and Jury*, 82
 4. *Instructions*, 83
- J. *Judgment*, 83
 1. *By Default*, 83
 2. *By Confession*, 84
 3. *Form and Sufficiency*, 84
 - a. *Conformity to Pleadings and Proof*, 84
 - b. *As to Names of Parties*, 84
 - (I.) *Generally*, 84
 - (II.) *After Dissolution*, 86
 - c. *Joint and Several*, 86
- K. *Enforcement of Judgment*, 89
 1. *Against What Property*, 89

- a. *In General*, 89
- b. *Homestead and Exemptions*, 90
- 2. *Writ of Execution*, 92
 - a. *Generally*, 92
 - b. *Form and Sufficiency of Writ*, 93
 - c. *Levy*, 93
 - (I.) *Manner of Making*, 93
 - (II.) *Effect of Levy on Title and Possession*, 94
 - (III.) *Sale of Partner's Interest*, 96
- 3. *Subsequent Proceedings Against Partner Not Served*, 97
- 4. *Accounting to Judgment Creditor or Execution Purchaser*, 97
- 5. *Remedies of Partners Not Parties Defendant*, 98
- 6. *Injunction Against Enforcement*, 98
- L. *Appeal and Error*, 99

III. ACTIONS BY OR AGAINST SURVIVING PARTNERS OR REPRESENTATIVES OF DECEASED PARTNERS, 100

- A. *By and Against Whom*, 100
 - 1. *At Common Law*, 100
 - 2. *In Equity*, 102
 - 3. *Statutory or Code Provisions*, 102
 - a. *In General*, 102
 - b. *Joint and Several Liability*, 102
 - c. *Bond by Surviving Partner*, 103
 - d. *Where Partner Not Administrator of Firm Assets*, 104
 - e. *Probate Authorization To Sue*, 104
 - 4. *In Actions Between Survivor and Deceased's Representatives*, 104
- B. *Pleadings*, 104
 - 1. *Complaint or Declaration*, 104
 - 2. *Replication or Reply*, 106
 - 3. *Amendments*, 106
- C. *Judgment*, 106

IV. LIMITED PARTNERSHIPS, 106

- A. *Actions by or Against Limited Partnerships*, 106
 - 1. *Parties*, 106
 - 2. *Pleadings*, 107
 - 3. *Judgment*, 107
- B. *Actions by or Between Special and General Partners*, 108

V. JOINT ADVENTURES, 108

A. *Actions or Suits Between Parties to*, 108

1. *Nature of Remedy*, 108
2. *Parties*, 109
3. *Pleading*, 109

B. *Actions by or Against Third Persons*, 110

CROSS-REFERENCES:

Account and Accounting;	Joinder of Actions;
Associations;	Joint Stock Companies;
Bankruptcy Proceedings;	Judgments;
Beneficial Associations;	Judgments and Decrees,
Declaration and Complaint;	Enforcement of;
Equity Jurisdiction and	Loan Associations.
Procedure;	

For forms in addition to those found in this article, see 9 STANDARD PROC. 623, 633, 930, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. ACTIONS OR SUITS BETWEEN PARTNERS OR THEIR REPRESENTATIVES.—A. ACTIONS AT LAW.—1. Transactions Involving an Account.—a. *Generally*.—Except to the extent that the common law action of account may be still available,¹ the general rule is that one partner cannot sue his copartner,² nor may the repre-

1. See *infra*, I, C, and the title "Account and Accounting."

2. Ala.—Merrill *v.* Smith, 158 Ala. 186, 48 So. 495; Broda *v.* Greenwald, 66 Ala. 538. Ark.—King *v.* Moore, 72 Ark. 469, 82 S. W. 494 (partner cannot recover for services rendered to the partnership by his minor son); Huyek *v.* Meador, 24 Ark. 191. Cal.—Ferey *v.* Olson, 169 Pac. 386; Dukes *v.* Kellogg, 127 Cal. 563, 60 Pac. 44; Fisher *v.* Sweet, 67 Cal. 228, 7 Pac. 657; Ross *v.* Cornell, 45 Cal. 133. Colo.—Mason *v.* Sieglitz, 22 Colo. 320, 44 Pac. 588. Conn.—Cole *v.* Fowler, 68 Conn. 450, 36 Atl. 807; Beach *v.* Hotchkiss, 2 Conn. 425, 428. Del.—Robinson *v.* Green's Admr., 5 Harr. 115. Fla.—Wills *v.* Andrews, 75 So. 618; White *v.* Ross, 35 Fla. 377, 17 So. 640. Ga.—Miller *v.* Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504; Paulk *v.* Creech, 8 Ga. App. 738, 70 S. E. 145. Ill.—Bowzer

v. Stoughton, 119 Ill. 47, 9 N. E. 208; Hanks *v.* Baber, 53 Ill. 292. Ind.—Thomas *v.* Hollingsworth, 181 Ind. 411, 103 N. E. 840; Adams *v.* Shewalter, 139 Ind. 178, 38 N. E. 607. Ia.—Hansen *v.* Morris, 87 Iowa 303, 54 N. W. 223; Thompson *v.* Smith, 82 Iowa 598, 48 N. W. 988. Kan.—Palm *v.* Poponoe, 60 Kan. 297, 56 Pac. 480; Clarke *v.* Mills, 36 Kan. 393, 13 Pac. 569; Pettingill *v.* Jones, 28 Kan. 749. Ky.—Lawrence *v.* Clark, 9 Dana 257, 35 Am. Dec. 133; Pritchard *v.* Ford, 1 J. J. Marsh. 543. La.—Reddick *v.* White, 46 La. Ann. 1198, 15 So. 487; McNair *v.* Gourrier, 40 La. Ann. 353, 4 So. 310. Me.—Pray *v.* Mitchell, 60 Me. 430; Farrar *v.* Pearson, 59 Me. 561, 8 Am. Rep. 439. Md.—Gusdorff *v.* Schleisner, 85 Md. 360, 37 Atl. 170; McSherry *v.* Brooks, 46 Md. 103. Mass.—Tyng *v.* Thayer, 8 Allen 391; Fanning *v.* Chadwick, 3 Pick. 420, 15 Am. Dec. 233. Mich.—Cooke *v.*

sentative of a deceased partner sue or be sued by the surviving partners³ at law in respect of any matter involving the partnership account, until the partnership affairs are adjusted, either by a judicial⁴ account-

Lymperis, 178 Mich. 299 144 N. W. 514; *Miner v. Lorman*, 56 Mich. 212, 22 N. W. 265. **Miss.**—*Morgan v. Nunes*, 54 Miss. 308; *Bonnafe v. Fenner*, 6 Smed. & M. 212, 45 Am. Dec. 278. **Mo.** *Willis v. Barron*, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673; *Johnson v. Ewald*, 82 Mo. App. 276. **Mont.** *Croft v. Bain*, 49 Mont. 484, 143 Pac. 960; *McMahon v. Thornton*, 4 Mont. 46, 1 Pac. 724. **Neb.**—*Dorwart v. Ball*, 71 Neb. 173, 98 N. W. 652, 8 Ann. Cas. 766; *Lord v. Peaks*, 41 Neb. 891, 60 N. W. 353. **Nev.**—*Wicks v. Lippman*, 13 Nev. 499. **N. H.**—*Ordiorne v. Woodman*, 39 N. H. 541; *Towle v. Meserve*, 38 N. H. 9. **N. J.**—*Davis v. Minch*, 80 N. J. L. 214, 76 Atl. 328. **N. J.**—*McCabe v. Sinclair*, 66 N. J. Eq. 24, 58 Atl. 412; *Hill v. Beach*, 12 N. J. Eq. 31. **N. M.**—*Wiley v. Renner*, 8 N. M. 641, 45 Pac. 1132. **N. Y.** *Arnold v. Arnold*, 90 N. Y. 580; *Smith v. Fitchett*, 56 Hun 473, 10 N. Y. Supp. 459, 31 N. Y. St. 606. **N. C.**—*Ledford v. Emerson*, 140 N. C. 288, 52 S. E. 641, 4 L. R. A. (N. S.) 130, 6 Ann. Cas. 107; *Newby v. Harrell*, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503. **N. D.**—*Devore v. Woodruff*, 1 N. D. 143, 45 N. W. 701. **Ohio.**—*Kunneke v. Mapel*, 60 Ohio St. 1, 53 N. E. 259. **Okla.**—*Nation v. Savely*, 168 Pac. 805; *Baughman v. Hebard*, 166 Pac. 88; *Cobb v. Martin*, 32 Okla. 588, 123 Pac. 422. **Ore.**—*Li Sai Cheuk v. Lee Lung*, 79 Ore. 563, 146 Pac. 94, 156 Pac. 254; *McDonald v. Holmes*, 22 Ore. 212, 29 Pac. 735. **Pa.**—*Kutz v. Dreibelbis*, 126 Pa. 335, 17 Atl. 609; *Crow v. Green*, 111 Pa. 637, 5 Atl. 23; *In re Ainey's Appeal*, 2 Penny. 192. **R. I.**—*Dowling v. Clarke*, 13 R. I. 134. **S. C.**—*Huffman v. Huffman*, 63 S. C. 1, 40 S. E. 963. **Utah.**—*Jennings v. Pratt*, 19 Utah 129, 56 Pac. 951. **Vt.**—*Beede v. Fraser*, 66 Vt. 114, 28 Atl. 880, 44 Am. St. Rep. 824; *Spear v. Newell*, 13 Vt. 288. **Va.**—*Summerson v. Donovan*, 110 Va. 657, 66 S. E. 822, 19 Ann. Cas. 253; *Wright v. Michie*, 6 Gratt. (47 Va.) 354. **Wash.**—*Stevens v. Baker*, 1 Wash. Ter. 315. **Wis.**—*Schmidt v. Mertes*, 145 Wis. 468, 130 N. W. 474; *Blakely v. Smoek*, 96 Wis. 611, 71 N. W. 1052. **Eng.**—*Brierly v. Cripps*, 7 Car. & P. 709, 32 E. C. L. 833.

[a] **Reason.**—"Until such final settlement, the general rule is that the firm and not the individual partner is the debtor; and in such case it cannot be said correctly that there is a debt due from one partner to the other." *Sprout v. Crowley*, 30 Wis. 187. To same effect see the following cases: *King v. Moore*, 72 Ark. 469, 82 S. W. 494; *Price v. Drew*, 18 Fla. 670.

[b] **The real test** to determine whether one partner may sue another at law is not solely whether the action can be tried without going into the partnership accounts, but whether the defendant has bound himself personally to the plaintiff. *Paulk v. Creech*, 8 Ga. App. 738, 70 S. E. 145.

[c] **By statute assumpsit** is a proper remedy for the settlement of accounts where only two partners are involved. *Mickle v. Peet*, 43 Conn. 65.

3. **Ala.**—*Calvert v. Marlow*, 18 Ala. 67, 6 Ala. 337. **Ia.**—*Stanberry v. Cat-tell*, 55 Iowa 617, 8 N. W. 478. **Kan.** *Palm v. Poponoe*, 60 Kan. 297, 56 Pac. 480. **Md.**—*Bruns v. Heise*, 101 Md. 163, 60 Atl. 604. **N. H.**—*Harris v. Harris*, 39 N. H. 45. **Okla.**—*Cobb v. Martin*, 32 Okla. 588, 123 Pac. 422.

[a] **Claim Against Estate.**—The claim of a surviving partner for advances to the partnership should not be presented to the administrator of the deceased partner for allowance until the partnership affairs are wound up; and it may be presented at any time within ten months after the partnership affairs are settled, and, if rejected, suit may be brought on it at any time within three months after its rejection. *Gleason v. White*, 34 Cal. 258.

As to actions between third persons and surviving partners or their representatives, see *infra*, III.

4. **Cal.**—*Barnstead v. Empire Min. Co.*, 5 Cal. 299. **Colo.**—*Robinson v. Compher*, 13 Colo. App. 343, 57 Pac. 754. **Ga.**—*Elliott v. Deason*, 64 Ga. 63. **Ill.**—*Newman v. Tichenor*, 88 Ill. App. 1. **Ind.**—*Page v. Thompson*, 33 Ind. 137. **La.**—*Martin v. Seabaugh*, 128 La. 442, 54 So. 935. **Md.**—*Corner v. Gilman*, 53 Md. 364. **Mass.**—*Wilby v.*

ing, or by an agreement reached by the partners.⁵ The fact that the partnership between the parties has been dissolved does not change the rule.⁶

An action at law will not lie for contribution for advances or loans made to the firm or for money paid or debts settled by a partner out of his private funds, before a final settlement of the partnership affairs.⁷ And the same is true of an action by a partner to recover his share of the partnership profits,⁸ or for a partial division of the firm

Phinney, 15 Mass. 116. **N. Y.**—Ferguson v. Baker, 116 N. Y. 257, 22 N. E. 400.

As to actions for dissolution, accounting and settlement of a partnership, see *infra*, I, C.

5. **Ala.**—Pope v. Randolph, 13 Ala. 214. **Ga.**—Elliott v. Deason, 64 Ga. 63. **Ill.**—Hanks v. Baber, 53 Ill. 292; Aldrich v. Mathias, 167 Ill. App. 589. **Ind.**—Douthit v. Douthit, 133 Ind. 26, 32 N. E. 715; Warring v. Hill, 89 Ind. 497. **La.**—Jenkins v. Howard, 21 La. Ann. 597. **Me.**—Pray v. Mitchell, 60 Me. 430. **Mass.**—Fanning v. Chadwick, 3 Pick. 420, 15 Am. Dec. 233; Wilby v. Phinney, 15 Mass. 116. **N. Y.**—Ferguson v. Baker, 116 N. Y. 257, 22 N. E. 400; Covert v. Henneberger, 53 How. Pr. 1; Head v. King, 33 Misc. 89, 67 N. Y. Supp. 141. **Tex.**—Reeves v. White (Tex. Civ. App.), 161 S. W. 43. **Wash.**—Kilbourn v. Rathbun, 91 Wash. 121, 157 Pac. 457.

6. **Ala.**—Philips v. Lockhart, 1 Ala. 521. **Ind.**—Lang v. Oppenheim, 96 Ind. 47. **N. J.**—Davis v. Minch, 80 N. J. L. 214, 76 Atl. 328; Gulick v. Gulick, 14 N. J. L. 578. **N. Y.**—Attwater v. Fowler, 1 Hall 180. **Ore.**—McDonald v. Holmes, 22 Ore. 212, 29 Pac. 735. **Pa.**—Murray v. Herrick, 171 Pa. 21, 32 Atl. 1125; Leidy v. Messinger, 71 Pa. 177. **R. I.**—Dowling v. Clarke, 13 R. I. 134.

7. **Ark.**—Johnson v. Peck, 58 Ark. 580, 25 S. W. 865. **Conn.**—Cole v. Fowler, 68 Conn. 450, 36 Atl. 807; Bishop v. Bishop, 54 Conn. 232, 6 Atl. 426; Mickle v. Peet, 43 Conn. 65. **Fla.**—Price v. Drew, 18 Fla. 670. **Ga.**—Elliott v. Deason, 64 Ga. 63. **Idaho.**—Haskins v. Curran, 4 Idaho 573, 43 Pac. 559. **Ill.**—Hartzell v. Murray, 224 Ill. 377, 79 N. E. 674. **Ind.**—Crossley v. Taylor, 83 Ind. 337; Coleman v. Coleman, 78 Ind. 344. **Ky.**—Kelley v. Ramsey, 176 Ky. 584, 195 S. W. 1111; Warring v. Arthur, 98 Ky. 34, 32 S. W. 221, 17 Ky. L. Rep. 605; Lawrence v.

Clark, 9 Dana 257, 35 Am. Dec. 133. **La.**—Reddick v. White, 46 La. Ann. 1198, 15 So. 487; Hennegin v. Wilcoxon, 13 La. Ann. 576. **Md.**—Bruns v. Heise, 101 Md. 163, 60 Atl. 604. **Mass.**—Starbuck v. Shaw, 10 Gray 492. **Mo.**—Bond v. Bemis, 55 Mo. 524; Morin v. Martin's Admr., 25 Mo. 360; Ross v. Carson, 32 Mo. App. 148. **N. J.**—Davis v. Minch, 80 N. J. L. 214, 76 Atl. 328; Sieghortner v. Weissenborn, 20 N. J. Eq. 172. **N. Y.**—Crater v. Biningier, 45 N. Y. 545; Bouton v. Bouton, 40 How. Pr. 217. **Ore.**—McDonald v. Holmes, 22 Ore. 212, 29 Pac. 735. **Pa.**—Murray v. Herrick, 171 Pa. 21, 32 Atl. 1125; Holbert v. Herrick, 171 Pa. 25, 32 Atl. 1125; Crow v. Green, 111 Pa. 637, 5 Atl. 23; Leidy v. Messinger, 71 Pa. 177. **Tex.**—Merriwether v. Harde-man, 51 Tex. 436; Lockhart v. Lytle, 47 Tex. 452; Danforth v. Levin (Tex. Civ. App.), 156 S. W. 569. **Va.**—Summerson v. Donovan, 110 Va. 657, 66 S. E. 822, 19 Ann. Cas. 253. **Eng.**—Richardson v. Bank of England, 4 Myl. & C. 165, 8 L. J. Ch. (N. S.) 1, 2 Jur. (O. S.) 911, 41 Eng. Reprint 65.

[a] An exception to this general rule prevails in some states. See Clarke v. Mills, 36 Kan. 393, 13 Pac. 569, and *infra*, this section.

Such issues to be determined in action for accounting, see *infra*, I, C.

As to advances to partner as an individual, see *infra*, I, A, 6, a.

8. **Ala.**—Merrill v. Smith, 158 Ala. 186, 48 So. 495. **Ind.**—Douthit v. Douthit, 133 Ind. 26, 32 N. E. 715. **Md.**—Morgart v. Smouse, 103 Md. 463, 63 Atl. 1070, 115 Am. St. Rep. 367. **Mass.**—Ryder v. Wilcox, 103 Mass. 24; Gomersall v. Gomersall, 14 Allen 60. **Mont.**—Boehme v. Fitzgerald, 43 Mont. 226, 115 Pac. 413. Compare McCormick v. Largey, 1 Mont. 158, wherein the court sustained an action for the recovery of a certain sum as the share of the partnership profits as the defendant's answer did not deny that such profits were made. **N. Y.**—Glover

assets,⁹ or for damages for the loss of profits,¹⁰ or neglect of partnership business.¹¹

But after a final and complete accounting is had, an action at law is the proper remedy to obtain the payment of the ascertained balance,¹² and this is true even where the precise sum is not specified if it is easily capable of reduction to a certainty.¹³ In some jurisdictions, there must be an express promise of the defendant to pay this balance;¹⁴ generally, however, no such express promise is considered necessary, but a promise is implied from the circumstances.¹⁵ And in one jurisdiction, at least, an action of assumpsit will lie, to recover a final balance of a partnership account without a settlement of accounts or a promise to pay, in all cases in which the rendition of the judgment will be an entire termination of the partnership transactions, so that no further cause of action can grow out of them.¹⁶ And in some states, where only a money judgment is sought, and the account is simple and all the partnership affairs settled so that nothing remains but to

v. Tuck, 24 Wend. 153; *Vickery v. Stemm*, 140 N. Y. Supp. 1007. **Ohio**. *Oglesby v. Thompson*, 59 Ohio St. 60, 51 N. E. 878.

9. *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679.

10. *Buckmaster v. Gowen*, 81 Ill. 153.

11. *Ryder v. Wilcox*, 103 Mass. 24; *Capen v. Barrows*, 1 Gray (Mass.) 376.

12. **Ala.**—*Pope v. Randolph*, 13 Ala. 214; *McGehee v. Dougherty*, 10 Ala. 863; *Clark v. Clark*, 4 Port. 9. **Colo.** *Bean v. Gregg*, 7 Colo. 499, 4 Pac. 903. **Ga.**—*Benton v. Hunter*, 119 Ga. 381, 46 S. E. 414; *Moore v. Stone*, 50 Ga. 157. **Ill.**—*Ridgway v. Grant*, 17 Ill. 117; *Rotramel v. Ford*, 169 Ill. App. 7. **Ia.**—*Thompson v. Smith*, 82 Iowa 598, 48 N. W. 988; *Wycoff v. Purnell*, 10 Iowa 332. **Mass.**—*Robinson v. Williams*, 8 Mete. 454. **Miss.**—*Hunt v. Morris*, 44 Miss. 314; *Lesley v. Rosson*, 39 Miss. 368, 77 Am. Dec. 679; *Sturges v. Swift*, 32 Miss. 239. **Mo.**—*Brewer v. Swartz*, 83 Mo. App. 451. **Ohio**. *Masters v. Freeman*, 17 Ohio St. 323. **Va.**—*Waggoner v. Gray's Admr.*, 2 Hen. & M. (12 Va.) 603. **Wis.**—*Schmidt v. Mertes*, 145 Wis. 468, 130 N. W. 474. **Eng.**—*Rackstraw v. Imber*, 1 Holt 368, 3 E. C. L. 149; *Foster v. Allanson*, 2 T. R. 479, 100 Eng. Reprint 258.

[a] Balances struck preparatory to a settlement are not sufficient. They must be final to support an action at law. **N. H.**—*Harris v. Harris*, 39 N. H. 45. **Pa.**—*In re Ainey's Appeal*, 2 Penny. 192. **Tex.**—*McKay v. Overton*, 65 Tex. 82.

Remedy in equity where the existence of fraud or mistake in securing the account is alleged, see *infra*, I, C, 1, b.

13. **Ark.**—*Bailey v. Starke*, 6 Ark. 191. **Ga.**—*Pool v. Perdue*, 44 Ga. 454; *Paulk v. Creech*, 8 Ga. App. 738, 70 S. E. 145. **Ind.**—*Thompson v. Lowe*, 111 Ind. 272, 12 N. E. 476.

14. *Belanger v. Dana*, 52 Hun 39, 4 N. Y. Supp. 776, 22 N. Y. St. 218; *Lasky v. Coverdale*, 84 Misc. 34, 145 N. Y. Supp. 994. See *Halsted v. Schmelzel*, 17 Johns. (N. Y.) 80.

[a] Where the ascertained balance has been converted into a promissory note, an action thereon will lie. *Aldrich v. Mathias*, 167 Ill. App. 589; *First Nat. Bank of Champlain v. Wood*, 128 N. Y. 35, 27 N. E. 1020.

15. **Ala.**—*McGehee v. Dougherty*, 10 Ala. 863. **Cal.**—*Ross v. Cornell*, 45 Cal. 133. **Colo.**—*Bean v. Gregg*, 7 Colo. 499, 4 Pac. 903. **Del.**—*Robinson v. Green's Admr.*, 5 Harr. 115. **Fla.**—*Price v. Drew*, 18 Fla. 670. **Ill.**—*Purvins v. Champion*, 67 Ill. 459. **Ia.**—*Wycoff v. Purnell*, 10 Iowa 332. **Me.**—*Lane v. Tyler*, 49 Me. 252. **Mass.**—*Wilby v. Phinney*, 15 Mass. 116. **N. J.**—*Jaques v. Hulit*, 16 N. J. L. 38. **Vt.**—*Spear v. Newell*, 13 Vt. 288. **Wash.**—*Stevens v. Baker*, 1 Wash. Ter. 315. **Wis.**—*Rose v. Bradley*, 91 Wis. 619, 65 N. W. 509.

16. *Wheeler v. Wheeler*, 111 Mass. 247; *Williams v. Henshaw*, 11 Pick. (Mass.) 79, 29 Am. Dec. 366; *Wilby v. Phinney*, 15 Mass. 116. See *Dorwart v. Ball*, 71 Neb. 173, 98 N. W. 652, 8 Ann. Cas. 766.

determine the amount due the partners, an action at law is maintainable.¹⁷

5. *Pleading Such Matters Defensively.*—In an action upon an individual demand of one partner against another, the defendant cannot set up as a counterclaim matters arising out of partnership transactions before there has been an accounting and a balance found due to the defendant after the liquidation of all the indebtedness of the firm.¹⁸ It has, however, been held to the contrary where the partnership has been dissolved,¹⁹ or where the plaintiff and defendant are the only members of the firm.²⁰ And it would seem that partnership transactions might be used as a set-off or counterclaim if they be otherwise proper for that purpose, whenever an action at law could be maintained upon them.²¹ And where an equitable defense may be made to an action at law, the defendant may by setting forth facts showing an equitable necessity therefor, ask for an accounting of the partnership business before being required to adjust the non-partnership transaction.²²

2. *Transactions Not Involving an Account.*—One partner may maintain any action at law against a co-partner which does not involve the consideration and settlement of the partnership accounts.²³

17. **Kan.**—Clarke *v.* Mills, 36 Kan. 393, 13 Pac. 569; Pettingill *v.* Jones, 28 Kan. 749. **Mich.**—See Wheeler *v.* Arnold, 30 Mich. 304. But see Miner *v.* Lorman, 56 Mich. 212, 22 N. W. 265. **Neb.**—See Dorwart *v.* Ball, 71 Neb. 173, 98 N. W. 652, 8 Ann. Cas. 766. **N. C.**—See Ledford *v.* Emerson, 140 N. C. 288, 52 S. E. 641, 4 L. R. A. (N. S.) 130, 6 Ann. Cas. 107. **Utah.**—See Mills *v.* Gray, 167 Pac. 358.

Action at law on account, see *infra*, I, C, and the title "Account and Accounting."

18. **Cal.**—Case *v.* Maxey, 6 Cal. 276. **Ill.**—Commons *v.* Snow, 194 Ill. App. 569; George *v.* Pfeil, 158 Ill. App. 261. **Mich.**—Randall *v.* Baird, 66 Mich. 312, 33 N. W. 506; Gardiner *v.* Fargo, 58 Mich. 72, 24 N. W. 655; Elder's Appeal, 39 Mich. 474. **Minn.**—Little *v.* Simonds, 46 Minn. 380, 49 N. W. 186. **Mo.**—Berthold *v.* O'Hara, 121 Mo. 88, 25 S. W. 845; Leabo *v.* Renshaw, 61 Mo. 292; Finney *v.* Turner, 10 Mo. 207. **N. H.**—Ordiorne *v.* Woodman, 39 N. H. 541; Harris *v.* Harris, 39 N. H. 45. **N. J.**—Reim *v.* Bissinger, 75 N. J. L. 289, 68 Atl. 88. **N. C.**—Love *v.* Rhyne, 86 N. C. 576. **Tex.**—See Reeves *v.* White (Tex. Civ. App.), 161 S. W. 43.

But see Mills *v.* Carrier, 30 S. C. 617, 9 S. E. 350, 741, where a counterclaim for an alleged balance arising from an unsettled partnership was held an action on contract.

Set-off of individual claims, see *infra*, I, A, 6, d.

Set-off in actions for accounting, see *infra*, I, C, 6, b, (II).

19. Irish *v.* Snelson, 16 Ind. 365.

[a] Plea to be good must show a balance due the defendant growing out of the entire partnership transactions. Hendry *v.* Hendry, 32 Ind. 349.

20. Reeves *v.* White (Tex. Civ. App.), 161 S. W. 43.

21. As to when an action at law may be maintained in partnership transactions, see *supra*, I, A, 1, a, and *infra*, I, C, 1, a.

22. Foulks *v.* Rhodes, 12 Nev. 225, in case of insolvency of plaintiff.

[a] **Cross-Bill.**—In a law action upon promissory notes, the defendant, if his defense at law is not adequate or practical and involves the settlement of partnership accounts, may file a cross-bill in equity to procure the data necessary to justly determine the issues of the action at law. Jones *v.* Skiles, 85 Ore. 554, 167 Pac. 505. As to right to interpose cross-bill in action at law, generally, see 6 STANDARD PROC. 268.

23. **Ala.**—Robinson *v.* Bullock, 58 Ala. 618; Scott *v.* Campbell, 30 Ala. 728. **Ill.**—Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826; Wells *v.* Carpenter, 65 Ill. 447; Lintner *v.* Millikin, 47 Ill. 178; Vennum *v.* Palmer, 123 Ill. App. 619. **Me.**—Lane *v.* Tyler, 49 Me. 252. **Mich.**—Cook *v.* Canny, 96

3. Single Unadjusted or Specially Segregated Item.—Where the partnership relation has been terminated and settled except as to a single item, an action at law may be maintained by a partner for a balance due by reason of this item,²⁴ and the same rule is applied where the partners, by agreement have segregated some item from the general partnership business and account.²⁵

4. Partnership Limited to a Single Transaction.—Where the partnership is limited to a single transaction or venture which has been completed, an action at law may be maintained by one partner against another for the amount alleged to be due him by reason of the transaction.²⁶

Mich. 398, 55 N. W. 987; *Carpenter v. Greenop*, 74 Mich. 664, 42 N. W. 276, 16 Am. St. Rep. 662, 4 L. R. A. 241. **Mo.**—*Russell v. Grimes*, 46 Mo. 410. **N. Y.**—*Ferguson v. Baker*, 116 N. Y. 257, 22 N. E. 400; *Esdaile v. Wuytack*, 25 Abb. N. C. 474, 11 N. Y. Supp. 421, 33 N. Y. St. 145; *Mulligan v. Kraus*, 88 Misc. 538, 151 N. Y. Supp. 401. **Tex.**—*McKay v. Overton*, 65 Tex. 82. **Vt.**—*Beede v. Fraser*, 66 Vt. 114, 28 Atl. 880, 44 Am. St. Rep. 824. **Wis.** *Edwards v. Remington*, 51 Wis. 336, 8 N. W. 193.

[a] Where a person is defrauded into buying an interest in a firm, he may affirm the contract of partnership and sue for damages caused by the fraud in its procurement, such right not being dependent upon an accounting. **Ill.**—*Vennum v. Palmer*, 123 Ill. App. 619. **Ind.**—*Cohoon v. Fisher*, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193. **Mo.**—*Pickett v. Wren*, 187 Mo. App. 83, 174 S. W. 156, fact that no pecuniary loss was suffered by plaintiff is immaterial. As to right to maintain a suit for the rescission of such a contract, see *infra*, I, B, 3.

Non-partnership transactions, see *infra*, I, A, 6.

24. Colo.—*Mason v. Sieglitz*, 22 Colo. 326, 44 Pac. 588. **Ill.**—*Purvines v. Champion*, 67 Ill. 459. **Mass.**—*Shattuck v. Lawson*, 10 Gray 405; *Fanning v. Chadwick*, 3 Pick. 420, 15 Am. Dec. 233, two unadjusted items. **Mich.** *Cookes v. Lymperis*, 178 Mich. 299, 144 N. W. 514. **Mo.**—*Bambrick v. Simms*, 132 Mo. 48, 33 S. W. 445; *Buckner v. Ries*, 34 Mo. 357; *Johnson v. Ewald*, 82 Mo. App. 276. **Neb.**—*Dorwart v. Ball*, 71 Neb. 173, 98 N. W. 652, 8 Ann. Cas. 766. **N. H.**—*Gibson v. Moore*, 6 N. H. 547. **Tex.**—*Hutchinson v. Murray* (Tex. Civ. App.), 169 S. W. 640.

25. U. S.—*Van Ness v. Forrest*, 8 Cranch 30, 3 L. ed. 478; *Burhans v. Jefferson*, 76 Fed. 25, 22 C. C. A. 25. **Ala.**—*Rowland v. Boozer*, 10 Ala. 690. **Fla.**—*Price v. Drew*, 18 Fla. 670. **Ga.** *Miller v. Freeman*, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504; *Paulk v. Creech*, 8 Ga. App. 738, 70 S. E. 145. **Ind.** *Douthit v. Douthit*, 133 Ind. 26, 32 N. E. 715. **Me.**—*Holyoke v. Mayo*, 50 Me. 385. **Mich.**—*Cookes v. Lymperis*, 178 Mich. 299, 144 N. W. 514. **Miss.** *Bonnafe v. Fenner*, 6 Smed. & M. 212, 45 Am. Dec. 278. **Mo.**—*Willis v. Barron*, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673. **N. H.**—*Harris v. Harris*, 39 N. H. 45; *Gibson v. Moore*, 6 N. H. 547. **N. Y.**—*First Nat. Bank of Champlain v. Wood*, 128 N. Y. 35, 27 N. E. 1020; *Paine v. Thacher*, 25 Wend. 450. **Ohio.**—*Kunneke v. Mapel*, 60 Ohio St. 1, 53 N. E. 259; *Neil v. Greenleaf*, 26 Ohio St. 567. **Ore.**—*Wilson v. Wilson*, 26 Ore. 251, 38 Pac. 185; *McDonald v. Holmes*, 22 Ore. 212, 29 Pac. 735. **Vt.**—*Beede v. Fraser*, 66 Vt. 114, 28 Atl. 880, 44 Am. St. Rep. 824; *Collamer v. Foster*, 26 Vt. 754.

26. Ga.—*Paulk v. Creech*, 8 Ga. App. 738, 70 S. E. 145. **Ky.**—*Kelley v. Ramsey*, 176 Ky. 584, 195 S. W. 1111; *Lawrence v. Clark*, 9 Dana 257, 35 Am. Dec. 133. **Neb.**—See *Dorwart v. Ball*, 71 Neb. 173, 98 N. W. 652, 8 Ann. Cas. 766. **N. J.**—*Jacques v. Hulit*, 16 N. J. L. 38. **N. C.**—*Ledford v. Emerson*, 140 N. C. 288, 52 S. E. 641, 4 L. R. A. (N. S.) 130, 6 Ann. Cas. 107. **N. D.**—*Devore v. Woodruff*, 1 N. D. 143, 45 N. W. 701. **Okla.**—*Reiser v. Johnston*, 166 Pac. 723. **Ore.**—*McDonald v. Holmes*, 22 Ore. 212, 29 Pac. 735. **Pa.**—*Kutz v. Dreibelbis*, 126 Pa. 335, 17 Atl. 609; *Kner v. Hoffman*, 65 Pa. 126; *Meason v. Kaine*, 63 Pa. 335; *Finlay v. Stewart*, 56 Pa. 183. **R. I.**—*Fry v. Potter*, 12 R. I. 542. **Utah.**—*Collin*

5. Possession of Partnership Property.—One partner cannot maintain an action for the exclusive possession of undivided partnership property as against the others.²⁷ But after the partners have by agreement divided the partnership property, an action at law may be maintained in accordance with the agreement.²⁸

6. Non-Partnership or Individual Transactions.—*a. Generally.* In suits upon contracts or transactions outside of the partnership, the partners stand in the same relation to each other in the courts as other persons.²⁹ And where one partner has made advances or loans to another partner as an individual for the purpose of forming a partnership,³⁰ or for furthering the interests and welfare of the partnership,³¹ the amount of such advances or loans is a personal debt of the promisor and is recoverable in an action at law without regard to the state of the partnership accounts.

b. Preliminary Contracts.—An action at law may be maintained for the breach of an agreement to enter into a partnership,³² or for the breach of any agreement entered into to assist in launching the

v. McIntosh, 9 Utah 315, 34 Pac. 247.

Compare *McLauthlin v. Smith*, 166 Mass. 131, 44 N. E. 125.

As to joint adventures, see more fully *infra*, V.

27. Ark.—*Allen v. Davis*, 13 Ark. 28. **Cal.**—*Buckley v. Carlisle*, 2 Cal. 420. **Ind.**—*Ferguson v. Day*, 6 Ind. App. 138, 33 N. E. 213. **Ky.**—*Whitesides v. Collier*, 7 Dana 283. **Md.**—*Anderson v. Stewart*, 108 Md. 340, 70 Atl. 228. **Miss.**—*Hoff v. Rogers*, 67 Miss. 208, 7 So. 358, 19 Am. St. Rep. 301. **Mont.**—*Boehme v. Fitzgerald*, 43 Mont. 226, 115 Pac. 413. **Neb.**—*Cinfel v. Malena*, 67 Neb. 95, 93 N. W. 165. **N. Y.**—*Azel v. Betz*, 2 E. D. Smith 188. **Wis.**—*Shields v. Fuller*, 4 Wis. 102, 65 Am. Dec. 293.

As to right of surviving partner to maintain an action for the recovery of partnership property, against the representative of the deceased partner, see *infra*, III, A, 4.

28. Hunt v. Morris, 44 Miss. 314.

29. Ala.—*Rowland v. Boozer*, 10 Ala. 690. **Ark.**—*Huyek v. Meador*, 24 Ark. 191. **Cal.**—*Bull v. Coe*, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; *Arnheim v. Gordon*, 21 Cal. App. 754, 132 Pac. 840. **Ga.**—*Miller v. Freeman*, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504; *Paulk v. Creech*, 8 Ga. App. 738, 70 S. E. 145. **Ill.**—*Edens v. Williams*, 36 Ill. 252. **Ind.**—*Crossley v. Taylor*, 83 Ind. 337. **Ia.**—*Newberry v. Gibson*, 125 Iowa 575, 101 N. W. 428; *Mullany v. Keenan*, 10 Iowa 224. **La.**—*Succession of Alexander*, 130 La. 7, 57

So. 534. **Me.**—*Marshall v. Winslow*, 11 Me. 58, 25 Am. Dec. 264. **Md.**—*Roache v. Pendergast*, 3 Har. & J. 33. **Mo.**—*Seehorn v. Hall*, 130 Mo. 257, 32 S. W. 643, 51 Am. St. Rep. 562. **N. Y.**—*Ferguson v. Baker*, 116 N. Y. 257, 22 N. E. 400. **Ohio.**—*Manufacturing & Mercantile Co. v. Schoolly*, Tapp. 271. **Ore.**—*McDonald v. Holmes*, 22 Ore. 212, 29 Pac. 735. **Utah.**—*Jennings v. Pratt*, 19 Utah 129, 56 Pac. 951. **Wis.**—*George v. Benjamin*, 100 Wis. 622, 76 N. W. 619, 69 Am. St. Rep. 963; *Edwards v. Remington*, 51 Wis. 336, 8 N. W. 193. **Transactions not involving an accounting**, see *supra*, I, A, 2.

30. Idaho.—*Haskins v. Curran*, 4 Idaho 573, 43 Pac. 559. **Ill.**—*Hartzell v. Murray*, 224 Ill. 377, 79 N. E. 674. **Mass.**—*Wetherbee v. Potter*, 99 Mass. 354. **Vt.**—*Collamer v. Foster*, 26 Vt. 754. **Wis.**—*Sprout v. Crowley*, 30 Wis. 187.

31. Cal.—*Bull v. Coe*, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235. **Mass.**—*Wetherbee v. Potter*, 99 Mass. 354; *Chamberlain v. Walker*, 10 Allen 429. **Va.**—*Wright v. Michie*, 6 Gratt. (47 Va.) 354. **Wis.**—*Edwards v. Remington*, 51 Wis. 336, 8 N. W. 193; *Sprout v. Crowley*, 30 Wis. 187.

But as to advances to the partnership, see *supra*, I, A, 1, a.

32. Cal.—*Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; *Powell v. Maguire*, 43 Cal. 11; *Taylor v. Nelson*, 26 Cal. App. 681, 147 Pac. 1189. **Ga.**—*Lane v. Lodge*, 139 Ga. 93, 76 S. E. 874; *Miller v. Freeman*, 111 Ga. 654, 36 S. E. 961,

partnership,³³ without regard to the state of the partnership account.

c. *Failure To Pay Debts Assumed*.—Where, upon the sale of a partner's interest in the firm, the purchasers assume the payment of the firm obligations, upon their failure to pay such debts, the seller may maintain an action against them upon the contract,³⁴ unless the payment was to be made out of the firm assets.³⁵

d. *Set-off or Counterclaim*.—In an action between partners upon a non-partnership or individual transaction the defendant may use as a counterclaim or set-off any other individual claim against the plaintiff not based upon an unsettled partnership which is otherwise a proper subject of set-off or counterclaim.³⁶

7. **Breach of Partnership Agreement.**³⁷—Where one partner violates an express stipulation in the partnership articles, an action at law to recover the damages may be brought against him by his co-partner,³⁸ where the damages, if recovered, will belong to the plain-

51 L. R. A. 504; Mann v. Bowen, 85 Ga. 616, 11 S. E. 862. **Ill.**—Clark v. Truitt, 183 Ill. 239, 55 N. E. 683; Buckmaster v. Gowen, 81 Ill. 153; Wilson v. Campbell, 10 Ill. 383. **Ind.**—Child v. Swain, 69 Ind. 230. **Mass.**—Williams v. Henshaw, 11 Pick. 79, 22 Am. Dec. 366. **Miss.**—Terry v. Carter, 25 Miss. 168. **Mo.**—Byrd v. Fox, 8 Mo. 574. **N. Y.**—Reed v. McConnell, 133 N. Y. 425, 31 N. E. 22; Manny v. Burke, 174 App. Div. 654, 160 N. Y. Supp. 879. **Pa.**—Meason v. Kaine, 63 Pa. 335. **R. I.**—Eastman v. Dunn, 34 R. I. 416, 83 Atl. 1057. **Wis.**—Hill v. Palmer, 56 Wis. 123, 14 N. W. 20, 43 Am. Rep. 703.

Breach of partnership agreement, see *infra*, I, A, 7.

33. **U. S.**—Hyer v. Richmond Traction Co., 168 U. S. 471, 18 Sup. Ct. 114, 42 L. ed. 547. **Ga.**—Miller v. Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504; Mann v. Bowen, 85 Ga. 616, 11 S. E. 862. **Mich.**—Cook v. Canny, 96 Mich. 398, 55 N. W. 987. **Miss.**—Morgan v. Nunes, 54 Miss. 308. **N. H.**—Reid v. McQuesten, 61 N. H. 421; Currier v. Rowe, 46 N. H. 72; Carrier v. Webster, 45 N. H. 226. **N. Y.**—Glover v. Tuck, 24 Wend. 153. **Ohio.**—Vance v. Blair, 18 Ohio 532, 51 Am. Dec. 467. **Pa.**—Addams v. Tutton, 39 Pa. 447. **Wis.**—Hill v. Palmer, 56 Wis. 123, 14 N. W. 20, 43 Am. Rep. 703. **Eng.**—Venning v. Leckie, 13 East 7, 104 Eng. Reprint 267; Gale v. Leckie, 2 Stark. 107, 3 E. C. L. 337.

34. **Ala.**—Tillis v. Folmar, 145 Ala. 176, 39 So. 913, 117 Am. St. Rep. 31; Hogan's Exr. v. Calvert, 21 Ala. 194. **Ill.**—Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762. **Kan.**—Gillen v. Peters, 39

Kan. 489, 18 Pac. 613. **Md.**—Martin v. Good, 14 Md. 398, 74 Am. Dec. 545. **Mass.**—Hunt v. Rogers, 7 Allen 469, 83 Am. Dec. 704; Lesure v. Norris, 11 Cush. 328. **Neb.**—Meyer v. Shamp, 26 Neb. 729, 42 N. W. 757. **N. Y.**—Clough v. Hoffman, 5 Wend. 499. **Ore.**—Miller v. Bailey, 19 Ore. 539, 25 Pac. 27. **Pa.**—Appeal of Clarke, 107 Pa. 436. **Tex.**—Pope v. Hays, 19 Tex. 375. **Vt.**—Beede v. Fraser, 66 Vt. 114, 28 Atl. 880, 44 Am. St. Rep. 824; Hicks v. Cottrill, 25 Vt. 80. **Wis.**—Edwards v. Remington, 51 Wis. 336, 8 N. W. 193; Lewis v. Woolfolk, 2 Pin. 209, 1 Chand. 171.

Bill in equity for specific performance, see *infra*, I, B, 2.

35. Shattuck v. Lawson, 10 Gray (Mass.) 405, in which a final settlement of the firm business must be shown.

36. **Ia.**—Farwell v. Tyler, 5 Iowa 535. **Ky.**—Stuart v. Harmon, 24 Ky. L. Rep. 1829, 72 S. W. 365. **Mich.**—Kinney v. Robison, 52 Mich. 389, 18 N. W. 120. **N. Y.**—Merrill v. Green, 55 N. Y. 270. **Wis.**—Sprout v. Crowley, 30 Wis. 187.

See generally the title "**Set-Off, Counterclaim and Recoupment.**"

Setting off partnership claim, see *supra*, I, A, 1, b.

Set-off in suit for accounting, see *infra*, I, C, 6, b, (II).

37. **Breach of preliminary agreement, see *supra*, I, A, 6, b.**

38. **Ala.**—Robinson v. Bullock, 58 Ala. 618, failure to furnish logs for mill. **Ga.**—Lane v. Lodge, 139 Ga. 93, 76 S. E. 874; Miller v. Freeman, 111 Ga. 654, 36 S. E. 961, 51 L. R. A.

tiff as an individual and not to the partnership.³⁹ Thus one partner may maintain an action at law against another for the breach of an agreement to contribute to the capital stock of the partnership.⁴⁰

Premature Withdrawal. — A withdrawal from the partnership by one partner in violation of the partnership agreement gives the others a right to maintain an action against him for such breach.⁴¹

8. Action for Agreed Salary. — One partner may maintain an action to recover for his salary earned in the management or employ of the partnership where there is an agreement to pay him a salary,⁴² unless the salary is based upon the profits earned by the partnership.⁴³

9. Torts. — One partner may maintain an action at law against another for damages due to the latter's tortious interference with the former's rights either as an individual,⁴⁴ or as a partner,⁴⁵ as for⁴⁶

504. **Ill.**—*Newman v. Tichenor*, 88 Ill. App. 1. **Ind.**—*Ellison v. Chapman*, 7 Blackf. 224. **Ky.**—*Thomas v. Pyke*, 4 Bibb 418. **Md.**—*Wadsworth v. Manning*, 4 Md. 59. **Mass.**—*Ryder v. Wilcox*, 103 Mass. 24. **Miss.**—*Morgan v. Nunes*, 54 Miss. 308. **Mo.**—*Whitehill v. Schickle*, 43 Mo. 537. **N. Y.**—*Glover v. Tuck*, 24 Wend. 153; *Duncan v. Lyon*, 3 Johns. Ch. 351, 8 Am. Dec. 513; *Madge v. Puig*, 12 Hun 15. **Ohio.** *Vance v. Blair*, 18 Ohio 532, 51 Am. Dec. 467.

39. *Miller v. Freeman*, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504; *Ryder v. Wilcox*, 103 Mass. 24.

40. **Ala.**—*Scott v. Campbell*, 30 Ala. 728. **Ga.**—*Miller v. Freeman*, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504. **Kan.**—*Truitt v. Baird*, 12 Kan. 420. **Me.**—*Wright v. Eastman*, 44 Me. 220; *Marshall v. Winslow*, 11 Me. 58, 25 Am. Dec. 264. **Mass.**—*Wetherbee v. Potter*, 99 Mass. 354; *Williams v. Henshaw*, 11 Pick. 79, 22 Am. Dec. 366. **Mich.**—*Cook v. Canny*, 96 Mich. 398, 55 N. W. 987. **Miss.**—*Morgan v. Nunes*, 54 Miss. 308. **Vt.**—*Collamer v. Foster*, 26 Vt. 754.

41. **U. S.**—*Karrick v. Hannaman*, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. ed. 484; *Kebart v. Arkin*, 232 Fed. 454, 146 C. C. A. 448. **Md.**—*Wadsworth v. Manning*, 4 Md. 59. **Mass.** *Dunham v. Gillis*, 8 Mass. 462. **Mich.** *Solomon v. Kirkwood*, 55 Mich. 256, 21 N. W. 336. **N. Y.**—*Bagley v. Smith*, 10 N. Y. 489, 19 How. Pr. 1, 61 Am. Dec. 756, Seld. Notes 109; *Sandias v. Mustacchi*, 153 App. Div. 810, 138 N. Y. Supp. 875. **Pa.**—*McCullum v. Carlucci*, 206 Pa. 312, 55 Atl. 979, 98 Am. St. Rep. 780; *Reiter v. Morton*, 96 Pa. 229; *Addams v. Tutton*, 39 Pa. 447.

Wash.—*Andreopoulos v. Peresteredes*, 95 Wash. 282, 163 Pac. 770.

42. **Ind.**—*McBride v. Stradley*, 103 Ind. 465, 2 N. E. 358; *Lassiter v. Jackman*, 88 Ind. 118. **La.**—See *Alexander v. Alexander*, 12 La. Ann. 588, wherein the court allowed one partner to recover for his services rendered to the partnership as a clerk, saying that "the duties of plaintiff as clerk and general agent were totally distinct from those as partner" in the firm business. **Mass.**—*Ryder v. Wilcox*, 103 Mass. 24. **Mich.**—*Godfrey v. White*, 43 Mich. 171, 5 N. W. 243. **Mo.**—*Gaston v. Kellogg*, 91 Mo. 104, 3 S. W. 589. **N. Y.**—*Paine v. Thacher*, 25 Wend. 450.

43. **Kan.**—*O'Brien v. Smith*, 42 Kan. 49, 21 Pac. 784. **Ky.**—*Stone v. Mattingly*, 14 Ky. L. Rep. 113, 19 S. W. 402. **Me.**—*Wright v. Troop*, 70 Me. 346. **N. Y.**—*Lasky v. Coverdale*, 84 Misc. 34, 145 N. Y. Supp. 994.

44. See *infra*, this note.

[a] **Injury to partner's individual property used in partnership business.** *Haller v. Willamowicz*, 23 Ark. 566; *Newby v. Harrell*, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503.

45. See *infra*, this note.

[a] **Where one partner wrongfully and maliciously causes an attachment in his own name to be sued out and levied on the partnership business, and ousts his co-partner from the business, an action for damages may be maintained by the partner thus ousted, against the wrongdoer.** *Newsom v. Pitman*, 98 Ala. 526, 12 So. 412.

46. *Montjoys v. Holden*, Litt. Sel. Cas. (Ky.) 447, 12 Am. Dec. 331; *Newby v. Harrell*, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503.

the destruction, or conversion,⁴⁷ of the partnership property.

10. Parties.—Actions between partners are governed, as to parties by the general rules elsewhere treated.⁴⁸

11. Pleadings.—Complaint or Declaration. — In an action at law between partners, involving the partnership account, plaintiff must allege facts authorizing such an action,⁴⁹ as that the partnership business has been adjusted and settled;⁵⁰ and that the balance found was in the favor of the plaintiff from the defendant.⁵¹ A complaint by a partner for contribution must show that there is not an existing or unsettled partnership between the parties,⁵² and that there is nothing due

47. N. Y.—Weiss v. Weiss, 75 Misc. 644, 133 N. Y. Supp. 1021, sale of the partnership property in hostility to and in denial of the partnership. **N. C.** Newby v. Harrell, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503. **Can.**—Doupe v. Stewart, 28 U. C. Q. B. 192; Rathwell v. Rathwell, 26 U. C. Q. B. 179.

48. See the title "Parties," and other titles dealing with specific kinds and classes of actions.

[a] Where a balance has been ascertained to be due to a partner from one of several co-partners, only the partner owing such balance is a proper party defendant. McGehee v. Dougherty, 10 Ala. 863.

[b] After the dissolution of the partnership, the remaining partners cannot sue jointly for the recovery of money alleged to be due from the withdrawing partner. Ross v. Cornell, 45 Cal. 133; Masters v. Freeman, 17 Ohio St. 323.

[c] Separate Action for Illegal Withdrawal.—Where one of three or more partners withdraws from the firm in violation of the partnership agreement, each of the co-partners may maintain an action against him for the breach without joining the other partner. Dunham v. Gillis, 8 Mass. 462.

[d] Action for Contribution.—In an action against a solvent partner for contribution for the payment of a partnership debt, the plaintiff need not join the other partners where it appears that they were insolvent or non-resident. Scott v. Bryan, 96 N. C. 289, 3 S. E. 235.

[e] An action for the breach of a partnership agreement may be brought against any one of the offending partners if the obligation of the broken covenant is several. Thomas v. Pyke, 4 Bibb (Ky.) 418.

49. When action at law may be

brought, see *supra*, I, A, 1, a.

50. Cal.—Dukes v. Kellogg, 127 Cal. 563, 60 Pac. 44. **Colo.**—Bean v. Gregg, 7 Colo. 499, 4 Pac. 903. **Del.**—Downs v. Short, 6 Penne. 264, 66 Atl. 365; Robinson v. Green's Admr., 5 Harr. 115. **Ill.**—Smith v. Riddell, 87 Ill. 165. **Ind.**—Lang v. Oppenheim, 96 Ind. 47; Krutz v. Craig, 53 Ind. 561; Cobble v. Tomlinson, 50 Ind. 550; Powell v. Bennett, 4 Ind. App. 112, 29 N. E. 926. **Ia.**—Wycoff v. Purnell, 10 Iowa 332. **Ky.**—Warring v. Arthur, 98 Ky. 34, 32 S. W. 221. **Mass.**—Gomersall v. Gomersall, 14 Allen 60. **Mont.**—Boehme v. Fitzgerald, 43 Mont. 226, 115 Pac. 413; Riddell v. Ramsey, 31 Mont. 386, 73 Pac. 597. **N. Y.**—Schulsinger v. Blau, 84 App. Div. 390, 82 N. Y. Supp. 686; Covert v. Henneberger, 53 How. Pr. 1; Mackey v. Auer, 8 Hun 180. **R. I.**—Dowling v. Clarke, 13 R. I. 134. **Tex.**—Glass v. Wiles, 14 S. W. 225. **Wash.**—Stevens v. Baker, 1 Wash. Ter. 315.

[a] An allegation as to the amount of the profits plaintiff claims is due him is not sufficient in the absence of an allegation of an accounting or that the partners agreed upon such amount. Schulsinger v. Blau, 84 App. Div. 390, 82 N. Y. Supp. 686.

51. Del.—Downs v. Short, 6 Penne. 264, 66 Atl. 365; Robinson v. Green's Admr., 5 Harr. 115. **Ill.**—Smith v. Riddell, 87 Ill. 165. **Ind.**—Krutz v. Craig, 53 Ind. 561; Powell v. Bennett, 4 Ind. App. 112, 29 N. E. 926. **Ia.**—Wycoff v. Purnell, 10 Iowa 332. **Ky.**—Warring v. Arthur, 98 Ky. 34, 32 S. W. 221. **Mass.**—Gomersall v. Gomersall, 14 Allen 60. **N. Y.**—Mackey v. Auer, 8 Hun 180; Covert v. Henneberger, 53 How. Pr. 1. **Wash.**—Stevens v. Baker, 1 Wash. Ter. 315.

52. Johnson v. Peek, 58 Ark. 580, 25 S. W. 865; **Houston v. Brown**, 23 Ark. 333; **Lang v. Oppenheim**, 96 Ind. 47; **Dale v. Thomas**, 67 Ind. 570.

to the firm from the plaintiff;⁵³ and it must show the amount he paid out.⁵⁴ A complaint for breach of the contract of partnership must set forth the breach relied on.⁵⁵ Where plaintiff relies on the breach of a contract to assume and pay all the partnership debts, he need not allege that the defendant had notice of the debt,⁵⁶ or of the payment of the debt by the plaintiff.⁵⁷ A complaint for conversion of partnership assets must show the facts in accordance with the general rules elsewhere treated.⁵⁸ A complaint against one partner for maliciously attaching the firm property, need not allege the grounds of the attachment,⁵⁹ or the nature and character of the debt.⁶⁰

Defensive Pleading. — A party must by some appropriate pleading urge the objection that the action involves partnership transactions upon which an action at law is not maintainable without a previous accounting.⁶¹ A demurrer will not lie on this ground unless the declaration or complaint affirmatively shows that a partnership account is involved.⁶²

Statutes dispensing with proof of allegations of partnership in actions by, or against alleged partners, unless the denial thereof is sworn to,⁶³ are not applicable to a suit by one individual against another, charging a partnership relation between them.⁶⁴

12. Trial and Subsequent Proceedings. — The rules governing the trial and proceedings thereafter in actions generally apply in actions between partners.⁶⁵ Where law and equity are administered in the

53. *Johnson v. Peck*, 58 Ark. 580, 25 S. W. 865; *Lang v. Oppenheim*, 96 Ind. 47.

54. *Coleman v. Coleman*, 78 Ind. 344.

55. *Reiter v. Morton*, 96 Pa. 229.

Action on contract generally, see the title "**Implied and Express Agreements.**"

56. *Clough v. Hoffman*, 5 Wend. (N. Y.) 499.

57. *Clough v. Hoffman*, 5 Wend. (N. Y.) 499.

58. See the title "**Trover and Conversion.**"

[a] **A complaint for collecting and converting assets of the partnership,** should allege (1) the dates when the collections were made (*McCament v. Gray*, 6 Blackf. [Ind.] 233), and (2) the amount. *Davis v. Wimberly*, 86 Ga. 46, 12 S. E. 208.

[b] **Demand need not be alleged.** *Snyder v. Baber*, 74 Ind. 47.

59. *Newsom v. Pitman*, 98 Ala. 526, 12 So. 412, since a partner cannot attach the firm property.

60. *Newsom v. Pitman*, 98 Ala. 526, 12 So. 412.

61. *Mills v. Gray* (Utah), 167 Pac. 358, otherwise he waives it. See *Foulks v. Rhodes*, 12 Nev. 225.

[a] **On the plea of the general issue,**

the defendant may avail himself of the defense that the parties were partners in an unsettled partnership. *Noble v. Martin*, 7 Mart. N. S. (La.) 282.

[b] **It is too late after trial to object** that the case was one in which an action at law could not be maintained. *Smith v. Allen*, 18 Johns. (N. Y.) 245.

Pleading partnership transactions as set-off or counterclaim to individual claim, see *supra*, I, A, 1, b.

62. *Manufacturing & Mercantile Co. v. Schoolly*, Tapp. (Ohio) 271.

63. See *infra*, II, G, 2, a, and II, H, 1.

64. *Short v. Taylor*, 137 Mo. 517, 38 S. W. 952, 59 Am. St. Rep. 508.

65. See generally the title "**Trial,**" and numerous other titles dealing with particular phases of proceedings at and after trial.

[a] **Questions of Law and Fact.**

(1) Whether a written promise to pay given by one partner to his co-partner relates to a partnership transaction so as to prevent the maintenance of an action at law thereon, is a question for the jury. *Matheny v. Lees*, 193 Ill. App. 503. (2) When the question whether a partnership exists is a matter of doubt, to be decided by infer-

same tribunal, an action for the recovery of a balance due the plaintiff cannot be dismissed merely because the relief to which he is entitled may be in equity for an accounting.⁶⁶

13. Provisional Remedies.—**Arrest.**—The remedy of arrest on mesne process is not available to one partner against another for alleged fraudulent misappropriation of the partnership assets.⁶⁷ But in an action at law on an individual or other transaction on which such an action is proper, the remedy of arrest may be resorted to if the facts otherwise justify it.⁶⁸

Attachment.—In some jurisdictions one partner cannot attach the firm property in an action against the other,⁶⁹ at least, if the action involves the unsettled partnership account.⁷⁰ In others, if the case be otherwise a proper one, attachment of such property is permissible.⁷¹

B. SUITS IN EQUITY.—**1. Generally.**—Suits in equity between partners are of course governed by the general principles and rules elsewhere treated.⁷² For a settlement and account of partnership transactions resort must ordinarily be had to equity.⁷³

Where a person has been induced to become a partner through the fraud of another, equity will aid him to rescind the contract.⁷⁴

One partner may resort to equity to establish the partnership character of property acquired or held by the other partner in his own name.⁷⁵

ences to be drawn from all the evidence, it is one of fact for the jury. *Nation v. Savely* (Okla.), 168 Pac. 805.

[b] Under a general denial of conversion of partnership property, it may be shown that the money received was expended for partnership purposes. *Hackney v. Williams*, 46 Ind. 413.

[c] **Instructions.**—See *Hutchinson v. Murray* (Tex. Civ. App.), 169 S. W. 640, and generally the title "Instructions."

[d] **Finding by jury conclusive** that agreement between partners did not relate to partnership transaction. *Matheny v. Lees*, 193 Ill. App. 503.

66. *Schulsinger v. Blau*, 84 App. Div. 390, 82 N. Y. Supp. 686; *Mills v. Gray* (Utah), 167 Pac. 358; *Morgan v. Child, Cole & Co.*, 41 Utah 562, 128 Pac. 521.

67. *Cal.*—*Soule v. Hayward*, 1 Cal. 345. *La.*—*Hanna v. Auter*, 4 Rob. 221. *N. Y.*—*Smith v. Small*, 54 Barb. 223; *Cary v. Williams*, 1 Duer 667.

But see *Com. v. Sumner*, 5 Pick. (Mass.) 360, and *infra*, I, C, 5, c.

68. *Ledford v. Emerson*, 140 N. C. 288, 52 S. E. 641, 4 L. R. A. (N. S.) 130, 6 Ann. Cas. 107. See *Com. v. Sumner*, 5 Pick. (Mass.) 360.

69. *Newsom v. Pitman*, 98 Ala. 526,

12 So. 412. See *infra*, II, C, 5, a. But see *Brinegar v. Griffin*, 2 La. Ann. 154, in case of a partnership in a single transaction.

70. See *infra*, I, C, 5, a, and *Brinegar v. Griffin*, 2 La. Ann. 154; *Levy v. Levy*, 11 La. 577.

71. See *infra*, I, C, 5, a.

Attachment by third persons, see *infra*, II, B.

72. See the title "Equity Jurisdiction and Procedure," and numerous other titles dealing with particular phases of equity procedure.

[a] **Where one partner fraudulently makes a promissory note** in the name of the firm and delivers it to a third person who has knowledge of the fraud, his copartner may maintain a bill in equity requiring the partner and the third person to cancel the note and to restrain the collection of it. *Fuller v. Percival*, 126 Mass. 381.

73. See *infra*, I, C, 1, b.

74. *Ind.*—*Cohoon v. Fisher*, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193. *N. J.*—*Powell v. Cash*, 54 N. J. Eq. 218, 34 Atl. 131. *Eng.* *Rawlins v. Wickham*, 1 Giff. 355, 65 Eng. Reprint 954; *Pillans v. Harkness*, Colles 442, 1 Eng. Reprint 363.

75. *Dikis v. Likis*, 187 Ala. 218, 65

2. Specific Performance.—The contract of partnership being of an essentially personal character, a court of equity will not lend its aid to enforce the specific performance thereof,⁷⁶ particularly where the partnership is not for a definite time, but is merely at will.⁷⁷ Equity will however, where there is no adequate legal remedy, secure to a partner the interests in property to which, by the partnership agreement, he is entitled,⁷⁸ and will, at the instance of a retiring partner, specifically enforce an agreement by the remaining partners or a purchaser, to pay the firm debts.⁷⁹

3. Injunction.—One partner, under proper circumstances, may enjoin a copartner from violating the rights arising out of the partnership,⁸⁰ as by using the partnership property in a manner not authorized by the contract of partnership.⁸¹ Equity may, for a time, enjoin a partner from dissolving a partnership before the expiration of the time agreed upon, when the circumstances are such that a dissolution would be specially injurious.⁸² But a court of equity will not lend its aid by injunction to one partner to exclude another partner from the partnership business.⁸³

C. PROCEEDINGS FOR DISSOLUTION, ACCOUNTING AND SETTLEMENT.

So. 398; *Donohoe v. Rogers*, 168 Cal. 700, 144 Pac. 958.

76. U. S.—*Hyer v. Richmond Traction Co.*, 168 U. S. 471, 18 Sup. Ct. 114, 42 L. ed. 547; *Karrick v. Hannaman*, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. ed. 484; *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955. **Ill.**—*Clark v. Truitt*, 183 Ill. 239, 55 N. E. 683. **La.**—*Levine v. Michel*, 35 La. Ann. 1121. **Mass.**—*Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459. **Mich.**—*Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84. **Ohio.**—*Halladay v. Faurot*, 8 Ohio Dec. (Reprint) 633. **Pa.**—*Meason v. Kaine*, 63 Pa. 335.

[a] **Mutuality of Remedy.**—Where, by the partnership agreement, one partner is to supply the capital, and the other to furnish his personal services, the agreement cannot be specifically enforced against the latter and will not be against the former. *Karrick v. Hannaman*, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. ed. 484.

77. Ill.—*Clark v. Truitt*, 183 Ill. 239, 55 N. E. 683. **Mass.**—*Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459. **Mich.**—*Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84. **Miss.**—*Whitworth v. Harris*, 40 Miss. 483.

78. *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459.

79. *Tillis v. Folmar*, 145 Ala. 176, 39 So. 913, 117 Am. St. Rep. 31.

80. See *infra* this note.

[a] **Enjoining competing business**

of same nature. **La.**—*Levine v. Michel*, 35 La. Ann. 1121. **Md.**—*Crownfield v. Phillips*, 125 Md. 1, 92 Atl. 1033, Ann. Cas. 1916 E, 991; *Norwood v. Norwood*, 4 Har. & J. 112. **Ohio.**—*Halladay v. Faurot*, 8 Ohio Dec. (Reprint) 633.

[b] **Injunction against interference with performance of duties** assigned to him by the partnership agreement. *Marble Co. v. Ripley*, 10 Wall (U. S.) 339, 19 L. ed. 955; *Miller v. O'Boyle*, 89 Fed. 140.

[c] **The Use of the Firm Name for Private Purposes May Be Enjoined.** *Page v. Vankirk*, 1 Brewst. (Pa.) 282.

[d] **A minority of the members of the firm may enjoin a change in the location of the partnership works, where it is fixed by the contract of partnership.** *Appeal of Jennings*, 2 Monag. (Pa.) 184, 16 Atl. 19, 2 L. R. A. 43.

81. *New v. Wright*, 44 Miss. 202; *Stockdale v. Ullery*, 37 Pa. 486, 78 Am. Dec. 440, using partnership assets for payment of individual debts.

[a] **An insolvent partner will be enjoined from disposing of or appropriating the effects of the partnership against the will of the copartner.** *Phillips v. Trezevant*, 67 N. C. 370; *Grobe v. Roup*, 44 W. Va. 197, 28 S. E. 699.

82. *Solomon v. Kirkwood*, 55 Mich. 256, 21 N. W. 336.

83. *Salmon v. Salmon*, 180 Ala. 252, 60 So. 837.

1. In What Forum. — a. *At Law.* — Ordinarily the only proper or adequate remedy for the settlement of partnership accounts is in equity.⁸⁴ The old common law action of account as a remedy to procure an accounting of partnership matters has largely fallen into disuse on account of the more complete and satisfactory remedy in equity.⁸⁵ Such an action at law is still available, however, in some jurisdictions,⁸⁶ being limited to those cases where only two partners are involved,⁸⁷ though some statutes have extended the remedy to permit of an account between partners irrespective of their number.⁸⁸ The action of book account is not an appropriate remedy for the purpose of closing a general and extensive partnership account.⁸⁹

The adjustment of partnership affairs cannot be had in other actions not involving any partnership matters to which the partners or the

84. See *supra*, I, A, 1, a, and *infra*, I, C, 1, b.

85. Conn.—*Gillett v. Hall*, 13 Conn. 426; *Russell v. Green*, 10 Conn. 269. Ill.—*Braeken v. Kennedy* 4 Ill. 558. Mass.—*Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381; *Bartlett v. Parks*, 1 Cush. 82; *Fowle v. Kirkland*, 18 Pick. 299 (abolished by statute); *Fanning v. Chadwick*, 3 Pick. 420, 15 Am. Dec. 233. Miss.—*Hunt v. Gorden*, 52 Miss. 194. N. Y.—*McMurray v. Rawson*, 3 Hill 59. Pa.—*Appeal of Ainey*, 2 Penny. 192.

[a] **Remedy Abandoned Altogether in England.**—*Bovill v. Hammond*, 6 Barn. & C. 149, 13 E. C. L. 79, 9 D. & R. 186, 5 L. J. K. B. (O. S.) 145, 108 Eng. Reprint 408. And see: *Me.—Farrar v. Pearson*, 59 Me. 561, 8 Am. Rep. 439. N. Y.—*McMurray v. Rawson*, 3 Hill 59. Pa.—*Geary v. Cunningham*, 10 Serg. & R. 230. See generally 1 STANDARD PROC. 215.

86. Ill.—*Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833, concurrent remedy. *Me.—Farrar v. Pearson*, 59 Me. 561, 8 Am. Rep. 439. Md.—*Wilhelm v. Caylor*, 32 Md. 151, concurrent remedy. Miss.—*Hunt v. Gorden*, 52 Miss. 194, concurrent remedy. N. J.—*Lilliendahl v. Stegmair*, 45 N. J. Eq. 648, 18 Atl. 216, concurrent remedy with bill in equity. Pa.—*McCollum v. Carlucci*, 206 Pa. 312, 55 Atl. 979, 98 Am. St. Rep. 780 (concurrent remedy); *Knerr v. Hoffman*, 65 Pa. 126. *In re Ainey's Appeal*, 2 Penny. 192. R. I.—*Chapman v. Chapman*, 13 R. I. 680, concurrent remedy. Vt.—*Stevens v. Coburn*, 71 Vt. 261, 44 Atl. 354; *Park v. McGowen*, 64 Vt. 173, 23 Atl. 855; *Newell v. Humphrey*, 37 Vt. 265; *Kendrick v.*

Tarbell, 27 Vt. 512; *Spear v. Newell*, 13 Vt. 288 (concurrent remedy).

87. *Niles v. Williams*, 24 Conn. 279; *Gillett v. Hall*, 13 Conn. 426; *Beach v. Hotchkiss*, 2 Conn. 425; *Wilhelm v. Caylor*, 32 Md. 151. And see *Portsmouth v. Donaldson*, 32 Pa. 202, 72 Am. Dec. 782; *Whelen v. Watmough*, 15 Serg. & R. (Pa.) 153, wherein this form of action was held not to be maintainable by one partner against two, unless a joint liability to account was shown.

[a] **This Was the Common Law Rule.**—N. Y.—*Appleby v. Brown*, 24 N. Y. 143, 23 How. Pr. 207; *McMurray v. Rawson*, 3 Hill 59. Pa.—*Whelen v. Watmough*, 15 Serg. & R. 153. Vt. *Stevens v. Coburn*, 71 Vt. 261, 44 Atl. 354; *Foster v. Ives*, 53 Vt. 458; *Green v. Chapman*, 27 Vt. 236.

88. *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833; *Stevens v. Coburn*, 71 Vt. 261, 44 Atl. 354; *Park v. McGowen*, 64 Vt. 173, 23 Atl. 855; *Foster v. Ives*, 53 Vt. 458.

[a] **The law court has all the powers of a court of chancery in such an action.** *Foster v. Ives*, 53 Vt. 458; *Hydeville Co. v. Barnes*, 37 Vt. 588; *Green v. Chapman*, 27 Vt. 236.

[b] **No action by third persons who are not members of the partnership is permitted by such statute.** *Green v. Chapman*, 27 Vt. 236.

[c] **Against Personal Representative.**—The action may be brought by one partner against another surviving partner and the administrator of the deceased partner. *Park v. McGowen*, 64 Vt. 173, 23 Atl. 855.

89. *Hydeville Co. v. Barnes*, 37 Vt. 588; *Duryea v. Whitecomb*, 31 Vt. 395; *Green v. Chapman*, 27 Vt. 236.

firm may have been made parties.⁹⁰

An action of assumpsit will not lie to correct or revise a partnership settlement.⁹¹

b. *In Equity*.—With the limitations pointed out in this article, the general rule is that proceedings which involve the settlement of the partnership account can only be maintained in equity.⁹² Whenever a remedy is furnished in a court of law for the settlement and adjustment of a partnership, it is generally not as adequate or satisfactory as the remedy by a bill for an accounting in a court of equity.⁹³ The dissolution and adjustment of partnership affairs is inherently a matter for the intervention of a court of equity,⁹⁴ although a resort thereto is not necessary where the partners can adjust such

90. **Colo.**—Hatch v. Fritz, 48 Colo. 530, 111 Pac. 74. **Ill.**—Ives v. Vanscoyoe, 81 Ill. 120. **Mich.**—Beardslee v. Citizens' Commercial & Sav. Bank, 112 Mich. 377, 70 N. W. 1027; Farwell v. Chambers, 62 Mich. 316, 28 N. W. 859; Elder's Appeal, 39 Mich. 474. **N. Y.** Lord v. Hull, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484.

91. Johnson v. Wilson, 54 Ill. 419; Pfeiffer v. Bauer, 122 Ill. App. 625; Chase v. Garvin, 19 Me. 211.

92. See *supra*, I, A, 1, a; I, C, 1, a; and *infra*, I, C, 1, c, d, e, and f.

93. **Fla.**—Wills v. Andrews, 75 So. 618. **Ga.**—Houston v. Polk, 124 Ga. 103, 52 S. E. 83; Epping v. Aiken, 71 Ga. 682. **Ill.**—Smith v. Riddell, 87 Ill. 165; Strong v. Clawson, 10 Ill. 346. **Ind.**—Horn v. Lupton, 182 Ind. 355, 105 N. E. 237, 106 N. E. 708; Adams v. Carmony, 44 Ind. App. 291, 87 N. E. 708, 89 N. E. 327. **Kan.**—Carter v. Christie, 57 Kan. 492, 46 Pac. 964; Anderson v. Beebe, 22 Kan. 768. **Mass.**—White v. White, 169 Mass. 52, 47 N. E. 499. **Mich.**—McLean v. McLean, 109 Mich. 258, 67 N. W. 118. **Miss.**—Whitney v. Cotten, 53 Miss. 689; Hunt v. Gorden, 52 Miss. 194. **Mo.**—Bambrick v. Simms, 132 Mo. 48, 33 S. W. 445; Ensworth v. Curd, 68 Mo. 282 (is proper tribunal in which to settle the affairs of a copartnership between the living); Johnson v. Ewald, 82 Mo. App. 276. **N. Y.**—Barclay v. Barrie, 209 N. Y. 40, 102 N. E. 602, Ann. Cas. 1913D, 1143, 47 L. R. A. (N. S.) 839; Watts v. Adler, 130 N. Y. 46, 29 N. E. 131, 3 Silv. 585; Simpson v. Simpson, 44 App. Div. 492, 60 N. Y. Supp. 879; Smith v. Fitchett, 56 Hun 473, 10 N. Y. Supp. 459, 31 N. Y. St. 606. **Ore.**—Gleason v. Van Aernam, 9 Ore. 343. **S. C.**—Boulard v. Carpin, 27 S. C. 235, 3 S. E. 219. **Va.**—Slaugh-

ter v. Danner, 102 Va. 270, 46 S. E. 289. **W. Va.**—Ballard v. Callison, 4 W. Va. 326. **Wis.**—Schmidt v. Mertes, 145 Wis. 468, 130 N. W. 474.

See also 8 STANDARD PROC. 438.

94. **U. S.**—Oteri v. Scalzo, 145 U. S. 578, 12 Sup. Ct. 895, 36 L. ed. 824; Iverson v. Hutton, 98 U. S. 79, 25 L. ed. 66. **Ala.**—Webb v. Butler, 192 Ala. 287, 68 So. 369, Ann. Cas. 1916D, 815; Haynes v. Short, 88 Ala. 562, 7 So. 157; Burney & Co. v. Boone, 32 Ala. 486. **Ark.**—Luke v. Rhodes, 117 Ark. 600, 176 S. W. 111. **Cal.**—Prince v. Lamb, 128 Cal. 120, 60 Pac. 689; Stokes v. Stevens, 40 Cal. 391. **Colo.**—Tarabino v. Nicoli, 5 Colo. App. 545, 39 Pac. 362. **Conn.**—Gillett v. Hall, 13 Conn. 426. **Fla.**—White v. Ross, 35 Fla. 377, 17 So. 640. **Ga.**—Printup v. Fort, 40 Ga. 276. **Ill.**—Strong v. Clawson, 10 Ill. 346; Bracken v. Kennedy, 4 Ill. 558; Aldrich v. Mathias, 167 Ill. App. 589. **Ind.**—Horn v. Lupton, 182 Ind. 355, 105 N. E. 237, 106 N. E. 708; Lesh v. Bailey, 49 Ind. App. 254, 95 N. E. 341. **Md.**—Bruns v. Heise, 101 Md. 163, 60 Atl. 604. **Mich.**—Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067. **N. H.**—Converse v. Hobbs, 64 N. H. 42, 5 Atl. 832. **N. J.**—Deveney v. Mahoney, 23 N. J. Eq. 247. **N. Y.**—Rickey v. Bowne, 18 Johns. 131; Kirkwood v. Smith, 47 Misc. 301, 95 N. Y. Supp. 926. **Ore.** Marx v. Goodnough, 16 Ore. 26, 16 Pac. 918. **Va.**—Jones v. Murphy, 93 Va. 214, 24 S. E. 825. **W. Va.**—Daniel v. Gillespie, 65 W. Va. 366, 64 S. E. 254; Childers v. Neely, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468. **Wis.**—Schmidt v. Mertes, 145 Wis. 468, 130 N. W. 474.

[a] **Amount in Controversy**.—Where there is a minimum limit on the jurisdiction of equity, the matter fairly and bona fide in controversy between

matters themselves.⁹⁵ Unless exclusive jurisdiction has been conferred on probate courts,⁹⁶ a surviving partner may be compelled to account as a trustee, in a court of equity, at the instance of the deceased partner's representatives.⁹⁷

In the absence of fraud, mistake or other ground for equitable interference, a final settlement arrived at by the partners is a complete bar to a suit for a judicial accounting,⁹⁸ but where such ground exists, a court of equity still has jurisdiction to correct and determine the accounts.⁹⁹ Where one partner has been defrauded into a settlement,

the parties, and not the amount of the balance ultimately struck by the master, is to determine the jurisdiction of the court. *Washburn v. Washburn*, 23 Vt. 576. See generally the title "**Jurisdiction**," for a discussion of the amount in controversy.

95. Ill.—*Hanks v. Baber*, 53 Ill. 292. Ky.—*Garnett v. Wills*, 24 Ky. L. Rep. 617, 69 S. W. 695. Mich.—*Beardslee v. Citizens' Commercial & Sav. Bank*, 112 Mich. 377, 70 N. W. 1027. Wis.—*Rommendahl v. Jackson*, 102 Wis. 444, 78 N. W. 742.

96. See *infra*, I, C, 1, c.

97. *Fried v. Burk*, 125 Md. 500, 94 Atl. 86; *Welbourn v. Kleinle*, 92 Md. 114, 48 Atl. 81; *Stokes v. Stokes*, 59 Hun 431, 13 N. Y. Supp. 407, 36 N. Y. St. 620.

[a] The equity jurisdiction rests not merely upon the doctrine concerning accounting, but upon the principles applicable to the administration of trusts. *Fried v. Burk*, 125 Md. 500, 94 Atl. 86.

98. Alaska.—*Pearce v. Sutherland*, 4 Alaska 120. Cal.—*Wallace v. Sisson*, 98 Cal. xviii, 33 Pac. 496; *Cayton v. Walker*, 10 Cal. 450. Colo.—*Gibson v. Glover*, 3 Colo. App. 506, 34 Pac. 687. Fla.—*Durham v. Edwards*, 50 Fla. 495, 38 So. 926. Ill.—*Raymond v. Vaughan*, 128 Ill. 256, 21 N. E. 566, 15 Am. St. Rep. 112, 4 L. R. A. 440 (accounting must be final); *Kellogg v. Moore*, 97 Ill. 282; *Correll v. Freeman*, 29 Ill. App. 39. Ind.—*Meredith v. Ewing*, 85 Ind. 410. Mich.—*Harrison v. Dewey*, 46 Mich. 173, 9 N. W. 152; *McGunn v. Hanlin*, 29 Mich. 476. Miss.—*Thornton v. McNeill*, 23 Miss. 369. Mo.—*Silver v. St. Louis, I. Mt. & S. Ry. Co.*, 5 Mo. App. 381, 72 Mo. 194. N. J.—*Harrison v. Farrington*, 40 N. J. Eq. 353, 3 Atl. 80. N. Y.—*Wilde v. Jenkins*, 4 Paige 481; *Heartt v. Corning*, 3 Paige 566. N. C.—*Eaton v. Eaton*, 43 N. C. 102. Ore.—*Gleason v. Van*

Aernam, 9 Ore. 343, settlement must be a final one. Pa.—Appeal of *Iredell*, 10 Sad. 127, 13 Atl. 752. R. I.—*Chapman v. Chapman*, 13 R. I. 680. S. C.—*Dial's Exrs. v. Rogers*, 4 Desaus. 175; *Burden v. McElmoyle*, *Bailey Eq.* 375. Tex.—*Merriwether v. Hardeman*, 51 Tex. 436. Wash.—*Kilbourne v. Rathbun*, 91 Wash. 121, 157 Pac. 457. W. Va.—*Mahnke v. Neale*, 23 W. Va. 57. Wis.—*Birkett v. Hird*, 55 Wis. 650, 13 N. W. 686.

[a] An accounting between the surviving partner and the representative of the deceased partner will not be disturbed by a court of equity upon a bill filed by the heirs in the absence of a showing that it is fraudulent or unfair. *Valentine v. Wysor*, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788.

99. Alaska.—*Pearce v. Sutherland*, 4 Alaska 120. Cal.—*Wallace v. Sisson*, 98 Cal. xviii, 33 Pac. 496. Fla.—*Durham v. Edwards*, 50 Fla. 495, 38 So. 926. Ga.—*Oliver v. House*, 125 Ga. 637, 54 S. E. 732. Ill.—*Hanks v. Baber*, 53 Ill. 292; *Hopkins v. Watt*, 13 Ill. 298. Ky.—*Loesser v. Loesser*, 81 Ky. 139; *Waggoner v. Minter*, 7 J. J. Marsh. 173. Me.—*Holyoke v. Mayo*, 50 Me. 385; *Chase v. Garvin*, 19 Me. 211. Minn.—*Cobb v. Cole*, 44 Minn. 278, 46 N. W. 364. Mo.—*Kammerman v. Wigginton*, 70 Mo. App. 476; *Silver v. St. Louis, I. M. & S. Ry. Co.*, 5 Mo. App. 381, 72 Mo. 194. N. J.—*Harrison v. Farrington*, 40 N. J. Eq. 353, 3 Atl. 80. Pa.—*Abrahams v. Hunt*, 26 Pa. 49. Wis.—*Birkett v. Hird*, 55 Wis. 650, 13 N. W. 686.

[a] A suit at the instance of a trustee in bankruptcy will not lie to judicially settle a partnership on the ground that the defendant fraudulently concealed the assets of the partnership at the time of the settlement between the partners, where it appears that the bankrupt partner had no creditors and had had equal means of knowing the

he may bring a bill for a judicial accounting, without rescinding the settlement or putting the defrauding partner in statu quo.¹

Dissolution Contemplated. — Generally, a court of equity will not entertain a bill for an account, filed by one co-partner against another, where the bill does not contemplate a dissolution and a final settlement of the affairs of the partnership,² but the court may do so, though no dissolution is prayed for, where it is necessary to conform the practice of the court to the wants of its suitors, and to prevent a failure of justice;³ thus, where one partner seeks to withhold from his copartner the profits arising from a secret transaction,⁴ or where one partner refuses to account where the agreement calls for a settlement periodically,⁵ or where the partnership is for a term of years still unexpired, and one partner refuses to permit another partner to take part in the business from which he has been excluded,⁶ or where one partner persists in misconduct so gross as to threaten destruction to the interests of all.⁷ Some jurisdictions, however, do not recognize the general rule and remit an accounting as a matter of course without a final settlement and dissolution of the firm.⁸

partnership assets. *Steinfeld v. Epstein*, 256 Pa. 601, 100 Atl. 996.

1. **Cal.**—*Wallace v. Sisson*, 98 Cal. xviii, 33 Pac. 496. **Ga.**—*Oliver v. House*, 125 Ga. 637, 54 S. E. 732. **W. Va.**—*Daniel v. Gillespie*, 65 W. Va. 366, 64 S. E. 254.

But see *contra*, *Pearce v. Sutherland*, 4 Alaska 120; *Farnsworth v. Whitney*, 74 Me. 370.

2. **U. S.**—*Cropper v. Coburn*, 2 Curt. 465, 6 Fed. Cas. No. 3,416. **Ind.**—*Valentine v. Wysor*, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788. **N. Y.**—*Lord v. Hull*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484. **Ohio.**—*Gray v. Kerr*, 46 Ohio St. 652, 23 N. E. 136. **W. Va.**—*Childers v. Neely*, 47 W. Va. 70, 34 S. E. 828, 81 Am. St. Rep. 777, 49 L. R. A. 468; *Coville v. Gilman*, 13 W. Va. 314.

[a] "The reason is, that the balance will probably fluctuate while the business continues." *Cropper v. Coburn*, 2 Curt. 465, 6 Fed. Cas. No. 3,416.

3. **U. S.**—*Cropper v. Coburn*, 2 Curt. 465, 6 Fed. Cas. No. 3,416. **Ga.**—*Miller v. Freeman*, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504, where articles of partnership provided for annual accounting. **N. Y.**—*Lord v. Hull*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484. And see *Sanger v. French*, 157 N. Y. 213, 51 N. E. 979.

[a] As where the partnership has proved a failure, and the partners are too numerous to be made parties to the action and a limited account will

result in justice to all. *Lord v. Hull*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484; *Wallworth v. Holt*, 4 Myl. & C. 619, 4 Jur. 814, 41 Eng. Reprint 238.

[b] "Extreme necessity only, however, will justify interference without a dissolution." *Lord v. Hull*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484.

4. *Lord v. Hull*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484.

5. *Miller v. Freeman*, 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504.

6. *Hogan v. Walsh*, 122 Ga. 283, 50 S. E. 84. **N. Y.**—*Lord v. Hull*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484. **Eng.**—*Fairthorne v. Weston*, 3 Hare 387, 13 L. J. Ch. 263, 8 Jur. 353, 67 Eng. Reprint 432; *Richards v. Davies*, 2 Russ. & M. 347, 39 Eng. Reprint 427.

7. *Lord v. Hull*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484.

8. **Ala.**—*Reilly v. Woolbert*, 196 Ala. 191, 72 So. 10; *Webb v. Butler*, 192 Ala. 287, 68 So. 369, Ann. Cas. 1916D, 815. **Ark.**—*Luke v. Rhodes*, 117 Ark. 600, 176 S. W. 111. **Pa.**—*Hudson v. Barrett*, 1 Pars. Eq. Cas. 414. **Eng.**—*Richardson v. Hastings*, 7 Beav. 301, 13 L. J. Ch. 129, 8 Jur. 72, 49 Eng. Reprint 1081; *Knowles v. Haughton*, 11 Ves. Jr. 168, 32 Eng. Reprint 1052 (wherein the object of the accounting was to establish the partnership, the existence of which was denied by the defendant); *Fairthorne v. Weston*, 3 Hare 387, 13 L. J. Ch. 263, 8 Jur. 353,

c. *Probate Court*.—The statutes of some states provide that the copartnership affairs may be fully adjusted and settled in the probate court, upon the death of either partner.⁹ These statutes are construed, in some jurisdictions, to give the probate court exclusive jurisdiction over the settlement of the affairs of the partnership,¹⁰ while in others, it is a concurrent remedy with a resort to a court of equity.¹¹ In the absence of such a statute, the only remedy is in equity.¹²

d. *Bankruptcy Court*.—Although some of the partners are adjudged bankrupt the partnership assets are administered by the solvent partners.¹³ The filing of a petition in bankruptcy by one of the partners after the commencement of a suit to settle the partnership accounts will not divest the jurisdiction of the first court.¹⁴

e. *Admiralty Courts*.—Courts of admiralty have no general jurisdiction to administer relief as courts of equity,¹⁵ and cannot assume jurisdiction in matters of account between partners in a vessel, but will leave them to their remedy in equity.¹⁶

67 Eng. Reprint 432. But *compare* earlier cases holding that accounting could not be had without a dissolution. *Knebell v. White*, 2 Younge & C. Exch. 15; *Losecombe v. Russell*, 4 Simons 3, 58 Eng. Reprint 4; *Forman v. Homfray*, 2 Ves. & B. 329, 35 Eng. Reprint 344.

9. **U. S.**—*Esterly v. Rua*, 122 Fed. 609, 58 C. C. A. 548, Alaska. Ind. *Harrah v. State ex rel. Dyer*, 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747. **Kan.**—*Carter v. Christie*, 57 Kan. 492, 46 Pac. 964; *Anderson v. Beebe*, 22 Kan. 768. **Mo.**—*Caldwell v. Hawkins*, 73 Mo. 450; *Ensworth v. Curd*, 68 Mo. 282. **N. H.**—*Scott v. Buffum*, 52 N. H. 345. **N. Y.**—*Simpson v. Simpson*, 44 App. Div. 492, 60 N. Y. Supp. 879.

10. *Harrah v. State ex rel. Dyer*, 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747; *Caldwell v. Hawkins*, 73 Mo. 450; *Ensworth v. Curd*, 68 Mo. 282.

11. **Cal.**—*Griggs v. Clark*, 23 Cal. 427. **Kan.**—*Carter v. Christie*, 57 Kan. 492, 46 Pac. 964. **Mich.**—*Perrin v. Lepper*, 49 Mich. 347, 13 N. W. 768. **N. H.**—*Scott v. Buffum*, 52 N. H. 345.

12. **Ala.**—*Vincent v. Martin*, 79 Ala. 540; *Roulston v. Washington*, 79 Ala. 529. **Ark.**—*Luke v. Rhodes*, 117 Ark. 600, 176 S. W. 111; *Choate v. O'Neal*, 57 Ark. 299, 21 S. W. 470; *Culley & Son v. Edwards*, 44 Ark. 423, 51 Am. Rep. 614. **Cal.**—*Andrade v. Superior Court*, 75 Cal. 459, 17 Pac. 531; *Theller v. Such*, 57 Cal. 447. **Ia.**—*Fredrick v. Cooper*, 3 Iowa 171. **La.**—*Gordon v. Dick*, 15 La. 33. **N. Y.**—*Blake v. Barnes*, 63 Hun 633, 18 N. Y. Supp. 471, 28 Abb. N. C. 401, 45 N. Y.

St. 130. **Pa.**—*Wiley's Exrs.*, Appeal, 84 Pa. 270. But *compare* *Estate of Unruh*, 13 Phila. 337, wherein it was held that the orphans' court had jurisdiction where the surviving partner was the executor of the estate of the deceased partner.

[a] **May Compel But Not Adjust Account**.—While the probate court has, by virtue of the statute, power to compel the surviving partner to account to the personal representative of the deceased partner, it has no power to settle or adjust such account. *Andrade v. Superior Court*, 75 Cal. 459, 17 Pac. 531.

[b] **Allowance by Probate Court**. Upon obtaining a decree of the court of equity in his favor, a surviving partner who has paid a firm debt out of his separate means should have it allowed in the probate court having jurisdiction over the deceased partner's estate. *Choate v. O'Neal*, 57 Ark. 299, 21 S. W. 470.

13. See 3 STANDARD PROC. 993, and *Williams v. Lane*, 158 Cal. 39, 109 Pac. 873.

14. *Williams v. Lane*, 158 Cal. 39, 109 Pac. 873.

[a] **The trustee in bankruptcy may be compelled to account** by the solvent partner for partnership property, in the state courts. *Williams v. Lane*, 158 Cal. 39, 109 Pac. 873.

15. See 1 STANDARD PROC. 373 and 375.

16. *Ward v. Thompson*, 22 How. (U. S.) 330, 16 L. ed. 249; *Grant v. Poillon*, 20 How. (U. S.) 162, 15 L. ed.

f. *Justice's Court*.¹⁷ — The settlement of a partnership being an equitable matter, is one over which a justice of the peace has no jurisdiction,¹⁸ and when an action of account at law is not expressly given him by statute, he has no jurisdiction to settle the partnership affairs by such an action.¹⁹

2. **Place of Bringing Suit.** — In a suit for an accounting, jurisdiction of the court does not depend upon the location of the partnership property,²⁰ but upon the residence of the defendant partners.²¹ Where, however, the chief purpose of an action is to compel a conveyance of lands it is subject to a statute requiring actions to be brought where the land is situated, even though the bill also asks for a dissolution and accounting of a partnership.²²

3. **Parties.** — a. *Who May Maintain Suit.* — (I.) **Partners.** — Any partner may maintain a bill for an accounting of the partnership business,²³ unless his right has been lost by his negligence or by laches

871; *Vandewater v. Mills*, 19 How. (U. S.) 82, 15 L. ed. 554.

17. See generally the title "**Justices of the Peace.**"

18. *Cal.*—*Robinson v. Compher*, 13 Colo. App. 343, 57 Pac. 754. *Mo.*—*Ran-kin v. Fairley*, 29 Mo. App. 587. *N. C.* *Love v. Rhyne*, 86 N. C. 576.

19. *Rickey v. Bowne*, 18 Johns. (N. Y.) 131; *Stevens v. Coburn*, 71 Vt. 261, 44 Atl. 354.

20. *Cal.*—*Clark v. Brown*, 83 Cal. 181, 23 Pac. 289, where it was not necessary to determine the interests of the parties in the realty. *Ill.*—*Quinn v. McMahan*, 40 Ill. App. 593. *Mich.* *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243. *Minn.* *Shackleton v. Kneisley*, 48 Minn. 451, 51 N. W. 470. *N. Y.*—*Williams v. Williams*, 83 Misc. 560, 145 N. Y. Supp. 564. *Pa.*—*Eshbach v. Stonaker*, 1 Pa. Dist. 32.

[a] "The proceeding is, in its essence, a personal and not a real controversy. It could hardly be claimed that a partner could get an accounting in any state or region where lands were to be found, and proceed to a decree without personal service or appearance, and without a personal accounting. The decree, when it reaches lands, does it incidentally and its chief purpose is different." *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243.

[b] In Louisiana the action should be at the domicile of the partnership. *Lobdell v. Bushnell*, 24 La. Ann. 295. See *Brinegar v. Griffin*, 2 La. Ann. 154.

Extraterritorial jurisdiction over

lands, see generally, 17 STANDARD PROC. 776, 780, 783.

21. *Ga.*—*Cox v. Manning*, 13 Ga. App. 518, 79 S. E. 484. *Ill.*—*Quinn v. McMahan*, 40 Ill. App. 593. *Ky.* *Maude v. Rodes*, 4 Dana 144. *Mich.* *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243. *N. Y.*—*Williams v. Williams*, 83 Misc. 560, 145 N. Y. Supp. 564. *Pa.*—*Eshbach v. Slonaker*, 1 Pa. Dist. 32.

[a] **Where the defendant is a non-resident** of the state, (1) the action may nevertheless be brought within the state where the business is transacted. *Brinegar v. Griffin*, 2 La. Ann. 154. (2) In which event, if the statute requires actions against nonresidents to be in the county where the cause of action arose, the action should be in the county where the business is transacted. *Wells v. Collins*, 11 Lea (Tenn.) 213.

22. *Falls of Neuse Mfg. Co. v. Brower*, 105 N. C. 440, 11 S. E. 313, under § 190 of the Code.

23. *Webb v. Butler*, 192 Ala. 287, 68 So. 369, Ann. Cas. 1916 D, 815; *Burney & Co. v. Boone*, 32 Ala. 486. *Ark.*—*Nichol v. Stewart*, 36 Ark. 612. *Cal.*—*Blood v. Fairbanks*, 48 Cal. 171; *Clark v. Gridley*, 41 Cal. 119; *Rassaert v. Mensch*, 17 Cal. App. 637, 120 Pac. 1072. *Ill.*—*Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833. *Ind.*—*Douthit v. Douthit*, 133 Ind. 26, 32 N. E. 715; *Warring v. Hill*, 89 Ind. 497; *Meredith v. Ewing*, 85 Ind. 410. *Ky.*—*Broeg v. Pool's Admr.*, 22 Ky. L. Rep. 1354, 60 S. W. 518. *La.*—*New Orleans v. Gauthreaux*, 32 La. Ann. 1126. *Md.* *Glenn v. Hebb*, 12 Gill & J. 271. *Mich.*

on his part,²⁴ even after a withdrawal from the partnership.²⁵

The surviving partner may under certain circumstances maintain a bill for an accounting against the estate of a deceased partner, according to some authorities,²⁶ but generally he cannot maintain a suit in equity for an accounting and settlement, since he has the legal right to take possession of the partnership assets and wind up its affairs.²⁷

(II.) **Transferee, Assignee or Mortgagee, etc.** — A transferee, assignee or mortgagee of the share of a partner may demand an accounting to determine his proportionate share of the net firm property after such accounting.²⁸

(III.) **Personal Representative of Deceased Partner.** — The personal representative of a deceased partner may maintain a bill for an accounting against the surviving partners.²⁹

Russell v. White, 63 Mich. 409, 29 N. W. 865 (partner who had sold his interest but, by agreement, was to remain a partner until purchaser had fully paid for the interest); Near v. Lowe, 49 Mich. 482, 13 N. W. 825. **Minn.**—Palmer v. Tyler, 15 Minn. 106, failure to contribute the full amount agreed upon does not affect his right. **Miss.**—Felder v. Wall, 26 Miss. 595. **Mo.**—Reilly v. Reilly, 14 Mo. App. 62. **N. J.**—Sharp v. Hibbens, 42 N. J. Eq. 543, 9 Atl. 113; Deveney v. Mahoney, 23 N. J. Eq. 247. **N. Y.**—Watts v. Adler, 130 N. Y. 646, 29 N. E. 131, 3 Silv. 585, 41 N. Y. St. 325; Greenwood v. Brodhead, 8 Barb. 593; Maddock v. Steel, 68 Hun 522, 23 N. Y. Supp. 61, 52 N. Y. St. 754, extent of interest immaterial. **S. C.**—Jones v. Smith, 31 S. C. 527, 10 S. E. 340. **Tex.**—Rische v. Rische, 46 Tex. Civ. App. 23, 101 S. W. 849. **Va.**—Jones v. Murphy, 93 Va. 214, 24 S. E. 825.

[a] **After Transfer of Property.**—“A partner has a right to file a bill for a settlement of the affairs of the firm, and a due application of the assets, and connected with that settlement to impeach any disposition of the property, even after an absolute transfer by himself to his co-partner of the property charged with the debts.” Ketchum v. Durkee, Hoffm. Ch. (N. Y.) 538.

[b] **A partner who had received his share of the profits and had no capital invested in the firm held not entitled to an accounting.** Brenner v. Brenner, 9 Pa. Dist. 511.

24. **Ky.**—Garnett v. Wills, 24 Ky. L. Rep. 617, 69 S. W. 695. **Md.**—Glenn v. Hebb, 12 Gill & J. 271. **Miss.**—Lamb v. Rowan, 83 Miss. 45, 35 So. 427, 690.

Ohio.—Gray v. Kerr, 46 Ohio St. 652, 23 N. E. 136. **Pa.**—Eyre v. Leshner, 14 Montg. Co. Rep. 189. **Vt.**—Spear v. Newell, 13 Vt. 288.

25. **Colo.**—Tarabino v. Nicoli, 5 Colo. App. 545, 39 Pac. 362. **La.**—Gridley v. Conner, 2 La. Ann. 87. **N. J.**—Sharp v. Hibbens, 42 N. J. Eq. 543, 9 Atl. 113.

26. **Mass.**—Burnside v. Merrick, 4 Metc. 537, assignee, as the representative of the insolvent surviving partner, may maintain the bill for an accounting against the estate of the deceased partner. **Miss.**—Felder v. Wall, 26 Miss. 595. **Vt.**—King v. White, 63 Vt. 158, 21 Atl. 535, 25 Am. St. Rep. 752.

27. **Gleeson v. Costella** (Ariz.), 138 Pac. 544; McGay v. Joy, 70 Cal. 581, 11 Pac. 832.

28. **U. S.**—Fourth National Bank v. New Orleans & C. R. Co., 11 Wall. 624, 20 L. ed. 82. **Ala.**—Farley, Spear & Co. v. Moog, 79 Ala. 148, 58 Am. Rep. 585. **Ark.**—Nichol v. Stewart, 36 Ark. 612. **Cal.**—Wright v. Ward, 65 Cal. 525, 4 Pac. 534; Miller v. Brigham, 50 Cal. 615. **Ill.**—Gerard v. Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 350; Strong v. Clawson, 10 Ill. 346. **Ind.**—Smith v. Evans, 37 Ind. 526, mortgagee. **N. M.**—De Manderfield v. Field, 7 N. M. 17, 32 Pac. 146. **N. Y.**—Stokes v. Stokes, 59 Hun 431, 13 N. Y. Supp. 407, 36 N. Y. St. 620. **Ore.**—Marx v. Goodnough, 16 Ore. 26, 16 Pac. 918. **Pa.**—McGlensey v. Cox, 1 Phila. 387. **R. I.**—Stiness v. Pierce, 13 R. I. 452. **W. Va.**—Ballard v. Callison, 4 W. Va. 326. **Wis.**—Rommerdahl v. Jackson, 102 Wis. 444, 78 N. W. 742; Driggs v. Morely, 2 Pin. 403, 2 Chand. 59.

29. **U. S.**—Denver v. Roane, 99 U. S. 355, 25 L. ed. 476. **Ala.**—Word v.

(IV.) **Heirs, Legatees or Devisees of Deceased Partner.** — Although, generally, the heirs, legatees, or devisees of a deceased partner have no standing in court against the surviving partner for an accounting,³⁰ even for the sole purpose of compelling him to account and settle with the personal representative of the deceased partner,³¹ exceptional circumstances may exist in the particular case rendering it proper for such persons to maintain the suit.³² But it has been held that the

Word, 90 Ala. 81, 7 So. 412; Farley, Spear & Co. v. Moog, 79 Ala. 148, 58 Am. Rep. 585; Costley v. Towles, 46 Ala. 660. **Ark.**—Tate v. Tate, 35 Ark. 289. **D. C.**—Consaul v. Cummings, 24 App. Cas. 36. **Ind.**—Valentine v. Wysor, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788; Skillen v. Jones, 44 Ind. 136. **Ia.**—Hutton v. Laws, 55 Iowa 710, 8 N. W. 642. **Me.**—Warren v. Warren, 56 Me. 360. **Md.**—Fried v. Burke, 125 Md. 500, 94 Atl. 86; Rosenzweig v. Thompson, 66 Md. 593, 8 Atl. 659; Glenn v. Hebb, 12 Gill & J. 271. **Mass.**—Freeman v. Freeman, 136 Mass. 260; Dyer v. Clark, 5 Mete. 562, 39 Am. Dec. 697, survivor must account to the representative after the partnership is liquidated. **N. Y.**—Murray v. Mumford, 6 Cow. 441; Hyer v. Burdett, 1 Edw. Ch. 325; Reinhardt v. Reinhardt, 134 App. Div. 440, 119 N. Y. Supp. 285; Secor v. Tradesmen's Nat. Bank, 92 App. Div. 294, 87 N. Y. Supp. 181; Krumbeck v. Clancy, 41 App. Div. 397, 58 N. Y. Supp. 727; Blake v. Barnes, 63 Hun 633, 18 N. Y. Supp. 471, 28 Abb. N. C. 401, 45 N. Y. St. 130. **N. C.**—Pitt v. Moore, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489. **Ohio.**—Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1. **Pa.**—*In re Dampf's Appeal*, 106 Pa. 72. **Tenn.**—Watkins v. Fakes, 5 Heisk. 185. **Vt.**—Newell v. Humphrey, 37 Vt. 265, action of account at law. **Eng.**—Betjemann v. Betjemann, 64 L. J. Ch. 641, (1895) 2 Ch. 474, 12 Rep. 455, 73 L. T. N. S. 2, 44 W. R. 182.

[a] **Single Favorable Item.**—The representatives cannot call the survivor to account for any single item which might appear to the credit of the deceased. Walmsley v. Mendelsohn, 31 La. Ann. 152.

[b] **Rule Stated.**—"The law governing the relations of the administrator of a deceased partner to the surviving partners * * * is well settled. Primarily, the administrator has nothing to do with either the partnership assets or the partnership debts. The surviving partners take the exclusive

legal title to the former for the payment of the latter. If any assets remain in their hands after payment of all liabilities, they should account to the administrator for the distributive share of the deceased, which then becomes, for the first time, assets in his hands as administrator. If, however, there is an unreasonable delay on the part of the surviving partners in closing the affairs of the partnership, or if they are wasting the partnership property, it is then the right and duty of the administrator, if the partnership creditors remain inactive, to file a bill * * * calling the survivors to account and praying for * * * the complete adjustment of the partnership affairs." Miller v. Jones, 39 Ill. 54.

[c] **Administrator De Bonis Non.** Worthy v. Brower, 93 N. C. 344.

Joinder of heirs, see 12 STANDARD PROC. 990.

30. See 12 STANDARD PROC. 990, and the following cases: **Ark.**—Tate v. Tate, 35 Ark. 289. **Ind.**—Valentine v. Wysor, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788. **Ia.**—Hutton v. Laws, 55 Iowa 710, 8 N. W. 642. **Ky.**—Hackett v. State Bank & Trust Co., 155 Ky. 392, 159 S. W. 952. **Me.**—Warren v. Warren, 56 Me. 360. **Md.**—Rosenzweig v. Thompson, 66 Md. 593, 8 Atl. 659. **N. Y.**—Hyer v. Burdett, 1 Edw. Ch. 325; Blake v. Barnes, 63 Hun 633, 18 N. Y. Supp. 471, 28 Abb. N. C. 401, 45 N. Y. St. 130. **Ohio.**—Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1. **Pa.**—*In re Dampf's Appeal*, 106 Pa. 72. **Wis.**—Blakely v. Smock, 96 Wis. 611, 71 N. W. 1052. **Eng.**—Travis v. Milne, 9 Hare 141, 150, 20 L. J. Ch. 665, 68 Eng. Reprint 449; Stainton v. The Carron Co., 18 Beav. 146, 157, 23 L. J. Ch. 299, 18 Jur. 137, 2 Eq. R. 466, 2 W. R. 176, 52 Eng. Reprint 58.

31. Harrison v. Righter, 11 N. J. Eq. 389.

32. **Ind.**—Valentine v. Wysor, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788. **Kan.**—Ravenscraft v. Pratt, 22 Kan. 20. **Me.**—Warren v. Warren, 56 Me. 360,

mere fact that the surviving partner is also the legal representative of the deceased partner, is not alone sufficient to justify such action.³³

(V.) **Creditor.**—Equity will, where the legal remedy is inadequate, compel an accounting and settlement of partnership matters at the instance of a creditor.³⁴

b. *Necessary and Proper Parties.*—(I.) **Generally.**—The general rules governing parties in equity,³⁵ are applicable to suits for an accounting and settlement of a partnership. Any person whose presence is necessary to a complete determination of the partnership accounting should be made a party,³⁶ while persons whose presence are

wherein the heirs had been admitted into partnership before the death of their testator, but the purpose of the suit was to secure an accounting of the old copartnership to determine the interest they acquired. **Md.**—*Rosenzweig v. Thompson*, 66 Md. 593, 8 Atl. 659. **Mo.**—*Byers v. Weeks*, 105 Mo. App. 72, 79 S. W. 485, if the defendant has an unsettled partnership estate in his hands which he has failed to administer and for which he has failed to account, and which the deceased partner's administrator failed to administer while in office, and there being no authority to appoint an administrator de bonis non, the plaintiffs have the right to sue in their own names as heirs at law. **N. J.**—*Harrison v. Righter*, 11 N. J. Eq. 389. **N. Y.**—*Blake v. Barnes*, 63 Hun 633, 18 N. Y. Supp. 471, 28 Abb. N. C. 401, 45 N. Y. St. 130. **S. C.**—*Wagner v. Sanders*, 49 S. C. 192, 27 S. E. 68.

[a] **Rule Stated.**—"While it is undoubtedly true, as a general rule, that an action to compel a surviving partner to account can only be maintained by the personal representative of the deceased partner, yet circumstances may appear which create an exception to the general rule and make it proper that a court of equity should entertain an action on behalf of the heirs. Where it is shown that there is collusion between the surviving partner and the executor, the latter refusing to compel an accounting by the former, or where there has been such dealing between the two as renders it probable that the executor will not make a bona fide effort to secure an accounting, or other like circumstances appear, it has been held that the heirs may maintain the action." *Valentine v. Wysor*, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788. And see to the same effect, *Stainton v. The Carron Co.*, 18 Beav. 146, 157,

23 L. J. Ch. 299, 18 Jur. 137, 2 Eq. R. 466, 2 W. R. 176, 52 Eng. Reprint 58; *Davies v. Davies*, 2 Keene 534, 1 Jur. 446, 48 Eng. Reprint 733; *Bowsher v. Watkins*, 1 Russ. & M. 277, 39 Eng. Reprint 107.

33. **Ia.**—*Hutton v. Laws*, 55 Iowa 710, 8 N. W. 642, remedy of the heirs is to have the survivor removed as administrator, and another appointed who would maintain the action against the surviving partner. **N. Y.**—*Hyer v. Burdett*, 1 Edw. Ch. 325. **Pa.**—See *In re Dampf's Appeal*, 106 Pa. 72.

34. **O. S. Kelly Co. v. Zarecor** (Tex.), 62 S. W. 189.

35. See the title "**Parties.**"

36. **U. S.**—*Hoxie v. Carr*, 1 Sumn. 173, 12 Fed. Cas. No. 6,802. **Ark.**—*Hirsch v. Adler*, 21 Ark. 338; *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376. **Cal.**—*Cuyamaca Granite Co. v. Pacific Pav. Co.*, 95 Cal. 252, 30 Pac. 525; *Roach v. Caraffa*, 85 Cal. 436, 25 Pac. 22; *Doudell v. Shoo*, 20 Cal. App. 424, 129 Pac. 478, vendee of property which was alleged to be partnership assets. **Ind.**—*Dehority v. Nelson*, 56 Ind. 414. **Mass.**—*Bartlett v. Parks*, 1 Cush. 82. **Mich.**—*Houghton v. State Mut. Life Assur. Co.*, 110 Mich. 308, 68 N. W. 142 (insurance company which consented to its general agent taking plaintiff in as partner); *Glynn v. Phetteplace*, 26 Mich. 383, assignee. **Mo.**—*Anable v. McDonald Land & Min. Co.*, 144 Mo. App. 303, 128 S. W. 38, participant in fraudulent combination against plaintiff. **Nev.**—*Rhodes v. Williams*, 12 Nev. 20. **N. H.**—*Penniman v. Jones*, 58 N. H. 447 (a confederate of a fraudulent partner); *Raymond v. Putnam*, 44 N. H. 160. **N. Y.**—*Wade v. Rusher*, 4 Bosw. 537 (confederate of fraudulent partner); *Johnson v. Snyder*, 7 How. Pr. 395 (assignee); *Jennings v. Whittemore*, 2 Thomp. & C. 377 (confederate of fraudulent partner); *Webb*

not necessary should not be made parties thereto.³⁷

(II.) Partners and Their Representatives. — Generally, all the partners,³⁸

v. Helion, 3 Robt. 625, fraudulent vendee. **Pa.**—*Parker v. Broadbent*, 134 Pa. 322, 19 Atl. 631. **S. C.**—*Wagner v. Sanders*, 49 S. C. 192, 27 S. E. 68. **Vt.** *Stimson v. Lewis*, 36 Vt. 91.

[a] **Others Claiming Interest in Firm Assets.**—Where a surviving partner has used the partnership assets in another partnership formed by him and subsequently dies, his representative and the surviving partner of the second partnership should be made parties defendant to a bill filed by the administrator of the first deceased member of the original firm. *Costley v. Towles*, 46 Ala. 660.

[b] **A person in possession of partnership property** is not a necessary party to a suit for an accounting between partners. *Duden v. Maloy*, 37 Fed. 98. But see *Wagner v. Sanders*, 49 S. C. 192, 27 S. E. 68.

[c] **Corporation Acting as Partnership Trustee.**—A corporation organized by a partnership for the purpose of acting as its trustee is a proper defendant to a suit for an accounting. *Pearce v. Sutherland*, 164 Fed. 609, 90 C. C. A. 519.

37. **Ala.**—*Webb v. Butler*, 196 Ala. 181, 72 So. 31. **Conn.**—*Bissell v. Ames*, 17 Conn. 121. **Pa.**—*Luzier v. Naylor Line & Twine Co.*, 8 Pa. Dist. 632.

[a] **Stranger Entitled to Share of Partner's Profits.**—The fact that another person, not a member of the partnership, is entitled to a share in the complainants' portion of the partnership assets does not make him a proper party. *Sanger v. French*, 157 N. Y. 213, 51 N. E. 979. Compare *Steele v. Schaffer*, 107 Ill. App. 320.

38. **U. S.**—*Fourth Nat. Bank v. New Orleans & C. R. Co.*, 11 Wall. 624, 20 L. ed. 82; *Gaddie v. Mann*, 147 Fed. 960; *Vose v. Philbrook*, 3 Story 335, 28 Fed. Cas. No. 17,010; *Gray v. Larimore*, 4 Sawy. 638, 2 Abb. 542, 10 Fed. Cas. No. 5,721. **Ala.**—*Webb v. Butler*, 196 Ala. 181, 72 So. 31; *Forcheimer v. Foster*, 192 Ala. 218, 68 So. 879. **Ark.**—*Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376. **Cal.**—*Cuyamaca Granite Co. v. Pacific Pav. Co.*, 95 Cal. 252, 30 Pac. 525; *Wright v. Ward*, 65 Cal. 525, 4 Pac. 534; *Blood v. Fairbanks*, 48 Cal. 171; *Settembre v. Putnam*, 30 Cal. 490. **Colo.**—*Lynch v.*

Foley, 32 Colo. 110, 76 Pac. 370. **Conn.** *Townsend v. Auger*, 3 Conn. 354. **Ga.** *Elliott v. Deason*, 64 Ga. 63; *Wells v. Strange*, 5 Ga. 22. **Ill.**—*Gerard v. Bates*, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 370; *Bracken v. Kennedy*, 4 Ill. 578; *Yergler v. Kaufmann*, 176 Ill. App. 564. **La.**—*Francis v. Lavine*, 21 La. Ann. 275; *Dufau v. Massicot's Heirs*, 6 Mart. (N. S.) 182. **Me.**—*Farrar v. Pearson*, 50 Me. 561, 8 Am. Rep. 439; *Warren v. Warren*, 56 Me. 360. **Md.** *Fried v. Burk*, 125 Md. 500, 94 Atl. 86; *Bruns v. Heise*, 101 Md. 163, 60 Atl. 604. **Mass.**—*Towle v. Pierce*, 12 Mete. 329, 46 Am. Dec. 679. **Mich.**—*Glynn v. Phetteplace*, 26 Mich. 383. **Minn.** *Wilcox v. Comstock*, 37 Minn. 65, 33 N. W. 42. **N. H.**—*Raymond v. Putnam*, 44 N. H. 160. **N. M.**—*De Manderfield v. Field*, 7 N. M. 17, 32 Pac. 146. **N. C.** *Allison v. Davidson*, 17 N. C. 79. **Tex.** *Boyd v. Boyd*, 34 Tex. Civ. App. 57, 78 S. W. 39; *Santleben v. Froboese*, 17 Tex. Civ. App. 626, 43 S. W. 571. **Vt.**—*Stimson v. Lewis*, 36 Vt. 91. **Va.** *Waggoner v. Gray's Admr.*, 2 Hen. & M. (12 Va.) 603. **Eng.**—*Ehrmann v. Ehrmann*, 72 L. T. N. S. 17, 43 Wkly. Rep. 125; *Ireton v. Lewes*, Rep. Temp. Finch 96, 23 Eng. Reprint 52.

[a] **Even though the members have split into two divisions** for the purpose of carrying on separate parts of the general enterprise. *Forcheimer v. Foster*, 192 Ala. 218, 68 So. 879.

[b] **Partner whose interest in the partnership is sold under an execution** upon a judgment against him personally is a necessary party. *Wright v. Ward*, 65 Cal. 525, 4 Pac. 534; *Gerard v. Bates*, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 350.

[c] **Partner with whom complainant had adjusted accounts** and succeeded to his interests is necessary party to accounting with the third partner. *Bracken v. Kennedy*, 4 Ill. 558.

[d] **Retired partner** (1) whose rights and interests have all passed by assignment to one who has taken his place in the firm with the consent of the other members, need not be made a party. *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376. But (2) in an action by the assignee of a partner for an accounting by the other partner, the

or their representatives,³⁹ should be made parties, either as plaintiffs or defendants, to a suit for a dissolution and accounting of the partnership, and this same rule applies where the statute provides that the law action of account may be used⁴⁰ or where the accounting is had in the probate court.⁴¹

Where the partners are very numerous,⁴² or some are out of the jurisdiction,⁴³ a court of equity may, within the exercise of its sound discretion, dispense with their being made parties, if their interests will not be prejudiced by the decree, or their absence affect the just and final determination of the merits of the case.

(III.) **Transferee, Assignee or Mortgagee, etc.** — The transferee, purchaser or other person acquiring an interest in a partnership should be made a party to a settlement of the partnership,⁴⁴ unless the accounting is for the purpose of adjusting previous partnership matters with which he is not concerned or connected.⁴⁵

(IV.) **Creditors.** — While a creditor of the partnership is not a necessary, nor generally, a proper party to an action between the partners for a settlement of the firm affairs,⁴⁶ yet he may be allowed to inter-

assignor must be made a party. *Pine Cliffs Farms v. Collier*, 92 Misc. 269, 156 N. Y. Supp. 293. And see 3 STANDARD PROC. 117, 118.

39. **U. S.**—*Brew v. Cochran*, 141 Fed. 459; *Gray v. Larrimore*, 4 Sawy. 638, 2 Abb. 542, 10 Fed. Cas. No. 5,721. **Ala.**—*Webb v. Butler*, 196 Ala. 181, 72 So. 31; *Cannon v. Copeland*, 43 Ala. 201. **Colo.**—*Lynch v. Foley*, 32 Colo. 110, 76 Pac. 370. **Me.**—*Fuller v. Benjamin*, 23 Me. 255. **Mich.**—*Carpenter v. St. Clair Circ. Judge*, 122 Mich. 323, 81 N. W. 95; *Jenness v. Smith*, 58 Mich. 280, 25 N. W. 191. **Miss.**—*Dilworth v. Mayfield*, 36 Miss. 40. **N. M.**—*De Manderfield v. Field*, 7 N. M. 17, 32 Pac. 146. **S. C.**—*Manship v. Newton*, 94 S. C. 260, 77 S. E. 941. **Vt.**—*Mason v. Mason's Exrs.*, 76 Vt. 287, 56 Atl. 1011. **Wis.**—*Blakely v. Smock*, 96 Wis. 611, 71 N. W. 1052.

Contra, *Parry v. Parry*, 155 N. Y. Supp. 1072, in the absence of an allegation of the insolvency of the firm.

[a] **An administrator de bonis non appointed in another state is not a necessary party to a suit for the settlement in another state of a partnership of which the deceased was a member.** *Manship v. Newton*, 94 S. C. 260, 77 S. E. 941.

40. *Foster v. Ives*, 53 Vt. 458.

[a] **Married woman who is a partner must be joined.** *Foster v. Ives*, 53 Vt. 458.

41. *Arnold v. Arnold*, 90 N. Y. 580.

42. *Thickson v. Barry*, 138 Ill. App.

100; *Stimson v. Lewis*, 36 Vt. 91.

43. **U. S.**—*Vose v. Philbrook*, 3 Story 335, 28 Fed. Cas. No. 17,010. **Ala.**—*Webb v. Butler*, 196 Ala. 181, 72 So. 31. **Cal.**—*Wright v. Ward*, 65 Cal. 525, 4 Pac. 534. **Colo.**—*Lynch v. Foley*, 32 Colo. 110, 76 Pac. 370. **Me.**—*Mudgett v. Gager*, 52 Me. 541. **Mass.**—*Towle v. Pierce*, 12 Metc. 329, 46 Am. Dec. 679. **Nev.**—*Beck v. Thompson*, 22 Nev. 109, 36 Pac. 562. **Eng.**—*Duxbury v. Isherwood*, 10 L. T. N. S. 712.

44. **U. S.**—*Hoxie v. Carr*, 1 Sumn. 173, 12 Fed. Cas. No. 6,802. **Ark.**—*Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376. **Ill.**—*Rosenstiel v. Gray*, 112 Ill. 282.

[a] **The assignee of a bankrupt partner should be made a party in his place.** *Fuller v. Benjamin*, 23 Me. 255.

[b] **If the transferee has no real interest, he need not be made a party, if the real person in interest is a party.** *Janney v. Brown*, 36 La. Ann. 118.

45. *Harper v. Anderson*, 104 Cal. xvii, 37 Pac. 926.

46. **U. S.**—*Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. ed. 1005; *Hoxie v. Carr*, 1 Sumn. 173, 12 Fed. Cas. No. 6,802. **Cal.**—*Adams v. Woods*, 8 Cal. 152, 68 Am. Dec. 313. **La.**—*Gridley v. Conner*, 2 La. Ann. 87. **N. Y.**—*Fielding v. Lucas*, 87 N. Y. 197, plaintiff partner cannot join the judgment creditors of his copartner in a bill for an accounting for the purpose of having them enjoined from satisfy-

vene to establish his claim,⁴⁷ although some courts will not permit this,⁴⁸ but will leave him to his remedy of filing a creditor's bill;⁴⁹ and it is really not necessary for the protection of his interests that he intervene, as the court will see that his interests are protected.⁵⁰

c. *Change in Parties Pendente Lite*.⁵¹—Where one of the partners dies during the pendency of the action for account, his representative should be substituted as a party;⁵² a partner who assigns his interest in the partnership pending the accounting should still remain a party thereto,⁵³ and his assignees should thereupon be made parties.⁵⁴

4. **Process and Appearance**.⁵⁵—To give a court of chancery jurisdiction, a real defendant against whom the complainant is entitled to a decree, must be personally served with process within the jurisdiction,⁵⁶ or some property must be found there, upon which the court can proceed in rem,⁵⁷ in which event service by publication may be made upon a non-resident partner.⁵⁸

5. **Provisional Remedies**.—a. *Attachment*.⁵⁹—In some jurisdictions the remedy of attachment may be resorted to in suits for partnership accounting, at least whenever the circumstances bring the case within some ground specified in the statute,⁶⁰ in others a contrary rule

ing their judgment as against the partnership property. **R. I.**—Updike v. Doyle, 7 R. I. 446.

47. **Cal.**—Grossini v. Perazzo, 66 Cal. 545, 6 Pac. 450. But compare Isaacs v. Jones, 121 Cal. 257, 53 Pac. 793, 1101, attaching creditor will not be allowed by intervening, to delay the suit for an accounting until his suit is determined. **Mass.**—White v. White, 169 Mass. 52, 47 N. E. 499; Harvey v. Varney, 98 Mass. 118; Washburn v. Goodman, 17 Pick. 519. **Neb.** Clark v. Hall, 54 Neb. 479, 74 N. W. 856. **N. J.**—Ross v. Titworth, 37 N. J. Eq. 333. **Ohio.**—Bell v. Miller, 11 Ohio Dec. (Reprint) 163, 25 Wkly. L. Bul. 126. **R. I.**—Updike v. Doyle, 7 R. I. 446. **Tex.**—Holder v. Shelby (Tex. Civ. App.), 118 S. W. 590. **Wis.**—Jacobson v. Landolt, 73 Wis. 142, 40 N. W. 636, 9 Am. St. Rep. 767.

As to intervention of creditors in general, see 14 STANDARD PROC. 300.

48. Burden v. Burden, 193 Ill. App. 102; Lyons v. Murray, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17.

49. Burden v. Burden, 193 Ill. App. 102. See generally the title "Creditors' Suits."

50. **U. S.**—Hoxie v. Carr, 1 Sumn. 173, 12 Fed. Cas. No. 6,802. **Cal.**—Isaacs v. Jones, 121 Cal. 257, 53 Pac. 793, 1101. **La.**—Gridley v. Conner, 2 La. Ann. 87. **R. I.**—Updike v. Doyle, 7 R. I. 446.

51. See generally the title "Parties."

52. Krumbeck v. Clancy, 41 App. Div. 397, 58 N. Y. Supp. 727.

[a] Even though the deceased had defaulted in his appearance and answer. Krumbeck v. Clancy, 41 App. Div. 397, 58 N. Y. Supp. 727.

53. Nichol v. Stewart, 36 Ark. 612.

54. Hoxie v. Carr, 1 Sumn. 173, 12 Fed. Cas. No. 6,802; Nichol v. Stewart, 36 Ark. 612.

55. See generally the titles "Appearances;" "Process."

56. Maude v. Rodes, 4 Dana (Ky.) 144.

57. Maude v. Rodes, 4 Dana (Ky.) 144.

58. Parsons v. Howard, 2 Woods 1, 18 Fed. Cas. No. 10,777; Gray v. Larimore, 4 Sawy. 638, 2 Abb. 542, 10 Fed. Cas. No. 5,721.

[a] A "partnership" is not property within the meaning of an act authorizing service, by direction of court, on parties beyond its jurisdiction, where a proceeding in equity is instituted concerning property within the jurisdiction. Eshbach v. Slonaker, 1 Pa. Dist. 32.

59. Attachment by third persons, see *infra*, II. B.

60. **Ill.**—Humphreys v. Matthews, 11 Ill. 471, action of account. **Ia.**—Hansen v. Morris, 87 Iowa 303, 54 N. W. 223; Curry v. Allen, 55 Iowa 318, 7 N. W. 635. **Kan.**—Stone v. Boone, 24

prevails.⁶¹ The conflict in the authorities is due partly to difference in the statutes and partly to different interpretation of similar statutes,⁶² the principles governing which are not peculiar to partnership cases and are fully treated elsewhere.⁶³ Generally the complainant cannot proceed by attachment where it is impossible for him to swear as to the amount which will be due him upon a final settlement.⁶⁴

b. *Sequestration*.—The remedy of sequestration is available in a suit for accounting.⁶⁵

c. *Arrest*.⁶⁶—One partner cannot secure the arrest of another for a failure to account for partnership assets in his hands.⁶⁷

d. *Injunction*.—The general rule that the granting of an injunction is within the sound discretion of the court, to be governed by the nature of the case,⁶⁸ applies in suits between partners for an accounting and settlement of the partnership.⁶⁹ An injunction will not be

Kan. 337 (nonresidence of defendant, the cause of action arising wholly within the jurisdiction); *Treadway v. Ryan*, 3 Kan. 437, not an action on contract within attachment statute. La.—*Barrow v. McDonald*, 12 La. Ann. 110. Mass.—See Com. v. Sumner, 5 Pick. 360. Ohio.—*Goble v. Howard*, 12 Ohio St. 165, even though the action be equitable in its nature. Wash.—*Bingham v. Keylor*, 19 Wash. 555, 53 Pac. 729.

[a] The obligation is not fraudulent—incurred within the meaning of the attachment statute, where a partner merely refuses to account for partnership funds collected by him. *Stone v. Boone*, 24 Kan. 337.

61. Ala.—*Newsom v. Pitman*, 98 Ala. 526, 12 So. 412. Cal.—*Wheeler v. Farmer*, 38 Cal. 203. But see cases cited in 3 STANDARD PROC. 349, note 36. Ky.—*Kennaird v. Adams*, 11 B. Mon. 102. N. Y.—*Ketchum v. Ketchum*, 1 Abb. Pr. (N. S.) 157, affirmed in 46 Barb. 43.

[a] Not an Action for Recovery of Money.—An action for the dissolution of the firm and the settlement of its affairs, and of the accounts of the several partners with the firm, is not an action for the recovery of money wherein an attachment may be issued. *Ketchum v. Ketchum*, 1 Abb. Pr. N. S. (N. Y.) 157, affirmed in 46 Barb. 43.

62. See cases in preceding notes.

63. See the title "Attachment."

64. Ill.—*Humphreys v. Matthews*, 11 Ill. 471. Kan.—*Treadway v. Ryan*, 3 Kan. 437. La.—*Barrow v. McDonald*, 12 La. Ann. 110; *Brinegar v. Griffin*, 2 La. Ann. 154; *Johnson v. Short*, 2 La. Ann. 277; *Lévy v. Levy*, 11 La.

577. Wash.—*Bingham v. Keylor*, 19 Wash. 555, 53 Pac. 729.

But see *Hansen v. Morris*, 87 Iowa 303, 54 N. W. 223; *Goble v. Howard*, 12 Ohio St. 165.

65. *Blanchard v. Luce*, 19 La. Ann. 46. See the title "Sequestration."

66. Arrest on mesne process, see generally the title "Arrest in Civil Cases."

Arrest on final process, see the title "Judgments and Decrees, Enforcement of."

67. *Soule v. Hayward*, 1 Cal. 345. See Com. v. Sumner, 5 Pick. (Mass.) 360, arrest not available in equity accounting.

68. See the title "Injunctions."

69. U. S.—*Rowland v. Auto Car Co.*, 133 Fed. 835. Fla.—*Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198. Ga.—*Joselove v. Bohrmann*, 119 Ga. 204, 45 S. E. 982. Md.—*Gusdorff v. Schleisner*, 85 Md. 360, 37 Atl. 170. N. J.—*Wagoner v. Warne* (N. J. Eq.), 14 Atl. 215; *Sutro v. Wagner*, 23 N. J. Eq. 588; *Moies v. O'Neill*, 23 N. J. Eq. 207. N. Y.—*Walker v. Trott*, 4 Edw. Ch. 38; *Dunham v. Jarvis*, 8 Barb. 88; *Greenwald v. Gotham-Attucks Music Co.*, 118 App. Div. 29, 103 N. Y. Supp. 123. N. C.—*Taylor v. Russell*, 119 N. C. 30, 25 S. E. 710. Pa.—*In re Slobig's Appeal*, 2 Sad. 365, 5 Atl. 670; *Baxter v. Buchanan*, 3 Brewst. 435. S. C.—*Ellis v. Commander*, 1 Strobb. Eq. 188. Eng.—*Alder v. Fouracre*, 3 Swanst. 489, 36 Eng. Reprint 947; *Littlewood v. Caldwell*, 11 Price 97, 25 Rev. Rep. 711; *Cofton v. Horner*, 5 Price 537.

[a] Not on Ex Parte Order.—*Goldman v. Manistee Circ. Judge*, 155 Mich. 47, 118 N. W. 600. See *Petit v. Cheve-*

granted merely on the ground of the dissolution of the partnership; there must be a violation of partnership rights and duties.⁷⁰

e. *Receiver*.⁷¹—In an action for the settlement of a partnership, the power to appoint a receiver is one inherent in a court of equity, but the application thereof in a particular case is within the judicial discretion of the court,⁷² and, as by the appointment of a receiver, the partners are entirely relieved from any control in the partnership af-

lier, 13 N. J. Eq. 181, where bill fails to show pressing emergency.

[b] **Bill for injunction**, see *Fletcher v. Vandusen*, 52 Iowa 448, 3 N. W. 488; 9 STANDARD PROC. 933-934, 623, 633; and generally the title "**Injunctions**."

[c] **A general order** enjoining a partner from intermeddling with the property and effects of the firm does not prohibit him from confessing a judgment for a debt bona fide due to a creditor of the firm. *McCredie v. Senior*, 4 Paige (N. Y.) 378; *Hewitt v. Patrick*, 26 Tex. 326.

70. **U. S.**—*Gaddie v. Mann*, 147 Fed. 960; *Miller v. O'Boyle*, 89 Fed. 140; *Wilkinson v. Tilden*, 9 Fed. 683, injunction will issue where one partner seeks to sell partnership property. **Ga.**—*Marshall & Co. v. Johnson*, 33 Ga. 500. **N. J.**—*Wolbert v. Harris*, 7 N. J. Eq. 605. **N. Y.**—*Haggerty v. Granger*, 15 How. Pr. 243. **N. C.**—*Taylor v. Russell*, 119 N. C. 30, 25 S. E. 710, restrain sale of partnership property by insolvent partner. **S. C.**—*Ellis v. Commander*, 1 Strobb. Eq. 188. **Wis.**—*Zimmerman v. Chambers*, 79 Wis. 20, 47 N. W. 947, injunction allowed complainant where he was excluded from participation in the firm. **Eng.**—*Elliott v. Brown*, 3 Swanst. 492, 36 Eng. Reprint 948 (will enjoin surviving partner from proceeding by ejectment to obtain exclusive possession of partnership property); *Blachford v. Hawkins*, 1 L. J. Ch. (O. S.) 141.

71. See the title "**Receivers**."

72. **U. S.**—*Rowland v. Auto Car Co.*, 133 Fed. 835; *Cary Bros. v. Dalhoff Const. Co.*, 126 Fed. 584. **Ala.**—*Gillett v. Higgins*, 142 Ala. 444, 38 So. 664; *Bard v. Bingham*, 54 Ala. 463. **Cal.**—*Silveira v. Reese*, 138 Cal. xix, 71 Pac. 515. **Ga.**—*Pritchett v. Kennedy*, 140 Ga. 248, 78 S. E. 902; *Joselove v. Bohman*, 119 Ga. 204, 45 S. E. 982. **Haw.**—*Oyama v. Stuart*, 22 Hawaii 693. **Ind.**—*Robbins v. Reed*, 174 Ind. 291, 91 N. E. 921. **La.**—*Meyer v. Meyer Bros.*, 116 La. 456, 40 So. 794;

McNair v. Gourrier, 40 La. Ann. 353, 4 So. 310; *Pratt v. McHatton*, 11 La. Ann. 260. **Minn.**—*Bacon v. Engstrom*, 129 Minn. 229, 152 N. W. 264, 537; *Albrecht v. Diamon*, 125 Minn. 283, 146 N. W. 1101. **Mo.**—*Cox v. Volkert*, 86 Mo. 505; *Quinlivan v. English*, 44 Mo. 46. **N. J.**—*Nathan v. Bacon*, 75 N. J. Eq. 401, 72 Atl. 359; *Rhodes v. Wilson* (N. J. Eq.), 19 Atl. 732. **N. Y.**—*Dunham v. Jarvis*, 8 Barb. 88; *Philipp v. Von Raven*, 26 Misc. 552, 57 N. Y. Supp. 701; *Pratt v. Underwood*, 4 Civ. Proc. 167. **Ore.**—*Fleming v. Carson*, 37 Ore. 252, 62 Pac. 374. **Pa.**—*Baxter v. Buchanan*, 3 Brewst. 435. **Tenn.**—*Todd v. Rich*, 2 Tenn. Ch. 107. **Tex.**—*Shulte v. Hoffman*, 18 Tex. 678; *Risché v. Rische*, 46 Tex. Civ. App. 23, 101 S. W. 849; *Webb v. Allen*, 15 Tex. Civ. App. 605, 40 S. W. 342. **W. Va.**—*Smith v. Brown*, 44 W. Va. 342, 30 S. E. 160. **Eng.**—*Pini v. Roncoroni*, 61 L. J. Ch. 218, 40 Wkly. Rep. 297 (1892), 1 Ch. 633, 66 L. T. N. S. 255.

[a] **Inherent Power Not Dependent on Statute**.—*Cox v. Volkert*, 86 Mo. 505.

[b] **Reasons Justifying Appointment**. "Generally speaking, the exigencies justifying the appointment are that the plaintiff is reasonably certain to prevail, and that it is necessary to the preservation of the property involved, and the protection of the rights of all parties as their interests may appear upon the final adjudication." *Fleming v. Carson*, 37 Ore. 252, 62 Pac. 374.

[c] **Effect**.—(1) The appointment in no way affects or determines property rights, but is merely preliminary to a full and final hearing upon the merits of all questions affecting the rights of the partners and the scope and extent of the partnership affairs and the property thereof. *Norton v. Sperry*, 113 Minn. 447, 129 N. W. 843; *Bird v. Austin*, 8 Jones & S. (N. Y.) 109. (2) It is not a dissolution of the partnership. *Waring v. Robinson*, *Hoffman* Ch. (N. Y.) 524.

fairs, the courts are reluctant to appoint one and will not do so where other remedies are sufficient, or the reasons for doing so are not urgent or imperative.⁷³ The existence of the partnership must be clearly established,⁷⁴ and as a rule the court will not appoint a receiver of a partnership unless the facts alleged will ultimately entitle the complainant to a dissolution of the partnership,⁷⁵ nor ordinarily will it appoint one on an ex parte order.⁷⁶

The mere dissolution of the partnership, is not, as a general rule, a sufficient reason for the appointment of a receiver,⁷⁷ but there must be some breach of duty,⁷⁸ or a breach of the contract of partner-

73. U. S.—Cary Bros. *v.* Dalhoff Const. Co., 126 Fed. 584; Devereux *v.* Fleming, 47 Fed. 177. **Ala.**—Bard *v.* Bingham, 54 Ala. 463. **Ia.**—Loomis *v.* McKenzie, 31 Iowa 425; Saylor *v.* Mockbie, 9 Iowa 209. **Md.**—Heflebower *v.* Buck, 64 Md. 15, 20 Atl. 991. **Mich.** Morey *v.* Grant, 48 Mich. 326, 12 N. W. 202; Simon *v.* Schloss, 48 Mich. 233, 12 N. W. 196. **Minn.**—Albrecht *v.* Diamond, 125 Minn. 283, 146 N. W. 1101. **Miss.**—Lawrence Lumb. Co. *v.* Lyon & Co., 93 Miss. 859, 47 So. 849. **N. J.** Nathan *v.* Bacon, 75 N. J. Eq. 401, 72 Atl. 359; Cox *v.* Peters, 13 N. J. Eq. 39. **N. Y.**—Buchanan *v.* Comstock, 57 Barb. 568; Hoffman *v.* Hauptner, 135 App. Div. 148, 119 N. Y. Supp. 1022; Cohn *v.* Wahn, 132 App. Div. 849, 117 N. Y. Supp. 633. **Tenn.**—Todd *v.* Rich, 2 Tenn. Ch. 107. **Wash.**—Smith *v.* Brown, 50 Wash. 240, 96 Pac. 1077; Wales *v.* Dennis, 9 Wash. 308, 37 Pac. 450. **W. Va.**—Wood *v.* Wood, 50 W. Va. 570, 40 S. E. 416. **Eng.**—Baxter *v.* West, 28 L. J. Ch. 169.

74. U. S.—Rowland *v.* Auto Car Co., 133 Fed. 835. **Ala.**—Irwin *v.* Everson, 95 Ala. 64, 10 So. 320. **Ill.**—Leeds *v.* Townsend, 74 Ill. App. 444. **Ia.**—Hobart *v.* Ballard, 31 Iowa 521. **Kan.** Hottenstein *v.* Conrad, 9 Kan. 435. **Minn.**—Bacon *v.* Engstrom, 129 Minn. 229, 152 N. W. 264, 537; Norton *v.* Sperry, 103 Minn. 447, 129 N. W. 843. **N. Y.**—Kirkwood *v.* Smith, 64 App. Div. 615, 72 N. Y. Supp. 291; Day *v.* Dow, 46 App. Div. 148, 61 N. Y. Supp. 793. **Pa.**—Baxter *v.* Buchanan, 3 Brewst. 435. **Tex.**—Rische *v.* Rische, 46 Tex. Civ. App. 23, 101 S. W. 849. **W. Va.** Wood *v.* Wood, 50 W. Va. 570, 40 S. E. 416. **Eng.**—Peacock *v.* Peacock, 16 Ves. Jr. 49, 33 Eng. Reprint 902.

[a] The denial of the partnership is not sufficient to prevent the appointment of a receiver, when the court is satisfied from the evidence that the

partnership relation exists. Leeds *v.* Townsend, 74 Ill. App. 444; Rische *v.* Rische, 46 Tex. Civ. App. 23, 101 S. W. 849.

75. U. S.—Einstein *v.* Schnebly, 89 Fed. 540. **Ala.**—Bard *v.* Bingham, 54 Ala. 463. **N. Y.**—Waring *v.* Robinson, Hoffm. Ch. 524. **Tex.**—Rische *v.* Rische, 46 Tex. Civ. App. 23, 101 S. W. 849. **Eng.**—Baxter *v.* West, 28 L. J. Ch. 169.

76. Goldman v. Manistee Circ. Judge, 155 Mich. 47, 118 N. W. 600; Lawrence Lumb. Co. *v.* Lyon & Co., 93 Miss. 859, 47 So. 849.

77. N. J.—Wilson *v.* Fitcher, 11 N. J. Eq. 71; Birdsall *v.* Colie, 10 N. J. Eq. 63. **Eng.**—Harding *v.* Glover, 18 Ves. Jr. 281, 34 Eng. Reprint 323. **Can.**—Doupe *v.* Stewart, 13 Grant Ch. 637.

[a] "But it is not a matter of course to appoint a receiver of the partnership assets, even where a case for a dissolution exists." Todd *v.* Rich, 2 Tenn. Ch. 107. But see Gillett *v.* Higgins, 142 Ala. 444, 38 So. 664; Bard *v.* Bingham, 54 Ala. 463; Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622.

78. Ala.—Brooke *v.* Tucker, 149 Ala. 96, 43 So. 141. **Fla.**—West *v.* Chasten, 12 Fla. 315; Allen *v.* Hawley, 6 Fla. 142, 63 Am. Dec. 198. **Ind.**—Buffin *v.* Boyce, 104 Ind. 53, 3 N. E. 615. **Ia.** Levi *v.* Karriek, 8 Iowa 150. **Md.** Drury *v.* Roberts, 2 Md. Ch. 157. **N. J.** Wilson *v.* Fitcher, 11 N. J. Eq. 71; Birdsall *v.* Colie, 10 N. J. Eq. 63. **N. Y.** Davis *v.* Grove, 2 Robt. 134. **Pa.**—Sloan *v.* Moore, 37 Pa. 217. **Tex.**—Rische *v.* Rische, 46 Tex. Civ. App. 23, 101 S. W. 849 (ousted from participation in business); Webb *v.* Allen, 15 Tex. Civ. App. 605, 40 S. W. 342. **Wash.**—Martin *v.* Wilson, 84 Wash. 625, 147 Pac. 401; Redding *v.* Anderson, 37 Wash. 209, 79 Pac. 628. **Can.**—Doupe *v.* Stewart, 13 Grant Ch. 637 (one partner car-

ship,⁷⁹ by the partner against whom the relief is sought, and this fact must appear from the pleadings.⁸⁰

Continuance of Business. — The court will appoint a receiver only with the purpose of finally winding up the partnership affairs, and not to carry on the business,⁸¹ though under some statutes, it may authorize the partnership business to be continued, during the pendency of the action, by one or more of the partners, upon their giving bond with sureties.⁸²

6. Pleadings.⁸³ — a. *Bill or Complaint.* — (I.) **Form and Sufficiency.**

A bill or complaint for the adjustment and settlement of partnership affairs must conform to the general rules relating to equity pleadings.⁸⁴ The fact of partnership between the parties should appear⁸⁵ by averment, either in terms or in substance, of the acts or agreements upon which the claim of partnership is based,⁸⁶ together with all of the

rying on trade after dissolution on their own account with the partnership effects); *Burden v. Howard*, 2 N. Bruns. Eq. 461.

79. **U. S.**—*Einstein v. Schnebly*, 89 Fed. 540. **Fla.**—*Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198. **N. J.**—*Wilson v. Fitcher*, 11 N. J. Eq. 71; *Birdsall v. Colie*, 10 N. J. Eq. 63. **N. Y.**—*Greenwald v. Gotham-Attucks Music Co.*, 118 App. Div. 29, 103 N. Y. Supp. 123. **Pa.**—*Sloan v. Moore*, 37 Pa. 217. **Can.**—*Doupe v. Stewart*, 13 Grant Ch. 637.

80. *Heflebower v. Buck*, 64 Md. 15, 20 Atl. 991; *Rische v. Rische*, 46 Tex. Civ. App. 23, 101 S. W. 849; *Webb v. Allen*, 15 Tex. Civ. App. 605, 40 S. W. 342.

81. **Fla.**—*Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198. **N. J.**—*Wolbert v. Harris*, 7 N. J. Eq. 605. **N. Y.**—*Greenwald v. Gotham-Attucks Music Co.*, 118 App. Div. 29, 103 N. Y. Supp. 123.

82. *Popper v. Scheider*, 7 Abb. Pr. N. S. (N. Y.) 56, 38 How. Pr. 34; *Kirkwood v. Smith*, 64 App. Div. 615, 72 N. Y. Supp. 291; *Philipp v. Von Raven*, 26 Misc. 552, 57 N. Y. Supp. 701; *Fleming v. Carson*, 37 Ore. 252, 62 Pac. 374.

83. **In action at law on account**, see the title "**Account and Accounting.**"

84. See the title "**Bills and Answers,**" and 9 STANDARD PROC. 8, 930; 1 STANDARD PROC. 288.

85. **Ala.**—*Reilly v. Woolbert*, 196 Ala. 191, 72 So. 10 (partnership sufficiently alleged); *Dugger v. Tutwiler*, 129 Ala. 258, 30 So. 91. **Cal.**—*Fischer v. Superior Court*, 98 Cal. 67, 32 Pac.

875; *Chalmers v. Chalmers*, 81 Cal. 81, 22 Pac. 395; *Doudell v. Shoo*, 20 Cal. App. 424, 129 Pac. 478, complaint sufficient. **Ga.**—*Bennett v. Woolfolk*, 15 Ga. 213. **Ill.**—*Bracken v. Kennedy*, 4 Ill. 558. **Kan.**—*Carlin v. Donegan*, 15 Kan. 495. **Ky.**—*Havner v. Stephens*, 22 Ky. L. Rep. 498, 58 S. W. 372. **Mass.**—*Towle v. Pierce*, 12 Mete. 329, 46 Am. Dec. 679. **Mich.**—*Houghton v. State Mut. Life Assur. Co.*, 110 Mich. 308, 68 N. W. 142. **Minn.**—*Stern v. Harris*, 40 Minn. 209, 41 N. W. 1036. **Mo.**—*Pope v. Salsman*, 35 Mo. 362. **Mont.**—*McMahon v. Thornton*, 4 Mont. 46, 1 Pac. 724. **Neb.**—*Shriver v. McCloud*, 20 Neb. 474, 30 N. W. 534. **N. J.**—*Patterson v. Sadler*, 71 N. J. Eq. 315, 63 Atl. 1115. **N. Y.**—*Salter v. Ham*, 31 N. Y. 321; *Ludington v. Taft*, 10 Barb. 447; *Chappell v. Chappell*, 125 App. Div. 127, 109 N. Y. Supp. 648. **Ohio.**—*Gray v. Kerr*, 46 Ohio St. 652, 23 N. E. 136; *Weber & Co. v. Kemper Bros.*, 8 Ohio Dec. (Reprint) 403. **R. I.**—*Congdon v. Aylsworth*, 16 R. I. 281, 18 Atl. 247. **Tex.**—*Wright v. Ross*, 30 Tex. Civ. App. 207, 70 S. W. 234. **Utah.**—*Owen v. Oviatt*, 4 Utah 95, 6 Pac. 527. **W. Va.**—*Wood v. Wood*, 50 W. Va. 570, 40 S. E. 416.

86. **Ala.**—*Dugger v. Tutwiler*, 129 Ala. 258, 30 So. 91. **Kan.**—*Carlin v. Donegan*, 15 Kan. 495. **N. J.**—*Patterson v. Sadler*, 71 N. J. Eq. 315, 63 Atl. 1115.

How partnership alleged in action between partners and third persons, see *infra*, II, G, 1, b, (I), (B).

[a] **The partnership property** need not be specifically set forth in the bill. *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067.

partners' names⁸⁷ and interests.⁸⁸ The facts constituting the grounds for seeking a dissolution should be alleged,⁸⁹ and the grounds for an accounting or other equitable relief.⁹⁰ It must appear from the bill that there are unsettled accounts growing out of the business of the alleged partnership,⁹¹ but it is not necessary to allege that the defendant is indebted to the complainant on an accounting.⁹² Nor is it necessary that complainant offer to pay any balance found against him, or to otherwise do equity, as the court will do all justice between the parties.⁹³

Where Dissolution Not Sought. — Where it is sought to obtain an accounting without a dissolution of the partnership,⁹⁴ facts must be alleged in the bill showing that such an accounting is essential to the continuance of the business,⁹⁵ or that some special and unusual reason

87. *Glover v. Hembree*, 82 Ala. 324, 8 So. 251.

88. *Glover v. Hembree*, 82 Ala. 324, 8 So. 251; *Frederick v. Cooper*, 3 Iowa 171.

[a] A statement of the capital put into the partnership by a partner (1), as well as the amount taken out by a partner, has in some states been held necessary (Fla.—*Nims v. Nims*, 23 Fla. 69, 1 So. 527. Ia.—*Cooper v. Frederick*, 4 G. Gr. 403. N. J.—*Patterson v. Sadler*, 71 N. J. Eq. 315, 63 Atl. 1115); (2) in others not. *Bufkin v. Boyce*, 104 Ind. 53, 3 N. E. 615; *Kimble v. Seal*, 92 Ind. 276.

89. U. S.—*Einstein v. Schnebly*, 89 Fed. 540. Ala.—*Dugger v. Tutwiler*, 129 Ala. 258, 30 So. 91. Ky.—*Havner v. Stephens*, 22 Ky. L. Rep. 498, 58 S. W. 372. N. Y.—*Waite v. Aborn*, 60 App. Div. 521, 69 N. Y. Supp. 967. Tex.—*Wright v. Ross*, 30 Tex. Civ. App. 207, 70 S. W. 234.

[a] If, however, the partnership is subject to dissolution at the will of either partner, it is necessary only for the complainant to allege that the firm had, prior to the filing of the bill, been dissolved. *Einstein v. Schnebly*, 89 Fed. 540; *Wright v. Ross*, 30 Tex. Civ. App. 207, 70 S. W. 234.

90. *Einstein v. Schnebly*, 89 Fed. 540.

[a] Lack of adequate remedy at law may sufficiently appear from the facts stated. *Pine Cliffs Farms v. Collier*, 92 Misc. 269, 156 N. Y. Supp. 293. See the title "Legal Remedy."

91. Ala.—*Dugger v. Tutwiler*, 129 Ala. 258, 30 So. 91; *Haynes v. Short*, 88 Ala. 562, 7 So. 157. Cal.—*Young v. Pearson*, 1 Cal. 448. Conn.—*Canfield v. Hard*, 6 Conn. 180. Ill.—*Bracken v. Kennedy*, 4 Ill. 558; *Acme Copying Co. v. McLure*, 41 Ill. App. 397. Ind.—De-

hority *v. Nelson*, 56 Ind. 414. Kan.—*Carlin v. Donegan*, 15 Kan. 495. La.—*Borah v. O'Niell*, 116 La. 672, 41 So. 29. Minn.—*Stern v. Harris*, 40 Minn. 209, 41 N. W. 1036. Mo.—*Pope v. Salsman*, 35 Mo. 362. N. Y.—*Ludington v. Taft*, 10 Barb. 447. Ohio.—*Gray v. Kerr*, 46 Ohio St. 652, 23 N. E. 136. Ore.—*Holladay v. Elliott*, 3 Ore. 340. R. I.—*Congdon v. Aylsworth*, 16 R. I. 281, 18 Atl. 247. Tex.—*Wright v. Ross*, 30 Tex. Civ. App. 207, 70 S. W. 234. 92. *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229.

[a] But see *Hunt v. Gorden*, 52 Miss. 194, wherein the court said. "A partner who impleads his associate for a settlement must aver and prove, if denied, an indebtedness to himself, or at least a probable indebtedness."

93. Colo.—*Continental Divide Min. Inv. Co. v. Bliley*, 23 Colo. 160, 46 Pac. 633; *Craig v. Chandler*, 6 Colo. 543. Ga.—*Wells v. Strange*, 5 Ga. 22. Ill.—*Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229; *Quinn v. McMahon*, 40 Ill. App. 593. Tex.—*Wright v. Ross*, 30 Tex. Civ. App. 207, 70 S. W. 234. W. Va.—*Marshall v. Anderson*, 92 S. E. 421; *Hyre v. Lambert*, 37 W. Va. 26, 16 S. E. 446.

[a] "Under the ancient equity practice, where one sued for an accounting, it was necessary to offer in his bill to do equity by an averment of his willingness to pay any balance that might be found owing from him to the defendant. But such averment has for many years been presumed, and the bill is not defective if the same is omitted therefrom." *Craig v. Chandler*, 6 Colo. 543.

94. See *supra*, I, C, 1, b.

95. *Lord v. Hull*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484.

exists to make such an accounting necessary.⁹⁶

Where all the partners are not before the court, the bill should contain facts showing that the interests of the absent partners will not be prejudicially affected,⁹⁷ or allege facts which will justify the court to proceed to judgment notwithstanding the absence of parties whose presence is ordinarily indispensable.⁹⁸

Where there has been a voluntary final settlement the bill must allege the particular facts as to such accident, mistake or fraud as would justify equitable interference.⁹⁹

(II.) Joinder of Causes.¹ — A bill for a general account and settlement of a partnership may embrace every object necessary to its complete adjustment without being demurrable for multifariousness,² and they may all properly be embraced in a single count.³ But a cause of action for the settlement of partnership accounts cannot be joined with one to recover from the heirs or representatives of a deceased partner the balance which may be found due the plaintiff.⁴ In action for the settlement of one partnership, the settlement of another and different partnership in which the parties may be interested, cannot be asked for.⁵

Merely personal claims between the partners are not cognizable in

96. *Lord v. Hull*, 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484.

97. *Ala.*—*Webb v. Butler*, 196 Ala. 181, 72 So. 31. *Colo.*—*Lynch v. Foley*, 32 Colo. 110, 76 Pac. 370. *Ill.*—*Thickson v. Barry*, 138 Ill. App. 100. *Me.*—*Mudgett v. Gager*, 52 Me. 541. *Mass.*—*Towle v. Pierce*, 12 Mete. 329, 46 Am. Dec. 679, that absent partners were "beyond the reach of the jurisdiction of the court," and that they had received their full share of the partnership effects.

[a] "While all partners would prima facie be necessary parties, and might under any conditions be proper parties, equity pleading would not forbid averment and proof dispensing with the necessity of making them parties to the cause." *Webb v. Butler*, 196 Ala. 181, 72 So. 31.

As to necessary or proper parties, see *supra*, I, C, 3, b.

98. *Lynch v. Foley*, 32 Colo. 110, 76 Pac. 370.

99. *Ala.*—*Broda v. Greenwald*, 66 Ala. 538. *Alaska.*—*Pearce v. Sutherland*, 4 Alaska 120. *Fla.*—*Durham v. Edwards*, 50 Fla. 495, 38 So. 926. *Ind.*—*Meredith v. Ewing*, 85 Ind. 410. *Ky.*—*Loesser v. Loesser*, 81 Ky. 139; *Lee's Admrs. v. Reed*, 4 Dana 109. *Mo.*—*McMahill v. Jenkins*, 69 Mo. App. 279. *N. J.*—*Parkhurst v. Muir*, 7 N. J. Eq. 555. *R. I.*—*Chapman v. Chapman*, 13

R. I. 680. *Tex.*—*Merriwether v. Harde- man*, 51 Tex. 436. *W. Va.*—*Mahnke v. Neale*, 23 W. Va. 57, bill will be dismissed in absence of such averment.

[a] General Allegation of Fraud or Mistake Insufficient.—*Loesser v. Loesser*, 81 Ky. 139. See the titles "Fraud and Deceit;" "Mistake."

1. See generally the titles "Duplicity;" "Joinder of Actions;" "Multifariousness."

2. *Cal.*—*Doudell v. Shoo*, 20 Cal. App. 424, 129 Pac. 478, wherein the bill prayed for the establishment of the existence of the partnership and for an accounting, and also for an injunction and the appointment of a receiver. *Ga.*—*Wells v. Strange*, 5 Ga. 22. *Minn.*—*Palmer v. Tyler*, 15 Minn. 106, an accounting, the appointment of a receiver, that a fraudulent transfer be adjudged void and the property delivered to the receiver, and for an injunction against the transferee.

3. *Bremner v. Leavitt*, 109 Cal. 130, 41 Pac. 859.

4. *Blakely v. Smock*, 96 Wis. 611, 71 N. W. 1052.

5. *Corner v. Gilman*, 53 Md. 364. See also *Pa.*—*Luzier v. Naylor Line & Twine Co.*, 8 Pa. Dist. 632. *Tenn.*—*Carey v. Williams*, 1 Lea 51. *Wis.*—*Diamond v. Henderson*, 47 Wis. 172, 2 N. W. 73.

an action to take and settle partnership accounts,⁶ although where the transactions are very closely intermingled, such claims are sometimes considered.⁷

(III.) **Prayer.**⁸ — The proper and ordinary form of prayer for settlement of an account between partners is, that an account may be taken by and under the decree and direction of the court, of all the partnership dealings and transactions between the complainant and the defendant.⁹ Although the prayer in such a suit should not be for a decree for a specific amount,¹⁰ yet such a prayer will not change the action into a mere demand for money.¹¹ A prayer for general relief authorizes all ordinary decrees which the pleadings and evidence may justify.¹²

If the bill is filed pending the partnership, it must either directly pray for a dissolution, or show that a dissolution is contemplated.¹³

6. **Ark.**—*Jones v. Jones*, 23 Ark. 212. **Fla.**—*Nims v. Nims*, 23 Fla. 69, 1 So. 527; *Robertson v. Baker*, 11 Fla. 192, 230. **Ill.**—*Hanks v. Baber*, 53 Ill. 292. **Ky.**—*Scott v. Perry's Admr.*, 17 Ky. L. Rep. 746, 32 S. W. 401. **Mich.**—*Wells v. Babcock*, 56 Mich. 276, 22 N. W. 809, 27 N. W. 575; *Gordon v. Gordon*, 49 Mich. 501, 13 N. W. 834. **Miss.**—*Freeman v. Finnall*, Smed. & M. Ch. 623. **N. J.**—*Smith v. Wood*, 1 N. J. Eq. 74. **Tenn.**—*Looney v. Gillenwaters*, 11 Heisk. 133, cannot be included, if excepted to. **Tex.**—*Santleben v. Froboese*, 17 Tex. Civ. App. 626, 43 S. W. 571. **Wis.**—*Green v. Stacy*, 90 Wis. 46, 62 N. W. 627; *Smith v. Diamond*, 86 Wis. 359, 56 N. W. 922; *Sprout v. Crowley*, 30 Wis. 187.

Set-off of personal claim, see *infra*, I, C, 6, b, (II).

7. *Monroe v. Hamilton*, 47 Ala. 217 (mortgage upon defendant's share of the partnership assets to secure his individual debt to complainant may be foreclosed in a suit for an accounting of the partnership between them); *Evans v. Bryan*, 95 N. C. 174, 59 Am. Rep. 233; *Royster v. Johnson*, 73 N. C. 474.

[a] **Individual Debt Growing Out of Partnership.**—In stating an account between an executor and the surviving partner of the testator, it is not error to charge the surviving partner with the value of a note, due the testator of the plaintiff individually, if such note arose from, or grew out of the business of the copartnership. *Royster v. Johnson*, 73 N. C. 474.

8. See generally the title "**Prayer**," and 4 STANDARD PROC. 136.

9. **Ala.**—*Haynes v. Short*, 88 Ala.

562, 7 So. 157. **Ill.**—*Winchester v. Grosvenor*, 48 Ill. 517; *Quinn v. Me-Mahan*, 40 Ill. App. 593. **Ind.**—*Miller v. Rapp*, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693. **La.**—*Richard v. Mouton*, 106 La. 435, 30 So. 894. **Ohio.**—*Peck v. Cavagna*, 7 Ohio Dec. 142. **Tex.**—*Wright v. Ross*, 30 Tex. Civ. App. 207, 70 S. W. 234. **W. Va.**—*Wood v. Wood*, 50 W. Va. 570, 40 S. E. 416.

[a] **One Item.**—The prayer should not ask for the settlement of but one item of the partnership account. *Haynes v. Short*, 88 Ala. 562, 7 So. 157.

[b] **Prayer for Accounting Held To Be Included.**—A prayer by one partner, that his copartner may be compelled to pay over to him one-half of the net profits of the partnership, includes within it a prayer that an account of the partnership may be taken. *Bennett v. Woolfolk*, 15 Ga. 213.

10. *Richard v. Mouton*, 106 La. 435, 30 So. 894; *Arnold v. Sinclair*, 11 Mont. 556, 29 Pac. 340, 28 Am. St. Rep. 489.

11. **Ind.**—*Miller v. Rapp*, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693. **La.**—*Richard v. Mouton*, 106 La. 435, 30 So. 894. **Mont.**—*Arnold v. Sinclair*, 11 Mont. 556, 29 Pac. 340, 28 Am. St. Rep. 489.

12. **Ill.**—*Veneman v. Ruckle*, 120 Ill. App. 251. **La.**—*Stark v. Howcott*, 118 La. 489, 43 So. 61. *Borah v. O'Neill*, 116 La. 672, 41 So. 29. **Mich.**—*Miller v. Casey*, 176 Mich. 221, 142 N. W. 589.

13. *Coville v. Gilman*, 13 W. Va. 314.

(IV.) **Amendment.** — The bill or complaint may be amended in accordance with the general rules elsewhere treated.¹⁴

b. *Defensive Pleadings.* — (I.) **Generally.** — The defendant's pleadings follow the general rules elsewhere treated.¹⁵ A previous voluntary final settlement must be specially pleaded.¹⁶

(II.) **Set-off, Counterclaim and Recoupment.**¹⁷ — Though the right of a partner to plead a set-off or counterclaim in an action for a partnership accounting has been denied,¹⁸ the prevailing rule undoubtedly is that in such actions, where no creditors' rights intervene, a partner may within the limitations of the code provisions¹⁹ assert any set-off,²⁰

14. See the titles "Amendments and Joinders;" "Bills and Answers;" "New Cause of Action or Defense."

[a] An amendment setting up a general partnership in place of a special partnership alleged in the original bill for an accounting is properly permitted. *Weber & Co. v. Kemper Bros.*, 8 Ohio Dec. (Reprint) 403, does not state a different cause of action.

[b] Amendment of prayer to ask for equitable in place of legal relief, where complaint shows grounds for equitable relief. *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673. See generally 1 STANDARD PROC. 925; 4 STANDARD PROC. 195; 6 STANDARD PROC. 719.

[c] Ambiguous averments as to the terms of the partnership may be amended. *Rose v. Moate*, 144 Ga. 316, 87 S. E. 20.

15. See 1 STANDARD PROC. 291; and also the titles "Bills and Answers;" "Pleas in Equity."

[a] A denial of the existence of the partnership must be supported by an answer and discovery as to every circumstance charged in the bill as evidence of the copartnership. *Everitt v. Watts*, 10 Paige (N. Y.) 82; *Sanders v. King*, 6 Mad. 61, 56 Eng. Reprint 1013.

[b] A failure to answer the bill for an accounting admits all traversable averments therein. *Acme Copying Co. v. McLure*, 41 Ill. App. 397.

[c] A demurrer for want of equity is the proper objection if the bill does not exhibit a case for the interference of a court of equity to settle the affairs of the partnership. *Reed v. Johnson*, 24 Me. 322.

[d] Failure to object to lack of equitable jurisdiction, see *Watts v. Adler*, 130 N. Y. 646, 29 N. E. 131, 3 Silv. 585, and 18 STANDARD PROC. 866.

16. *Gleason v. Van Aernam*, 9 Ore.

343. See 1 STANDARD PROC. 291.

17. See generally the title "Set-off, Counterclaim and Recoupment."

18. *Smith v. Diamond*, 86 Wis. 359, 56 N. W. 922. See also *Pendleton v. Beyer*, 94 Wis. 31, 68 N. W. 415.

[a] "The reason is plain. A partner has no claim against his copartner. * * * But if he owes an individual debt to his copartner (as in the case just cited) the firm has nothing to do with it, and a claim therefor by the creditor partner cannot have any place in an action to dissolve the partnership and settle its affairs." *Smith v. Diamond*, 86 Wis. 359, 56 N. W. 922.

19. See *infra*, this note.

[a] The general code provisions respecting counterclaim would permit (1) a partner to counterclaim, in an action for accounting, for any cause of action arising out of the same transaction or a transaction connected with the same subject matter (*More v. Rand*, 60 N. Y. 208; *Brown v. Dennison*, 28 App. Div. 535, 51 N. Y. Supp. 300), or (2) for any other cause of action on contract (*Petrakion v. Arbelly*, 23 Civ. Proc. 183, 26 N. Y. Supp. 731), (3) existing at the commencement of the accounting. *Petrakion v. Arbelly*, 23 Civ. Proc. 183, 26 N. Y. Supp. 731.

[b] That an accounting is an action on contract within the provisions of the code allowing a counterclaim in such cases as to any other cause of action on contract existing at the commencement of the action, see *Petrakion v. Arbelly*, 23 Civ. Proc. 183, 26 N. Y. Supp. 731. But see *Smith v. Diamond*, 86 Wis. 359, 56 N. W. 922.

20. **U. S.**—*Warren v. Burnham*, 32 Fed. 579. **Ky.**—*Swofford's Admr. v. White*, 28 Ky. L. Rep. 119, 89 S. W. 129; *Wathen v. Russell*, 20 Ky. L. Rep. 709, 47 S. W. 437. **N. Y.**—*Newhall v.*

counterclaim,²¹ or recoupment,²² which he may have. And independently of the codes he could avail himself of a legal,²³ or under certain circumstances, of an equitable²⁴ set-off.

(III.) Cross-Bill. — As a general rule, where a party's right to a decree depends upon affirmative matter, cross-demands or set-off, a cross-bill should be filed,²⁵ but in case of a partnership accounting the courts have recognized an exception to this rule²⁶ by giving a judgment for a balance found due a defendant, even though no cross-bill is filed seeking the same.²⁷ But the exception only applies as to the adjust-

Wyatt, 68 Hun 1, 22 N. Y. Supp. 828, 52 N. Y. St. 456.

[a] Though the accounting is among several partners a contract demand of one partner is available as a set-off or counterclaim against another as to whom a balance is due. *Kemmerer v. Kemmerer*, 85 Iowa 193, 52 N. W. 194.

[b] The independent personal demands of one partner against another may be set off. *Warren v. Burnham*, 32 Fed. 579; *Wathen v. Russell*, 20 Ky. L. Rep. 709, 47 S. W. 437.

[c] Where it arises in connection with the partnership (1) the claim may be set off or counterclaimed (*Swafford's Admr. v. White*, 28 Ky. L. Rep. 119, 89 S. W. 129), unless (2) the demand is an item in the accounting to be had (*Reeves v. Bushby*, 25 Misc. 226, 55 N. Y. Supp. 70), as for example, (3) a claim for a share of the expenses or outlays of the defendant in the business. *Reeves v. Bushby*, 25 Misc. 226, 55 N. Y. Supp. 70.

21. *Kemmerer v. Kemmerer*, 85 Iowa 193, 52 N. W. 194; *Reeves v. Bushby*, 25 Misc. 226, 55 N. Y. Supp. 70.

[a] Indebtedness for moneys loaned to partner pleaded as counterclaim. *Petrakion v. Arbelly*, 23 Civ. Proc. 183, 26 N. Y. Supp. 731.

[b] Counterclaim on a note due from plaintiff partner to one of defendant partners. *Kemmerer v. Kemmerer*, 85 Iowa 193, 52 N. W. 194.

[c] A counterclaim for damages for fraud (1) in inducing the defendant to enter into the copartnership is pleadable (*More v. Rand*, 60 N. Y. 208), though (2) the claim exist in favor of defendant partners jointly. *More v. Rand*, 60 N. Y. 208.

[d] Claim for damages for violating the partnership agreement proper subject of counterclaim. *Brown v. Dennison*, 28 App. Div. 535, 51 N. Y. Supp. 300; *Reeves v. Bushby*, 25 Misc.

226, 55 N. Y. Supp. 70.

22. *McConnell v. Stubbs*, 124 Ga. 1038, 53 S. E. 698.

[a] Recoupment for fraud and neglect resulting in damage to the firm. *McConnell v. Stubbs*, 124 Ga. 1038, 53 S. E. 698.

23. *Jones v. Jones*, 23 Ark. 212.

[a] Money paid by one partner as the other's security may be set off against a sum found due the latter on partnership accounting to the extent of extinguishing that claim, but cannot be made the foundation of a decree. *Jones v. Jones*, 23 Ark. 212.

24. *Pendleton v. Beyer*, 94 Wis. 31, 68 N. W. 415. But see *Smith v. Diamond*, 86 Wis. 359, 56 N. W. 922.

[a] Where the plaintiff is insolvent equity may, independently of the statute relating to set-offs, allow a set-off of claims of defendants against the plaintiff, upon which actions at law would be futile, even though such claims grow out of matters entirely outside the partnership transactions. *Pendleton v. Bever*, 94 Wis. 31, 68 N. W. 415.

25. *Saunders v. Wood*, 15 Ark. 24.

26. *Craig v. Chandler*, 6 Colo. 543.

27. Ark.—*Saunders v. Wood*, 15 Ark. 24. Colo.—*Craig v. Chandler*, 6 Colo. 543. Ill.—*Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229; *House v. John Linn & Co.*, 179 Ill. App. 114; *Wilcoxon v. Wilcoxon*, 111 Ill. App. 90. Me.—*Little v. Merrill*, 62 Me. 328. Md.—*Hunt v. Stuart*, 53 Md. 225; *Grove v. Fresh*, 9 Gill & J. 280; *Hall v. McPherson*, 3 Bland 529. Mich.—*Wyatt v. Sweet*, 48 Mich. 539, 12 N. W. 692, 13 N. W. 525. N. H.—*Raymond v. Came*, 45 N. H. 201. N. J.—*Johnson v. Buttler*, 31 N. J. Eq. 35; *Scott v. Lalor's Exrs.*, 18 N. J. Eq. 301. N. Y.—*White v. Reed*, 124 N. Y. 468, 26 N. E. 1037; *Cook v. Jenkins*, 79 N. Y. 575 (value of partnership good will purchased by plaintiff under an agreement is proper item of ac-

ment of the partnership accounts,²⁸ and if one of the defendants desires affirmative relief upon grounds other than that of an adjustment and balancing the accounts of the partners, he must file a cross-bill therefor.²⁹

7. Issues, Proof and Variance.—In an action for a partnership accounting, any item connected with the accounting of the partnership business may be adjudicated.³⁰ The amount of advances or loans made by a partner to the firm or of money paid or debts settled by him for the firm out of his private funds can be ascertained only in an action for an accounting.³¹ Under an allegation that three persons were

count to be considered): *Scott v. Pinkerton*, 3 Edw. Ch. 70; *Boyd v. Foot*, 5 Bosw. 110; *Reeves v. Bushby*, 25 Misc. 226, 55 N. Y. Supp. 70. **Tenn.** *Fisher v. Stovall*, 85 Tenn. 316, 2 S. W. 567; *Allen v. Allen*, 11 Heisk. 387. **W. Va.**—*Hyre v. Lambert*, 37 W. Va. 26, 16 S. E. 446. **Wis.**—*Hutchinson v. Paige*, 67 Wis. 206, 29 N. W. 908.

As to when cross-bill is unnecessary for affirmative relief generally, see 6 STANDARD PROC. 267.

[a] **The benefit of the prayer of the bill** is extended to the defendant as well as to the complainant, as to all matters within the scope of the bill. *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229.

[b] **Such decree as the equity of the case may require** may be rendered irrespective of whether a cross-bill is filed. *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229; *Atkinson v. Cash*, 79 Ill. 53.

[c] **As between several defendants** the rule applies and where a balance is found due from one to the other, it may be awarded as if each was a plaintiff in a bill against the others. *Acme Copying Co. v. McClure*, 41 Ill. App. 397.

[d] **The decree for such balance is said (1) to rest upon the plaintiff's bill** (*Craig v. Chandler*, 6 Colo. 543), in (2) that he offers therein to do equity. *House v. John Linn & Co.*, 179 Ill. App. 114. (3) And even though no such offer is contained in the bill it will be presumed. *Craig v. Chandler*, 6 Colo. 543.

28. *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229.

29. *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229; *Price v. Blackmore*, 65 Ill. 386; *Norman v. Hudleston*, 64 Ill. 11; *Helmer v. Yetzer*, 92 Iowa 627, 61 N. W. 206.

[a] **Recovery of Losses.**—Where

defendant simply denies plaintiff's claim that a profit was made in their partnership business, and the evidence shows a loss, he cannot under such denial recover half of such loss from the plaintiff. *Helmer v. Yetzer*, 92 Iowa 627, 61 N. W. 206.

30. *Lesh v. Davison*, 181 Ind. 429, 104 N. E. 642; *Lesh v. Bailey*, 49 Ind. App. 254, 71 N. E. 507; *Burbank v. Oglesby*, 35 La. Ann. 1201.

[a] **A claim for damages sustained through the misconduct of one partner in the management of the firm's business or affairs may be determined.** *Sweet v. Morrison*, 103 N. Y. 235, 8 N. E. 396; *Hollister v. Simonson*, 36 App. Div. 63, 55 N. Y. Supp. 372; *Reeves v. Bushby*, 25 Misc. 226, 55 N. Y. Supp. 70; *Doupe v. Stewart*, 13 Grant Ch. (Can.) 637.

[b] **But injury to the individual property of one partner used in the partnership business is not a proper item for consideration in a partnership accounting.** *Haller v. Willamowicz*, 23 Ark. 566, remedy is in law.

[c] **The affairs of another company in which the parties are also partners, jointly with others, cannot be considered.** *Bishop v. Bishop*, 54 Conn. 232, 6 Atl. 426, notwithstanding the parties' agreement that they might be settled.

31. **Ark.**—*Johnson v. Peck*, 58 Ark. 580, 25 S. W. 865. **Conn.**—*Bishop v. Bishop*, 54 Conn. 232, 6 Atl. 426. **Idaho.** *Haskins v. Curran*, 4 Idaho 573, 43 Pac. 559. **Ind.**—*Coleman v. Coleman*, 78 Ind. 344. **La.**—*Reddick v. White*, 46 La. Ann. 1198, 15 So. 487; *Heneggin v. Wilcoxon*, 13 La. Ann. 576. **N. J.**—*Davis v. Minch*, 80 N. J. L. 214, 76 Atl. 328; *Sieghortner v. Weisenborn*, 20 N. J. Eq. 172; *Hill v. Beach*, 12 N. J. Eq. 31. **Ore.**—*McDonald v. Holmes*, 22 Ore. 212, 29 Pac. 735. **Pa.**—*Murray v. Herriek*, 171 Pa. 21, 32 Atl. 1125; *Holbert v. Herriek*,

partners, it may be shown, without amendment that but two constituted the firm.³² But where a cause of action is based upon an alleged partnership between two persons, the failure to prove it as alleged is not a mere variance but a case of failure to prove the cause of action alleged.³³

8. Dismissal of Bill.—A partner who has filed a bill for a partnership accounting may dismiss it in accordance with the general rules elsewhere discussed.³⁴ After a bill for an accounting has reached a decree that the parties do account with each other,³⁵ or that the partnership be dissolved,³⁶ no voluntary dismissal can be entered therein. The court will dismiss the bill praying for an account and settlement of the partnership affairs, where it is impossible, upon the pleadings and evidence, to ascertain what the account is and render a decree which will do justice between the parties.³⁷ Where matter, alleged

171 Pa. 25, 32 Atl. 1125; *Crow v. Green*, 111 Pa. 637, 5 Atl. 23. **Tex.** *Danforth v. Levin* (Tex. Civ. App.), 156 S. W. 569.

See *supra*, I, A, 1, a.

32. *Chalmers v. Chalmers*, 81 Cal. 81, 22 Pac. 395; *Bass v. Taylor*, 34 Miss. 342.

33. *Buckley v. Kelly*, 70 Conn. 411, 39 Atl. 601 (where the bill asks for the settlement of the partnership as beginning from a certain date, the accounts of a partnership existing before such date will not be considered, as it is a matter outside the pleadings); *Moran v. Bentley*, 69 Conn. 392, 37 Atl. 1092; *Miller v. Casey*, 176 Mich. 221, 142 N. W. 589, allegation of existence of partnership as to one transaction not sustained by proof of a partnership between the parties as to another transaction.

34. See the title "Dismissal, Discontinuance and Nonsuit," and the following cases: **Ill.**—*Jackson v. Lahee*, 114 Ill. 287, 2 N. E. 172. **Mo.**—*Worthington v. White*, 42 Mo. 462, wherein the plaintiff dismissed his bill after the receiver filed a report showing a full settlement of the partnership had been reached between the parties. **N. J.**—*Ross v. Tittsworth*, 37 N. J. Eq. 333. **N. Y.**—*Waring v. Robinson*, Hoffm. Ch. 524.

[a] **Not Where Defendant's Rights Would Be Prejudiced.**—*Worthington v. White*, 42 Mo. 462; *Price v. Price*, 21 App. Div. 597, 47 N. Y. Supp. 772. See generally 7 STANDARD PROC. 656.

[b] **As Against Creditors.**—After the partnership assets are taken into the possession of a receiver and the

partnership creditors are notified by the court to establish their claims, the partners will not be permitted to dismiss the suit without the consent of the creditors. **Ill.**—*Jackson v. Lahee*, 114 Ill. 287, 2 N. E. 172. **N. J.**—*Ross v. Tittsworth*, 37 N. J. Eq. 333. **N. Y.** *Holmes v. McDowell*, 15 Hun 585 (*affirmed* in 76 N. Y. 596); *Waring v. Robinson*, Hoffm. Ch. 524. **R. I.**—*Updike v. Doyle*, 7 R. I. 446.

35. Ill.—*Wileoxon v. Wileoxon*, 111 Ill. App. 90. **Md.**—*Hall v. McPherson*, 3 Bland 529. **N. Y.**—*Waring v. Robinson*, Hoffm. Ch. 524. **R. I.**—*Updike v. Doyle*, 7 R. I. 446. **Tenn.**—*Fisher v. Stovall*, 85 Tenn. 316, 2 S. W. 567. **Wis.**—*Hutchinson v. Paige*, 67 Wis. 206, 29 N. W. 908.

36. *Adams v. Woods*, 8 Cal. 152, 68 Am. Dec. 313; *Adams v. Hackett*, 7 Cal. 187.

37. Del.—*Davidson v. Wilson*, 3 Del. Ch. 307. **D. C.**—*Rick v. Neitzzy*, 1 Mackey 21. **Fla.**—*Nims v. Nims*, 23 Fla. 69, 1 So. 527; *Marvin v. Hampton*, 18 Fla. 131. **Ill.**—*Vermillion v. Bailey*, 27 Ill. 230. **Ky.**—*Clement v. Ditterline's Admr.*, 11 Ky. L. Rep. 294, 11 S. W. 658; *Hyatt v. Kennedy*, 9 Ky. L. Rep. 860; *Bradford v. Ware's Exr.*, 6 Ky. L. Rep. 304. **La.**—*Succession of Gassie*, 42 La. Ann. 239, 7 So. 454. **Md.**—*Hall v. Claggett*, 48 Md. 223, 243. **N. J.**—*Stout v. Seabrook's Exrs.*, 30 N. J. Eq. 187. **Ohio.**—*Oglesby v. Thompson*, 59 Ohio St. 60, 63, 51 N. E. 878. **Ore.**—*Ashley v. Williams*, 17 Ore. 441, 21 Pac. 556. **Tenn.** *Maupin v. Daniel*, 3 Tenn. Ch. 223. **Va.**—*Slater, Myers & Co. v. Arnett*, 81 Va. 432.

in bar of an accounting, is sustained by the proof, the bill should be dismissed.³⁸

9. **Trial.**—a. *Jury Trial.*—The general rule that neither party to an equitable action has a right to demand a jury trial³⁹ applies in a suit for an accounting of a partnership.⁴⁰ But the judge may, as in other equity cases, use a jury in an advisory capacity and submit to it for determination such issues as he may choose.⁴¹

b. *Disposition of Matters in Bar.*—All matters in bar of an accounting must first be disposed of before a decree for an accounting can be granted.⁴² Thus the existence of the partnership, if denied, must be first proved,⁴³ and the issue of an alleged account stated between the partners must likewise be determined in the negative.⁴⁴

The hearing upon a bill for accounting between partners is conducted in the same manner as other suits in equity.⁴⁵

38. *Auld v. Butcher*, 2 Kan. 135.

As to order of proof as to matters alleged in bar, see *infra*, I, C, 9, b.

[a] Upon the finding that an alleged partner is not a member of the firm, a nonsuit should be entered as to him. *Chalmers v. Chalmers*, 81 Cal. 81, 22 Pac. 395.

39. See 8 STANDARD PROC. 496, and 16 STANDARD PROC. 879.

40. **Ind.**—*Horn v. Lupton*, 182 Ind. 355, 105 N. E. 237, 106 N. E. 708. **Minn.**—*Shipley v. Belduc*, 93 Minn. 414, 101 N. W. 952; *Berkey v. Judd*, 14 Minn. 394. **Tex.**—*Hengy v. Hengy* (Tex. Civ. App.), 151 S. W. 1127. **Wash.**—*Hamar v. Peterson*, 9 Wash. 152, 37 Pac. 309. **W. Va.**—*Mahnke v. Neale*, 23 W. Va. 57.

41. **Cal.**—*Haight v. Haight*, 151 Cal. 90, 90 Pac. 197. **Kan.**—*Carlin v. Donegan*, 15 Kan. 495. **Minn.**—*Cobb v. Cole*, 44 Minn. 278, 46 N. W. 364. **Mont.**—*Lenahan v. Casey*, 46 Mont. 367, 128 Pac. 601; *Arnold v. Sinclair*, 11 Mont. 556, 29 Pac. 340, 28 Am. St. Rep. 489, existence of partnership. **Tex.**—*Hengy v. Hengy* (Tex. Civ. App.), 151 S. W. 1127. **Va.**—*Slaughter v. Danner*, 102 Va. 270, 46 S. E. 289. **W. Va.**—*Mahnke v. Neale*, 23 W. Va. 57.

42. **Kan.**—*Auld v. Butcher*, 2 Kan. 135. **N. J.**—*Hudson v. Trenton L. & M. Mfg. Co.*, 16 N. J. Eq. 475. **N. C.**—*Smith v. Barringer*, 74 N. C. 665. **Pa.**—*In re Dampf's Appeal*, 106 Pa. 72. **Vt.**—*Spaulding v. Holmes*, 25 Vt. 491.

[a] A denial of plaintiff's allegation of an indebtedness to him makes it necessary for him to show at least a probable indebtedness, before an accounting will be ordered. *Hunt v. Gordon*, 52 Miss. 194.

43. **U. S.**—*Gray v. Larrimore*, 4 Sawy. 638, 2 Abb. 542, 10 Fed. Cas. No. 5,721. **Ark.**—*La Cotts v. Pike*, 91 Ark. 26, 120 S. W. 144, 134 Am. St. Rep. 48. **Cal.**—*Hart v. Finigan*, 71 Cal. 578, 12 Pac. 682. **Conn.**—*Moran v. Bentley*, 69 Conn. 392, 37 Atl. 1092. **Del.**—*Reybold v. Dodd's Admr.*, 1 Harr. 401, 26 Am. Dec. 401. **Fla.**—*Nims v. Nims*, 20 Fla. 204. **Minn.**—*Bruner v. Jacobson*, 115 Minn. 425, 132 N. W. 995. **N. Y.**—*Arnold v. Angell*, 62 N. Y. 508; *Salter v. Ham*, 31 N. Y. 321; *Low v. Swartwout*, 171 App. Div. 725, 157 N. Y. Supp. 1067; *Freeman v. Miller*, 157 App. Div. 715, 142 N. Y. Supp. 797. **Ohio.**—*Peck v. Cavagna*, 7 Ohio Dec. 142. **Ore.**—*Ashley v. Williams*, 17 Ore. 441, 21 Pac. 556. **Pa.**—*In re Christy's Appeal*, 92 Pa. 157; *Collyer v. Collyer*, 38 Pa. 257. **S. C.**—*Askew's Representatives v. Poyas*, 2 Desaus. Eq. 145. **Utah.**—*Kahn v. Central Smelting Co.*, 2 Utah 371. **W. Va.**—*Lantz v. Tumlin*, 74 W. Va. 196, 81 S. E. 820.

[a] Failure to prove the alleged partnership defeats the plaintiff's action. *Adams v. Gaubert*, 69 Ill. 585; *Vermillion v. Bailey*, 27 Ill. 230; *Arnold v. Angell*, 62 N. Y. 508.

44. **Kan.**—*Auld v. Butcher*, 2 Kan. 135. **N. J.**—*Dickey v. Allen*, 2 N. J. Eq. 40. **N. Y.**—*Heartt v. Corning*, 3 Paige 566. **N. C.**—*Clements v. Rogers*, 95 N. C. 248; *Smith v. Barringer*, 74 N. C. 665; *Price v. Eccles*, 73 N. C. 162.

45. *Wilkinson v. Tilden*, 9 Fed. 683. As to the power of the court to compel the production of books for the inspection of the adversary, see generally, 7 STANDARD PROC. 605.

10. Reference To Take Account. — a. *In General.*⁴⁶ — In a bill for the accounting and settlement of a partnership business where the items of account are many or complicated, the judge may, within his discretion, refer all,⁴⁷ or any part⁴⁸ of the facts to a master or auditor, or other like officer, to investigate and report the result to the court. The general rule is that the facts which relate to the gist of the action, and which the plaintiff is bound to prove to entitle him to relief,⁴⁹ must be proved in the first instance before the reference is made,⁵⁰ thus a reference to account cannot be ordered until it has first been determined whether the parties are or were partners,⁵¹ whether such an accounting is necessary.⁵² The court may order a reference of its own motion,⁵³ and without the consent of the partners.⁵⁴

Instructions to Referee, Auditor, etc. — In its order of reference, the court should settle the principles of the accounting and put them in the form of instructions to its officer.⁵⁵

The procedure before a master for a partnership accounting is the same as in other cases where a reference is made.⁵⁶

b. *Form of Report.*⁵⁷ — Where a partnership account is referred to a master, his report should state the account in such manner that the court may judge whether it is correct,⁵⁸ and to enable it to set-

See generally the title "Hearing."

[a] **An accounting between partners cannot be had on affidavits** on an interlocutory motion; it must be had in the orderly progress of a suit. *Wilkinson v. Tilden*, 9 Fed. 683; *Wickes v. Hatch*, 103 App. Div. 426, 92 N. Y. Supp. 1017.

46. See generally the title "References."

47. **Ga.**—*Smith v. Smith*, 135 Ga. 582, 69 S. E. 1110. **Ia.**—*Levi v. Karriek*, 8 Iowa 150. **Ky.**—*Bush v. Stamper*, 22 Ky. L. Rep. 1592, 61 S. W. 267. **Mich.**—*Roelofs v. Wever*, 119 Mich. 334, 78 N. W. 136. **Okla.**—*Conley v. Horner*, 10 Okla. 277, 62 Pac. 807. **S. C.**—*Boulard v. Carpin*, 27 S. C. 235, 3 S. E. 219.

48. *Smith v. Smith*, 135 Ga. 582, 69 S. E. 1110; *Boulard v. Carpin*, 27 S. C. 235, 3 S. E. 219.

49. **As to disposition of matters in bar**, see *supra*, I, C, 9, b.

50. *Hunt v. Gorden*, 52 Miss. 194.

51. **Ark.**—*Fullenwider v. Bank of Waldo*, 101 Ark. 259, 142 S. W. 149. **N. Y.**—*Bantes v. Brady*, 8 How. Pr. 216; *Jones v. Lester*, 77 App. Div. 174, 78 N. Y. Supp. 1000; *McCall v. Moschowitz*, 14 Daly 16, 10 Civ. Proc. 107, 1 N. Y. St. 99. **Pa.**—*In re Dampf's Appeal*, 106 Pa. 72.

Compare *McPeters v. Ray*, 85 N. C. 462.

52. *Hunt v. Gorden*, 52 Miss. 194;

Diehl v. Dreyer, 84 App. Div. 247, 82 N. Y. Supp. 770.

[a] **Whether there has been a full adjustment and settlement between the partners**, as alleged by defendant. *Wynkoop v. Wynkoop*, 119 App. Div. 679, 104 N. Y. Supp. 296.

53. *Conley v. Horner*, 10 Okla. 277, 62 Pac. 807.

54. *Conley v. Horner*, 10 Okla. 277, 62 Pac. 807.

55. **Ark.**—*Bernie v. Vandever*, 16 Ark. 616. **Miss.**—*Randle v. Richardson*, 53 Miss. 176; *Hunt v. Gorden*, 52 Miss. 194. **N. Y.**—*Kowing v. Manly*, 2 Abb. Pr. N. S. 377, wherein the court particularly sets forth the special instructions to be given the master in case one partner continues in business and uses the firm property without an accounting.

56. See generally the title "References," and *Brockman v. Aulger*, 12 Ill. 277.

57. See 9 STANDARD PROC. 1043, 1046, and the title "References."

58. *Nims v. Nims*, 20 Fla. 204; *Brockman v. Aulger*, 12 Ill. 277, stating the amount only found due to one of the partners is not sufficient. See *Hunt v. Gorden*, 52 Miss. 194.

[a] **The master should state his account at length** (1) and his findings so that they will be intelligible, and that the court may see the correctness of the master's inferences. *Nims*

tle, on an equitable basis, the accounts between the partners.⁵⁹ Whether the partnership resulted in a profit or loss, and to what extent should be shown.⁶⁰

c. *Effect of Report.*—The effect of the referee's report is determined in accordance with general principles elsewhere treated.⁶¹

11. Determination and Decree.⁶²—A court of equity, having acquired jurisdiction for the settlement of the accounts and dissolution of the partnership, will proceed to the complete determination of all controversies touching the partnership, of its demands against the members, and their claims against the firm,⁶³ but not of the demands

v. Nims, 20 Fla. 204. See *Lannan v. Clavin*, 3 Kan. 17, where impossible to give details. (2) A report sufficiently itemizes the amounts found to be due to the complainant without giving the details of the several items, where the itemized statement leaves no doubt as to what was included in the total. *Shadburne v. Sbarbaro*, 182 Ill. App. 54.

[b] **The evidence upon which the conclusions of the referee are based need not be set forth in his report, unless exception be taken to any of the referee's conclusions, when so much of the evidence as is necessary to bring the matter intelligently before the court must be contained in the report.** *Young v. Winkley*, 191 Mass. 570, 78 N. E. 377.

[c] **The report need not particularly describe the assets found to belong to the partnership.** *Stower v. Kamphefner*, 6 Cal. App. 80, 91 Pac. 424.

[d] **Where the report is made after the partnership property is attached for the separate debt of one of the partners, it should show whether the property was partnership property, and what was the interest of the debtor partner therein at the time of the attachment.** *Johnson v. Sanford*, 13 Conn. 461.

59. Patterson v. Kellogg, 53 Conn. 38, 22 Atl. 1096.

60. Ala.—*Zimmerman v. Huber*, 29 Ala. 379. *Fla.*—*Nims v. Nims*, 20 Fla. 204. *Ky.*—*Honore v. Colmesnil*, 1 J. J. Marsh. 506. *Miss.*—*Randle v. Richardson*, 53 Miss. 176.

61. See the title "References."

[a] **Advisory Only.**—*U. S.*—*Van Tine v. Hilands*, 142 Fed. 613. *Mo.* *Johnson v. Ewald*, 82 Mo. App. 276. *N. Y.*—*Donnelly v. McArdle*, 152 App. Div. 805, 137 N. Y. Supp. 801; *Smith v. Fitchett*, 56 Hun 473, 10 N. Y.

Supp. 459, 31 N. Y. St. 606. *Pa.* *In re Lobb's Appeal*, 3 Walk. 374.

[a] **Findings approved by the court** are as binding on the appellate court as the verdict of a jury. *Noble v. Faull*, 26 Colo. 467, 58 Pac. 681.

62. See generally the titles "Decrees;" "Judgments."

63. Ala.—*Northern v. Tatum*, 164 Ala. 368, 51 So. 17. *Ark.*—*Saunders v. Wood*, 15 Ark. 24. *Cal.*—*Clark v. Hewitt*, 136 Cal. 77, 68 Pac. 303; *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *Nisbet v. Nash*, 52 Cal. 540; *Rassaert v. Mensch*, 17 Cal. App. 637, 120 Pac. 1072; *Durphy v. Pearsall*, 6 Cal. App. 54, 91 Pac. 407. *Colo.* *Craig v. Chandler*, 6 Colo. 543. *Ga.* *Epping v. Aiken*, 71 Ga. 682. *Ill.* *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229; *Veneman v. Ruckle*, 120 Ill. App. 251; *Johnson v. Miller*, 50 Ill. App. 60. *Kan.*—*Carter v. Christie*, 57 Kan. 492, 46 Pac. 964; *Lord v. Anderson*, 16 Kan. 185. *Ky.*—*Maude v. Rodes*, 4 Dana 144. *Me.*—*Little v. Merrill*, 62 Me. 328. *Md.*—*Grove v. Fresh*, 9 Gill & J. 280. *Mass.*—*Griffith v. Kirley*, 189 Mass. 522, 76 N. E. 201. *Mich.*—*McLean v. McLean*, 109 Mich. 258, 67 N. W. 118. *Minn.*—*Walsh v. St. Paul School Furn. Co.*, 60 Minn. 397, 62 N. W. 383, will distribute assets to creditors in case of insolvency of the firm. *N. H.*—*Raymond v. Came*, 45 N. H. 201. *N. Y.*—*Rhiner v. Sweet*, 2 Lans. 386; *Hayes v. Reese*, 34 Barb. 151; *Blake v. Barnes*, 63 Hun 633, 18 N. Y. Supp. 471, 28 Abb. N. C. 401, 45 N. Y. St. 130. *N. D.*—*Oustad v. Hahn*, 27 N. D. 334, 146 N. W. 557. *Ohio.*—*Gray v. Kerr*, 46 Ohio St. 652, 23 N. E. 136. *Ore.*—*Fleming v. Carson*, 37 Ore. 252, 62 Pac. 374; *Durkheimer v. Heilner*, 24 Ore. 270, 33 Pac. 401, 34 Pac. 475; *Ashley v. Williams*, 17 Ore. 441, 21 Pac. 556; *Gleason v. Van Aernam*, 9 Ore. 343. *Pa.*—*Mc-*

of one partner individually against another as an individual.⁶⁴ The decree should be a final adjudication of the rights of the parties,⁶⁵ and should conform to the pleadings and proof,⁶⁶ and be sustained by the findings.⁶⁷ Real estate constituting part of the assets of the dissolved partnership should be treated as personalty;⁶⁸ under some circumstances, however, it has been held proper to decree it to one partner alone,⁶⁹ or to all the partners as tenants in common.⁷⁰ In decreeing the dissolution of a partnership, the court may declare at what date the partnership shall be at an end.⁷¹

Personal Decree.—No personal decree should be rendered against one in favor of the other partner for any sum until the partnership assets have been collected and applied to the partnership obligations,

Ginn v. Benner, 22 Pa. Super. 134.
Tenn.—*Maupin v. Daniel*, 3 Tenn. Ch. 223.
Vt.—*Whitcomb v. Whitcomb*, 85 Vt. 76, 81 Atl. 97, Ann. Cas. 1913E, 1015, may compel partner to assign to the firm a patent adjudged to belong to it.
Wash.—*Yarwood v. Billings*, 31 Wash. 542, 72 Pac. 104.
W. Va.—*Gore v. Vines*, 72 W. Va. 783, 79 S. E. 820; *Carper v. Hawkins*, 8 W. Va. 291.
Wis.—*Strang v. Thomas*, 114 Wis. 599, 91 N. W. 237; *Singer v. Heller*, 40 Wis. 544.

[a] **Good Will.**—Where the defendant has taken exclusive possession of the firm property to which the good will is attached, and is carrying on the business as though he were the purchaser of it, the court may regard the defendant, so far as respects the good will, as though he had purchased under an order of the court for the sale of the property and good will, and therefore that he should be charged with the value of the good will. *Griffith v. Kirley*, 189 Mass. 522, 76 N. E. 201.

[b] **A dissolution of the partnership** may be decreed although not specifically asked for, where it appears that relief can be had only by dissolution. *Loscombe v. Russell*, 4 Sim. 8, 58 Eng. Reprint 4.

64. Ark.—*Jones v. Jones*, 23 Ark. 212.
Ill.—*Hanks v. Baber*, 53 Ill. 292.
Wis.—*Green v. Stacy*, 90 Wis. 46, 62 N. W. 627; *Smith v. Diamond*, 86 Wis. 359, 56 N. W. 922.

65. Kayser v. Maugham, 8 Colo. 232, 6 Pac. 803.

66. Clark v. Hall, 54 Neb. 479, 74 N. W. 856; *Arnold v. Angell*, 62 N. Y. 508. See 15 STANDARD PROC. 35.

67. Williams v. Williams, 104 Cal. 85, 37 Pac. 784. See *Clark v. Gallaher*, 3 Tex. Civ. App. 541, 22 S. W. 1047,

must be warranted by the findings.

68. Moran v. McInerney, 129 Cal. 29, 61 Pac. 575, 948.

[a] **It is improper for the court to decree** that the plaintiff be let into joint possession with the defendants of an undivided one-half of such partnership real property, but it must be ordered sold and the residue, after paying debts, distributed. *Moran v. McInerney*, 129 Cal. 29, 61 Pac. 575, 948.

[b] **A decree for partition of the partnership's real property** cannot be sustained, for partition is not an incident to a suit for accounting, and the partners have a right usually to have the assets disposed of, if they choose. If not disposed of, all that could be done would be to leave the land as a distinct tenancy in common, so that the tenants could have it partitioned in a separate suit if they should see fit. *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243.

69. Clearkin v. Taheny, 256 Pa. 615, 100 Atl. 1053, where the realty was given to one partner in satisfaction of the excess contributed by him to the business, with provision that he file a bond indemnifying the other partner against liability for any firm debts.

70. Tenney v. Simpson, 37 Kan. 579, 15 Pac. 512, wherein the sole asset of the partnership was realty. The judgment was that each partner have an undivided one-half of such property, there being no creditors of the partnership, and that as the accounting showed that one partner was the creditor of the other, a personal judgment in his favor for the amount of such balance should be entered and made a lien upon the debtor partner's one-half interest.

71. Ala.—*Dumont v. Ruepprecht*, 38 Ala. 175. **Ohio.**—*Durbin v. Barber*,

and then the balance due the other partner ascertained.⁷² The judgment in favor of one partner for a balance should be against the others severally and not jointly, in the proportion in which the facts show them to be liable,⁷³ unless the circumstances show such concert of action as to create a joint liability for the whole amount due.⁷⁴

Effect of Decree.—An interlocutory decree to account is decisive of the existence of a partnership but not of its extent or terms.⁷⁵ Where the decree for dissolution and an accounting provides for the partnership creditors,⁷⁶ a creditor may be enjoined from proceeding at law thereafter for the collection of his debt.⁷⁷ The decree as such has no effect on partnership property situated in another state,⁷⁸ but through its jurisdiction and control over the parties themselves the court may control their action with respect to partnership matters in another state.⁷⁹

12. Costs.⁸⁰—Generally, the partnership assets are chargeable with the costs incurred in the settlement and accounting,⁸¹ though

14 Ohio 311. **Eng.**—*Besch v. Frolich*, 1 Ph. 172, 12 L. J. Ch. 118, 7 Jur. 73, 41 Eng. Reprint 597 (will not make the decree retrospective); *Lyon v. Tweddell*, 50 L. J. Ch. 571, 29 Wkly. Rep. 689, dissolution should be dated from the judgment and not from the issuing of the writ.

72. **Cal.**—*Clark v. Hewitt*, 136 Cal. 77, 68 Pac. 303; *Rassaert v. Mensch*, 17 Cal. App. 637, 120 Pac. 1072; *Stower v. Kamphefner*, 6 Cal. App. 80, 91 Pac. 424. **Ill.**—*Rosenstiel v. Gray*, 112 Ill. 282. But see *Shadburne v. Sbarbaro*, 182 Ill. App. 54. **Ia.**—*Bank of Percival v. Farmers' Nat. Bank*, 162 N. W. 21; *Johnson v. Mantz*, 69 Iowa 710, 27 N. W. 467. **Kan.**—*McGillvray v. Moser*, 43 Kan. 219, 23 Pac. 96. But see *Tenney v. Simpson*, 37 Kan. 579, 15 Pac. 512. **Ky.**—*Turner's Admr. v. Turner*, 9 Ky. L. Rep. 456, 5 S. W. 457. **La.**—*Pratt v. McHatton*, 11 La. Ann. 260. **Mass.**—*Paine v. Paine*, 15 Gray 299; *Tyng v. Thayer*, 8 Allen 391. **N. Y.**—*Hayes v. Reese*, 34 Barb. 151. **N. C.**—*Allison v. Davidson*, 17 N. C. 79. **Ohio.**—*Oglesby v. Thompson*, 59 Ohio St. 60, 51 N. E. 878. **Okla.**—*Baughman v. Hebard*, 166 Pac. 88. **W. Va.**—*Jones v. Rose*, 94 S. E. 41; *Lantz v. Tumlin*, 74 W. Va. 196, 81 S. E. 820; *Steele v. Moore*, 71 W. Va. 436, 76 S. E. 850; *Bartlett v. Boyles*, 66 W. Va. 327, 66 S. E. 474. **Wis.**—*Green v. Stacy*, 90 Wis. 46, 62 N. W. 627. **Eng.**—*Wild v. Milne*, 26 Beav. 504, 53 Eng. Reprint 993.

[a] No final decree can be made while debts due from the firm remain unadjusted. **Cal.**—*Albery v. Geis*, 1

Cal. App. 381, 82 Pac. 262. **Conn.** *Mickle v. Peet*, 43 Conn. 65. **W. Va.** *Hyre v. Lambert*, 37 W. Va. 26, 16 S. E. 446. **Wis.**—*Green v. Stacy*, 90 Wis. 46, 62 N. W. 627.

[b] But if justice is done and no objection raised, the failure of the decree to contain an order for the sale of the property will not make it erroneous. *Johnson v. Mantz*, 69 Iowa 710, 27 N. W. 467.

73. **Ia.**—*Starr v. Case*, 59 Iowa 491, 13 N. W. 645; *Levi v. Karrick*, 8 Iowa 150. **N. Y.**—*Rhiner v. Sweet*, 2 Lans. 386. **Ore.**—*Bloomfield v. Buchanan*, 14 Ore. 181, 12 Pac. 238. **Eng.**—*Ex parte Marlin*, 2 Bro. C. C. 15, 29 Eng. Reprint 8.

74. *Bloomfield v. Buchanan*, 14 Ore. 181, 12 Pac. 238, wherein the defendants by concert of action excluded plaintiff from all participation in the business, and from all knowledge of the books or accounts.

75. *Reybold v. Dodd's Admr.*, 1 Harr. (Del.) 401, 26 Am. Dec. 401.

76. See *supra*, I, C, 3, b, (IV).

[a] Does not discharge the debt. *Schnell v. Schnell*, 39 Ind. App. 556, 80 N. E. 432.

77. **Cal.**—*Adams v. Hackett*, 7 Cal. 187. **N. Y.**—*Waring v. Robinson*, Hoffm. Ch. 524. **R. I.**—*Updike v. Doyle*, 7 R. I. 446.

78. *Williams v. Williams*, 83 Misc. 560, 145 N. Y. Supp. 564.

79. *Williams v. Williams*, 83 Misc. 560, 145 N. Y. Supp. 564. See 17 STANDARD PROC. 780, et seq.

80. See the title "Costs."

81. **Ill.**—*Mariner v. Gilchrist*, 280

it is within the discretion of the court to apportion the costs against the parties as he may deem proper and equitable.⁸²

II. ACTIONS OR PROCEEDINGS BETWEEN PARTNERS AND THIRD PERSONS.—A. JURISDICTION AND VENUE.—Actions between partners and third persons follow the general principles else-

Ill. 544, 117 N. E. 695. **Ky.**—Swafford's Admr. v. White, 28 Ky. L. Rep. 119, 89 S. W. 129; Green v. Hart, 27 Ky. L. Rep. 970, 87 S. W. 315; Lyford's Exrx. v. Haines, 21 Ky. L. Rep. 948, 53 S. W. 646. **La.**—Baxter v. Hewes, 45 La. Ann. 1065, 13 So. 864; Burke v. Fuller, 41 La. Ann. 740, 6 So. 557; Philpot v. Patterson, 5 Mart. (N. S.) 273, costs of lawsuit decreed against defendant, and the expenses and charges which accrued in taking the account decreed against the partnership assets. **Md.**—Stevens v. Yeatman, 19 Md. 480. **Mass.**—Whitney v. Cook, 5 Mass. 139. **N. Y.**—Hopfensack v. Hopfensack, 9 Daly 457, 61 How. Pr. 498; Masters v. Brooks, 132 App. Div. 874, 117 N. Y. Supp. 585; Crotty v. Jarvis, 1 Misc. 316, 20 N. Y. Supp. 728, 48 N. Y. St. 781. **N. C.** Taylor v. Cawthorne, 17 N. C. 221. **Ohio.**—Wehrman v. McFarland, 10 Ohio Dec. 320, 8 Ohio N. P. 673; Payne v. McNamara, 6 Ohio Cir. Dec. 62. **Ore.** Fleming v. Carson, 37 Ore. 252, 62 Pac. 374. **Pa.**—Gordon v. Moore, 134 Pa. 486, 19 Atl. 753; *In re Gyger's Appeal*, 62 Pa. 73, 1 Am. Rep. 382. **Eng.**—Hamer v. Giles, 11 Ch. Div. 942, 48 L. J. Ch. 508, 41 L. T. N. S. 270, 27 Wkly. Rep. 834; Bonville v. Bonville, 35 Beav. 129, 55 Eng. Reprint 844; Rowlands v. Evans, 14 Wkly. Rep. 882; Timothy v. Hindley, 14 Wkly. Rep. 382. **Can.**—Bingham v. Smith, 16 Grant Ch. 373; Curran v. Carey, 4 Manitoba 450; Chapman v. Newell, 14 Ont. Pr. 208.

[a] As a general rule, in a suit for a partnership accounting and settlement, the costs should be charged to the partnership fund, either where the suit is necessary or beneficial to both parties, or where both are in fault; and may be imposed upon one party only, as a punishment, if he has been guilty of misconduct rendering necessary a resort to legal proceedings. **N. C.**—Taylor v. Cawthorne, 17 N. C. 221. **Ore.**—Fleming v. Carson, 37 Ore. 252, 62 Pac. 374. **Eng.**—Hamer v. Giles, 11 Ch. Div. 942, 48 L. J. Ch. 508, 41 L. T. N. S. 270, 27 Wkly. Rep.

834. **Can.**—Curran v. Carey, 4 Manitoba 450; Chapman v. Newell, 14 Ont. Pr. 208.

[b] A receiver is entitled to be paid his costs out of the partnership assets as a matter of course. Hopfensack v. Hopfensack, 9 Daly (N. Y.) 457, 61 How. Pr. 498.

82. Cal.—Faulkner v. Hendy, 79 Cal. 265, 21 Pac. 754, opposite party will not be required to pay as costs, for the services of an expert accountant employed by the other partner for his own benefit. **Ga.**—Smith v. Smith, 135 Ga. 582, 69 S. E. 1110 (auditor's fees); Houston v. Polk, 124 Ga. 103, 52 S. E. 83. **Ill.**—Taft v. Schwamb, 80 Ill. 289. **Ia.**—Starr v. Case, 59 Iowa 491, 13 N. W. 645. **Kan.**—Smith v. Harris, 88 Kan. 226, 128 Pac. 378; McGillvray v. Moser, 43 Kan. 219, 23 Pac. 96. **Ky.**—Caldwell v. Lang, 31 Ky. L. Rep. 237, 101 S. W. 972; Dyer v. Ballinger, 24 Ky. L. Rep. 1918, 72 S. W. 738; Broeg v. Pool's Admr., 22 Ky. L. Rep. 1354, 60 S. W. 518; McBurnie v. Semple, 14 Ky. L. Rep. 30, 19 S. W. 183. **La.**—Borah v. O'Niell, 121 La. 733, 46 So. 788; Richard v. Mouton, 109 La. 465, 33 So. 563. **Mo.** Campbell v. Coquard, 16 Mo. App. 552. **N. J.**—Patrick v. Patrick, 71 N. J. Eq. 347, 63 Atl. 848. **N. Y.**—Smith v. Underhill, 64 Hun 639, 19 N. Y. Supp. 249, 47 N. Y. St. 23. **Ore.**—Fleming v. Carson, 37 Ore. 252, 62 Pac. 374; *In re Beck & Son's Estate*, 19 Ore. 503, 24 Pac. 1038. **Pa.**—*In re Gyger's Appeal*, 62 Pa. 73, 1 Am. Rep. 382; *In re Lobb's Appeal*, 3 Walk. 374; Gordon v. Moore, 8 Pa. Co. Ct. 289. **S. C.**—Kennedy v. Hill, 89 S. C. 462, 71 S. E. 974. **Tex.**—Navarro v. Lamaia (Tex. Civ. App.), 179 S. W. 922; Baker v. Milde (Tex. Civ. App.), 33 S. W. 152. **Wash.**—Boothe v. Summit Coal Min. Co., 72 Wash. 679, 131 Pac. 252. **Wis.**—Briere v. Taylor, 126 Wis. 347, 105 N. W. 817; Hart v. Hart, 117 Wis. 639, 94 N. W. 890; Ritter v. Ritter, 100 Wis. 468, 76 N. W. 347; Knapp v. Edwards, 57 Wis. 191, 15 N. W. 140. **Eng.**—Newton v. Taylor, L. R. 19 Eq. 14, 23 Wkly. Rep. 330. **Can.**

where discussed, as to jurisdiction and venue.⁸³ Ordinarily an action against a partnership is maintainable in any county where one of the partners resides,⁸⁴ but where for purposes of suit a partnership is a legal entity, it would seem that it should be governed by the principles applied to other similar entities,⁸⁵ and the action, in such case, may be brought in any county wherein the partnership is doing business.⁸⁶

B. ATTACHMENT.⁸⁷ — **1. Of Firm Property.** — a. *For What Claims.* — Partnership property may be attached for firm debts;⁸⁸ and, for the individual debt of a partner, his interest⁸⁹ in the firm

Hall v. Antrobus, 44 Nova Scotia 96; O'Lone v. O'Lone, 2 Grant Ch. 125.

83. See generally the titles "**Jurisdiction**;" "**Venue**;" and numerous other titles dealing with particular classes of actions.

In actions between partners, see *supra* I.

84. Pyron v. Ruohs, 120 Ga. 1060, 48 S. E. 434; Wadley, Jones & Co. v. Jones, 55 Ga. 329; Sloan v. Cooper, 54 Ga. 486; King Bros. & Co. v. Passmore, 18 Ga. App. 514, 89 S. E. 1103.

[a] **A county where none of the partners reside** is not a proper venue in such actions, even though the partnership maintained a branch office therein in charge of an agent who is a resident of such county. King Bros. & Co. v. Passmore, 18 Ga. App. 514, 89 S. E. 1103.

[b] **At Domicil.** — After a dissolution of the partnership, the parties may be sued at the domicil of the partnership. Weil Bros. v. Adams, 126 La. 532, 52 So. 757.

85. See Fitzgerald v. Grimmell, 64 Iowa 261, 20 N. W. 179; 18 STANDARD PROC. 996; 5 STANDARD PROC. 585, et seq.

86. **Ill.** — Watson v. Coon, 247 Ill. 414, 93 N. E. 289. **Ia.** — Ruthven v. Beckwith, 84 Iowa 715, 45 N. W. 1073, 51 N. W. 153; Sketchley v. Smith, 78 Iowa 542, 43 N. W. 524; Fitzgerald v. Grimmell, 64 Iowa 261, 20 N. W. 179. **La.** — Weil Bros. v. Adams, 126 La. 532, 52 So. 757; Wolf v. New Orleans Tailor-Made Pants Co., 52 La. Ann. 1357, 27 So. 893; Marsh v. Marsh, 9 Rob. 45; Hobson & Co. v. Whittemore, 13 La. 422.

[a] **But if transacting business in several counties** the action should be brought in the county where the obligation is entered into. Weil Bros. v. Adams, 126 La. 532, 52 So. 757; Wolf v. New Orleans Tailor-Made Pants Co., 52 La. Ann. 1357, 27 So. 893.

87. See generally the title "**Attachment**."

88. **Mich.** — Smith v. Runnells, 94 Mich. 617, 54 N. W. 375. **N. H.** — Hall v. Richardson, 66 N. H. 205, 20 Atl. 978. **N. M.** — Curran v. Kendall Boot & Shoe Co., 8 N. M. 417, 45 Pac. 1120. **N. Y.** — Woodward v. Stearns, 10 Abb. Pr. (N. S.) 395.

89. **Conn.** — Hannon v. O'Dell, 71 Conn. 698, 43 Atl. 147; Stevens v. Stevens, 39 Conn. 474. **Ill.** — Newhall v. Buckingham, 14 Ill. 405. **Ind.** — Burgess v. Atkins, 5 Blackf. 337. **Kan.** — Williams v. Muthersbaugh, 29 Kan. 730; Hershfield v. Claflin & Co., 25 Kan. 166, 37 Am. Rep. 237. **La.** — Marston & Co. v. Dewberry, 21 La. Ann. 518; Fraser & Co. v. Thorpe, 9 La. Ann. 518. **Me.** — Parker v. Wright, 66 Me. 392; Hacker v. Johnson, 66 Me. 21; Thompson v. Lewis, 34 Me. 167; Douglas v. Winslow, 20 Me. 89. **Mass.** — Breck v. Blair, 129 Mass. 127; Allen v. Wells, 22 Pick. 450, 33 Am. Dec. 757. **Minn.** — Allis v. Day, 13 Minn. 199; Day v. McQuillan, 13 Minn. 205. **Mo.** — Hill v. Bell, 111 Mo. 35, 19 S. W. 959; Fleisher v. Hinde (Mo. App.), 93 S. W. 1126. **N. J.** — Curtis v. Hollingshead, 14 N. J. L. 402. **N. Y.** — Staats v. Bristow, 73 N. Y. 264; Hergman v. Dettlebach, 11 How. Pr. 46. **Ohio.** — Stewart & Co. v. Hunter, 1 Handy 22, 12 Ohio Dec. (Reprint) 6. **Ore.** — Cogswell v. Wilson, 17 Ore. 31, 21 Pac. 388. **R. I.** — Trafford v. Hubbard, 15 R. I. 326, 4 Atl. 762, 8 Atl. 690; Randall v. Johnson, 13 R. I. 338; Remington v. Howard Express Co., 8 R. I. 406. **S. C.** — Schatzill & Co. v. Bolton, 2 McCord 478, 13 Am. Dec. 748. **Tenn.** — Morrow v. Fossick, 3 Lea 129; Saunders v. Bartlett, 12 Heisk. 316. **Utah.** — Snell v. Crowe, 3 Utah 26, 5 Pac. 522. **Va.** — Shaver v. White, 6 Munf. (20 Va.) 110, 8 Am. Dec. 730. **W. Va.** — Andrews

property may in some states, but not in all⁹⁰ be attached.

b. *Grounds for Attachment.*—To authorize the attachment of partnership property some one or more of the statutory grounds therefor must appear,⁹¹ as that the partners have transferred the partnership property in fraud of creditors,⁹² or that the debtors have absconded or concealed themselves,⁹³ or are non-residents.⁹⁴ But where the ground of attachment is non-residence, unless the liability is joint and several,⁹⁵ an attachment will not lie where one or more of the partners continue to reside in the state.⁹⁶

v. Mundy, 36 W. Va. 22, 14 S. E. 414.

[a] **The partner's interest in a specific portion of a stock of goods** belonging to his firm may be taken on attachment. *Fogg v. Lawry*, 68 Me. 78, 28 Am. Rep. 19. But see *Sanborn v. Royce*, 132 Mass. 594, holding such a levy a trespass.

90. **U. S.**—*McCoombe v. Dunch*, 2 Dall. 73, 1 L. ed. 294. **N. H.**—*Hill v. Wiggins*, 31 N. H. 292; *Huffum v. Seaver*, 16 N. H. 160. But see *Dow v. Sayward*, 14 N. H. 9, holding that an attachment will lie but that the goods cannot be taken out of the possession of the partnership. **N. C.** *Jarvis v. Hyer*, 15 N. C. 367. **Pa.** *Horne v. Petty*, 192 Pa. 32, 43 Atl. 404; *Ryon v. Wynkoop*, 148 Pa. 188, 23 Atl. 1002; *Alter v. Brooke*, 9 Phila. 258.

See *Brande v. Bond*, 63 Wis. 140, 23 N. W. 101, wherein the court quæried whether an attachment would lie in such case.

91. **Ga.**—*Starr v. Mayer & Co.*, 60 Ga. 546. **Ill.**—*Lawrence v. Steadman*, 49 Ill. 270; *Hinman v. Andrews Opera Co.*, 49 Ill. App. 135. **Kan.**—*Williams v. Mothersbaugh*, 29 Kan. 730. **Mich.** *Van Benschoten v. Fales*, 126 Mich. 176, 85 N. W. 476; *Jaffray v. Jennings*, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645. **Mo.**—*Tennent, Walker & Co. v. Guenther*, 31 Mo. App. 429, a sale by one partner of his interest in the firm not a ground for issuing an attachment where no fraud shown. **N. Y.**—*In re Matter of Smith*, 16 Johns. 102; *Monette v. Chardon*, 16 Misc. 165, 37 N. Y. Supp. 2, 72 N. Y. St. 135; *Edick v. Green*, 38 Hun 202; *Bogart v. Dart*, 25 Hun 395. **Okla.** *Johnson v. Jones*, 39 Okla. 323, 135 Pac. 12, 48 L. R. A. (N. S.) 547. **Vt.**—*Leach v. Cook*, 10 Vt. 239. **W. Va.** *Goodman v. Henry*, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847; *Baer v. Wilkinson*, 35 W. Va. 422, 14 S. E. 1.

Wis.—*Evans v. Virgin*, 69 Wis. 153, 33 N. W. 569.

See generally 3 STANDARD PROC. 349.

92. **Ill.**—*Keith v. Fink*, 47 Ill. 272; *Reynolds v. Radke*, 112 Ill. App. 575. **Md.**—*Collier v. Hanna*, 71 Md. 253, 17 Atl. 1017. **Mich.**—*Van Benschoten v. Fales*, 126 Mich. 176, 85 N. W. 476. **Minn.**—*Rosenberg v. Burnstein*, 60 Minn. 18, 61 N. W. 684. **Mo.**—*Wilson-Obear Groc. Co. v. Cole*, 26 Mo. App. 5. **N. Y.**—*Globe Woolen Co. v. Carhart*, 67 How. Pr. 403; *Hirsch v. Hutchison*, 64 How. Pr. 366, 3 Civ. Proc. 106; *Heye v. Bolles*, 2 Daly 231, 33 How. Pr. 266; *Friend v. Michaelis*, 15 Abb. N. C. 354; *Rogers v. Ingersoll*, 103 App. Div. 490, 93 N. Y. Supp. 140. **Ohio.**—*Sellew v. Chrisfield*, 1 Handy 86, 12 Ohio Dec. 41. **Tenn.** *Johnson v. Rankin*, 59 S. W. 638. **Wis.** *Winner v. Kuehn*, 97 Wis. 394, 72 N. W. 227; *Keith v. Armstrong*, 65 Wis. 225, 26 N. W. 445.

[a] **Transfer by managing partner** sufficient. *Winner v. Kuehn*, 97 Wis. 394, 72 N. W. 227.

93. **Ill.**—*Bryant v. Simoneau*, 51 Ill. 324. **Ohio.**—*Sellew v. Chrisfield*, 1 Handy 86, 12 Ohio Dec. 41. **Vt.** *Leach v. Cook*, 10 Vt. 239.

94. *Woodward v. Stearns*, 10 Abb. Pr. (N. S.) 395.

95. *Conklin v. Harris*, 5 Ala. 213; *Wilcox, Dickerman & Co. v. Carey*, 9 Dana 297.

96. **Ga.**—*Wiley & Co. v. Sledge*, 8 Ga. 532. **La.**—*Weil Bros. v. Adams*, 126 La. 532, 52 So. 757; *Thomas & Co. v. Lusk & Co.*, 13 La. Ann. 277; *Shirley, Escott & Co. v. Steamer Bride*, 5 La. Ann. 260; *Munroe v. Frosh*, 2 La. Ann. 962. **Md.**—*Johnston v. Mathews*, 32 Md. 363. **Miss.**—*Barney v. Moore-Haggerty Lumb. Co.*, 95 Miss. 118, 48 So. 232. **N. J.**—*Hollingshead v. Curtis*, 14 N. J. L. 402. **N. Y.** *Sears v. Gearn*, 7 How. Pr. 383. **Ohio.** *Taylor v. McDonald*, 4 Ohio 149;

2. Of Individual Property for Partnership Debt.—In jurisdictions allowing an action to be brought against one or more partners upon a firm obligation, an attachment in aid of the action may be levied on the individual property of such partner or partners.⁹⁷ But an attachment will not lie against the individual property of an innocent co-partner for a firm debt fraudulently contracted by the other member of the firm.⁹⁸

3. Affidavit.—To procure an attachment against a partnership or its members, an affidavit as required by statute must be made⁹⁹ setting forth the name of the firm,¹ or the names of the persons composing it,² the claim or indebtedness,³ and some one or more of the statutory grounds for the writ.⁴

4. Bond.—A bond complying with the conditions of the statute must be furnished by the attaching party.⁵

5. Writ of Attachment.—a. *Form and Contents.*—In those jurisdictions requiring that the names of the partners be set out in full in the pleadings,⁶ a writ of attachment is fatally defective if it does not set out their names,⁷ but where the statute renders it unneces-

Cowdin v. Hurford, 4 Ohio 132. **Okl.** Johnson v. Jones, 39 Okla. 323, 135 Pac. 12, 48 L. R. A. (N. S.) 547. **Pa.** White's Case, 10 Watts 217; Hauson v. Watson, 12 Wkly. N. C. 368. **R. I.** Remington v. Howard Express Co., 8 R. I. 406. **S. C.**—Whitfield v. Hovey, 30 S. C. 117, 8 S. E. 840; Robinson v. Crowder, 1 Bailey 185. **Tenn.**—Wallace v. Galloway, 5 Coldw. 510. **W. Va.** Goodman v. Henry, 42 W. Va. 526, 26 S. E. 528, 35 L. R. A. 847.

97. Fla.—First Nat. Bank v. Greig, 43 Fla. 412, 31 So. 239. **Ga.**—Cannon v. Dunlap, 64 Ga. 680; Starr v. Mayer & Co., 60 Ga. 546. **Ill.**—Lawrence v. Steadman, 49 Ill. 270; Inderrieden Co. v. Frost, 155 Ill. App. 575; Hinman v. Andrews Opera Co., 49 Ill. App. 135. **Kan.**—Williams v. Muthersbaugh, 29 Kan. 730. **Md.**—Johnston v. Mathews, 32 Md. 363. **Mass.**—Stevens v. Perry, 113 Mass. 380; Allen v. Wells, 22 Pick. 450, 33 Am. Dec. 757. **Mich.**—Jaffray v. Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645; People v. Circuit Judge, 41 Mich. 326, 2 N. W. 26; Edwards v. Hughes, 20 Mich. 289. **Minn.** Daly v. Bradbury, 46 Minn. 396, 49 N. W. 190. **N. J.**—Curtis v. Hollingshead, 14 N. J. L. 402. **N. Y.**—*In re* Matter of Smith, 16 Johns. 102; *In re* Chipman, 14 Johns. 217; Monette v. Chardon, 16 Misc. 165, 37 N. Y. Supp. 2; Bogart v. Dart, 25 Hun 395. **N. C.** Jarvis v. Hyer, 15 N. C. 367. **Pa.** White's Case, 10 Watts 217. **W. Va.** Andrews v. Mundy, 36 W. Va. 22, 14

S. E. 414; Baer v. Wilkinson, 35 W. Va. 422, 14 S. E. 1.

But see Johnson v. Jones, 39 Okla. 323, 135 Pac. 12, 48 L. R. A. (N. S.) 547.

98. Ark.—Worthley v. Goodbar, 53 Ark. 1, 13 S. W. 216. **Kan.**—Williams v. Muthersbaugh, 29 Kan. 730. **Mich.** Jaffray v. Jennings, 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645; Edwards v. Hughes, 20 Mich. 289. **N. Y.**—Monette v. Chardon, 16 Misc. 165, 37 N. Y. Supp. 2, 72 N. Y. St. 135.

99. Johnston & Co. v. Smith, 83 Ga. 779, 10 S. E. 354. See generally 3 STANDARD PROC. 396.

1. Sims, Harrison & Co. v. Jacobson & Co., 51 Ala. 186.

2. Johnston & Co. v. Smith, 83 Ga. 779, 10 S. E. 354.

3. Hines v. Kimball & Co., 47 Ga. 587. See *supra*, II, B, 1.

4. Guckenheimer v. Day, 74 Ga. 1; Corbit v. Corbit, 50 N. J. L. 363, 13 Atl. 178. See 3 STANDARD PROC. 428.

Grounds for writ, see *supra*, II, B, 1, b.

5. Ga.—Birdsong v. McLaren, 8 Ga. 521. **Ia.**—Courrier v. Cleghorn, 3 G. Gr. 523. **Tex.**—De Caussey v. Bailly, 57 Tex. 665.

See generally 3 STANDARD PROC. 443.

6. See infra, II, G, 1, b, (II).

7. Hirsh v. Thurber & Co., 54 Md. 210, reference cannot be had to the affidavit of attachment or any pleading to cure the defect in the writ.

sary to set forth the names of the partners,⁸ the failure to allege the individual names of the members of the partnership will not render the attachment invalid.⁹ The statutory grounds for issuing the writ must sometimes be averred.¹⁰

b. *Levy*.—The officer must make levy of the writ¹¹ upon the property attachable thereunder,¹² and take the goods thus levied upon into his custody.¹³

c. *Quashal or Vacation of Writ*.—In a proper case the writ of attachment may be vacated or quashed.¹⁴ Thus it is ground for quashal of a writ against a partnership that the issuance of such writ was not warranted as to one or more of the partners.¹⁵

C. GARNISHMENT.—In another portion of this work the question of how far creditors may by garnishment reach partnership funds or the property of an individual partner is fully discussed,¹⁶ as is also the matter of parties to such proceeding,¹⁷ and to some extent that of

8. See *infra*, II, G, 1, b, (II).

9. *Ala.*—*McCaskey v. Pollock*, 82 Ala. 174, 2 So. 674. *Ohio*.—*Byers v. Schlup*, 51 Ohio St. 300, 38 N. E. 117, 25 L. R. A. 649. *Tenn.*—*Blue Grass Can. Co. v. Wardman*, 103 Tenn. 179, 52 S. W. 137.

[a] A misnomer of a partner is immaterial where the firm name is correctly stated. *Rushton v. Rowe*, 64 Pa. 63.

[b] Waiver of misnomer by appearance. *Blue Grass Can. Co. v. Wardman*, 103 Tenn. 179, 52 S. W. 137.

10. *Roach v. Brannon*, 57 Miss. 490.

11. See generally 3 STANDARD PROC. 488.

12. *Cogswell v. Wilson*, 19 Ore. 31, 21 Pac. 388. See also cases under note immediately following. And see *supra*, II, B, 1 and 2.

[a] That the partnership property and the individual property of the partners against whom the attachment was issued may be levied on under an attachment against some of the partners, see *Rogers v. Ingersoll*, 103 App. Div. 490, 93 N. Y. Supp. 140.

[b] "An attachment against a partnership by its firm name, without mention of the individual partners, can only be levied on partnership property; it cannot be levied on the individual property of the partners." *Haas v. Cook*, 148 Ala. 670, 41 So. 731.

13. *Hannon v. O'Dell*, 71 Conn. 698, 43 Atl. 147; *Phillips v. Bridge*, 11 Mass. 242.

[a] Where a partner's interest in the firm is attached (1) for his indi-

vidual debt, the officer may in some states take into his possession all the firm property. *Conn.*—*Stevens v. Stevens*, 39 Conn. 474. *Ill.*—*Newhall v. Buckingham*, 14 Ill. 405. *Kan.*—*Hershfield v. Claffin & Co.*, 25 Kan. 166, 37 Am. Rep. 237. *La.*—*Lee v. Bullard*, 3 La. Ann. 462. *Me.*—*Hacker v. Johnson*, 66 Me. 21; *Douglas v. Winslow*, 20 Me. 89. *N. Y.*—*Atkins v. Saxton*, 77 N. Y. 195; *Hergman v. Dettlebach*, 11 How. Pr. 46. *Ohio*.—*Stewart & Co. v. Hunter*, 1 Handy 22, 12 Ohio Dec. (Reprint) 6. *Ore.*—*Cogswell v. Wilson*, 17 Ore. 31, 21 Pac. 388. *R. I.*—*Trafford v. Hubbard*, 15 R. I. 326, 4 Atl. 762, 8 Atl. 690. *Tenn.*—*Saunders v. Bartlett*, 12 Heisk. 316. *Utah*.—*Snell v. Crowe*, 3 Utah 26, 5 Pac. 522. *Vt.*—*Reed v. Shepardson*, 2 Vt. 120, 19 Am. Dec. 697. *Va.*—*Shaver v. White*, 6 Munf. (20 Va.) 110, 8 Am. Dec. 730. (2) But in some jurisdictions the officer cannot in such case take possession of the firm property to the exclusion of the partners. *Conn.*—*Hannon v. O'Dell*, 71 Conn. 698, 43 Atl. 147. *Ind. Ter.*—*Carlisle v. McAlester*, 3 Ind. Ter. 164, 53 S. W. 531. *Mass.*—*Sandborn v. Royce*, 132 Mass. 594; *Crawford v. Capen*, 132 Mass. 596.

14. See generally 3 STANDARD PROC. 747.

15. *Leach v. Cook*, 10 Vt. 239; *Evans v. Virgin*, 69 Wis. 153, 33 N. W. 569.

[a] As to partner filing plea, abatement granted. *Hill v. Bell*, 111 Mo. 35, 19 S. W. 959.

16. 10 STANDARD PROC. 413.

17. As to who must be made parties where a partnership is charged as

process.¹⁸ Where the debtor of a firm is garnished for the individual debt of a partner, the other members of the firm must be given notice of such fact.¹⁹

D. PARTIES.—1. **Generally.**—At common law a partnership is not recognized as a legal entity,²⁰ and in jurisdictions where this rule still prevails, suits by and against partnerships must be conducted in the names of the individual members of the firm.²¹

garnishee, see 10 STANDARD PROC. 486; where the partnership is the debtor, see 10 STANDARD PROC. 487.

Effect upon the proceedings of change in the partnership by death or otherwise, see 10 STANDARD PROC. 487.

18. **As to manner of making service upon partnership as garnishee,** see 10 STANDARD PROC. 496.

19. *Henderson v. Cashman*, 85 Me. 437, 27 Atl. 344.

As to service of notice upon principal defendant, of the garnishment proceedings, see 10 STANDARD PROC. 498.

20. **U. S.**—*Bruett & Co. v. Austin Drainage Excavator Co.*, 174 Fed. 668. **Ala.**—*Illinois Central R. Co. v. Kilgore & Son*, 12 Ala. App. 358, 67 So. 707. **Del.**—*Barber v. Clendaniel*, 102 Atl. 84. **Ia.**—*Markham v. Buckingham*, 21 Iowa 494, 89 Am. Dec. 590. **Mass.**—*Hughes v. Gross*, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L. R. A. 620. **Mo.**—*Weldon v. Fisher*, 194 Mo. App. 573, 186 S. W. 1153. **Neb.**—*McJunkin v. Placek*, 80 Neb. 373, 114 N. W. 411. **Ohio.**—*Smith v. Hoover*, 39 Ohio St. 249, 256. **Tex.**—*Glasscock v. Price*, 92 Tex. 271, 47 S. W. 965; *Commonwealth Bond & Cas. Ins. Co. v. Meeks* (Tex. Civ. App.), 187 S. W. 681. **W. Va.**—*Wilson v. Carter Oil Co.*, 46 W. Va. 469, 33 S. E. 249; *Courson v. Parker*, 39 W. Va. 521, 20 S. E. 583.

21. **U. S.**—*Bruett & Co. v. Austin Drainage Excavator Co.*, 174 Fed. 668; *Fruit-Cleaning Co. v. Fresno Home Packing Co.*, 94 Fed. 845 (equity rule); *Adams v. May*, 27 Fed. 907. **Colo.**—*Simonton v. Rohm*, 14 Colo. 51, 23 Pac. 86. **Del.**—*Roberts v. Rowan & Co.*, 2 Harr. 314. **Fla.**—*Richardson v. Smith & Co.*, 21 Fla. 336. **Ill.**—*Gore v. Muhlenburg*, 135 Ill. App. 525; *Ives v. Muhlenburg*, 135 Ill. App. 517. **Ind.**—*Pollock v. Dunning*, 54 Ind. 115; *Livingston v. Harvey*, 10 Ind. 218. **Ky.**—*Heavrin v. Lack Malleable Iron Co.*, 153 Ky. 329, 155 S. W. 729; *Fox v. Blue-Grass Grocery Co.*, 22 Ky. L.

Rep. 169, 61 S. W. 265. **Md.**—*Armstrong v. Robinson*, 5 Gill & J. 412. **Mich.**—*Barber v. Smith*, 41 Mich. 138, 1 N. W. 992 (common law rule applies to suits in circuit court, but not in justice's court); *Smith v. Canfield*, 8 Mich. 493. **Miss.**—*Lewis v. Cline*, 5 So. 112; *Blackwell v. Reid & Co.*, 41 Miss. 102. **Mo.**—*Iroquois Mfg. Co. v. Annan-Burg Milling Co.*, 179 Mo. App. 87, 161 S. W. 320; *Johnson Mach. Co. v. Watson*, 57 Mo. App. 629. **Mont.**—*Wilson v. Yegen Bros.*, 38 Mont. 504, 100 Pac. 613; *Boyd v. Platner*, 5 Mont. 226, 2 Pac. 346. **N. J.**—*Faulkner v. Whitaker*, 15 N. J. L. 438; *Tomlinson v. Burke*, 10 N. J. L. 295. **N. Y.**—*Liebert v. Reiss*, 174 App. Div. 308, 160 N. Y. Supp. 535; *Union Wine Co. v. Green*, 62 Misc. 551, 115 N. Y. Supp. 921. **Okla.**—*Cox v. Gille Hdw. & Iron Co.*, 8 Okla. 483, 58 Pac. 645. **Ore.**—*Dunham v. Shindler*, 17 Ore. 256, 20 Pac. 326; *Kamm v. Harker*, 3 Ore. 208. **Pa.**—*Tonge v. Item Pub. Co.*, 244 Pa. 417, 91 Atl. 229; *Cover v. Brown, Sutter & Co.*, 7 Pa. Dist. 19. **S. C.**—*Smith v. Walker*, 6 S. C. 169; *Martin v. Kelly, Cheves L. 215*. **Tex.**—*Glasscock v. Price*, 92 Tex. 271, 47 S. W. 965; *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409. **Va.**—*Pate v. Bacon & Co.*, 6 Munf. (20 Va.) 219; *Scott & Co. v. Dunlop, Pollok & Co.*, 2 Munf. (16 Va.) 349. **Wash.**—*Olson v. Veazie*, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855. **W. Va.**—*Courson v. Parker*, 39 W. Va. 521, 20 S. E. 583.

In what name judgment rendered, see *infra*, II, J, 3, b.

[a] **Names of partners set out in caption** is sufficient. *Fruit-Cleaning Co. v. Fresno Home-Packing Co.*, 94 Fed. 845; *Orr v. How*, 55 Mo. 328.

[b] **Where the partners are numerous**, one or more may represent the others. *Lloyd v. Loaring*, 6 Ves. Jr. 773, 31 Eng. Reprint 1302; *Small v. Attwood*, 1 Young 407, 2 L. J. Ex. Eq. 1, 6, *quoted in* *Platt v. Colvin*, 50 Ohio St. 703, 36 N. E. 735. See generally the title "**Parties.**"

Where a partner refuses to join as plaintiff, he may pursuant to the general rule²² be made defendant,²³ or his co-partners may use his name as a plaintiff upon indemnifying him against loss, if so demanded.²⁴

Where Partnership a Legal Entity. — By virtue of statute a partnership is regarded in some states, at least for the purposes of suit, as a legal entity and may be sued,²⁵ and in some jurisdictions both sue and be sued²⁶ in its firm name. The right is sometimes limited to

[c] **An individual doing business in name and style of a firm** (1) should be declared against by his proper Christian and surname (*Schroeder v. Turner*, 68 Md. 506, 13 Atl. 331), (2) although some courts permit a suit to be brought by or against him in the business name assumed. *Birmingham Loan & Auction Co. v. First Nat. Bank*, 100 Ala. 249, 13 So. 945, 46 Am. St. Rep. 45; *Robinovitz v. Hamill*, 44 Okla. 437, 141 Pac. 1024, L. R. A. 1915D, 981; *National Surety Co. v. Oklahoma Presby. College*, 38 Okla. 429, 132 Pac. 652; *Roberts v. Mosier*, 35 Okla. 691, 132 Pac. 678, Ann. Cas. 1914D, 423.

22. See generally the title "Parties," and 11 STANDARD PROC. 971.

23. *Ala.*—*Allen v. White*, Minor 365. *Ark.*—*Ingham Lumber Co. v. Ingersoll & Co.*, 93 Ark. 447, 125 S. W. 139. *Cal.*—*Nightingale v. Scannell*, 6 Cal. 506, 65 Am. Dec. 525. *Ind.*—*Hill v. Marsh*, 46 Ind. 218. *Mo.*—*Sanders v. Clifford*, 72 Mo. App. 548. *N. Y.*—*Schnaier v. Schmidt*, 59 Hun 626, 13 N. Y. Supp. 728, 37 N. Y. St. 641; *Marx v. Valley Stone Co.*, 84 Misc. 514, 147 N. Y. Supp. 519; *Freeman v. Abramson*, 30 Misc. 101, 61 N. Y. Supp. 839. *Tex.*—*Barker v. Abbott*, 2 Tex. Civ. App. 147, 21 S. W. 72; *Hines v. Dean*, 1 White & W. Civ. Cas., §690. *Wis.*—*Noonan v. Orton*, 31 Wis. 265.

24. *Ingham Lumber Co. v. Ingersoll & Co.*, 93 Ark. 447, 125 S. W. 139; *Skeer v. Lehigh Valley Nat. Bank*, 41 Pa. Co. Ct. 42.

25. *Ala.*—*Conn v. Sellers*, 73 So. 961; *Wahouma Drug Co. v. Clay*, 193 Ala. 79, 69 So. 82; *Ratchford v. Covington County Stock Co.*, 172 Ala. 461, 55 So. 806. *Cal.*—*Holden v. Mensinger*, 165 Pac. 950; *Booth v. Gamble*. *Robinson Commission Co.*, 139 Cal. 175, 72 Pac. 908. See *King v. Randlett*, 33 Cal. 318. *Colo.*—*Barnes v. Colorado Springs & C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. 570; *Ellsberry v. Block*, 28 Colo. 477, 65 Pac. 629; *Peabody v. Oleson*, 15 Colo. App. 346, 62 Pac.

234. *Mich.*—*Stever v. Brown*, 119 Mich. 196, 77 N. W. 704, where names of members composing firm are unknown. *Minn.*—*Dimond v. Minnesota Sav. Bank*, 70 Minn. 298, 73 N. W. 182. *Mont.*—*Doll v. Hennessy Mercantile Co.*, 33 Mont. 80, 81 Pac. 625. *Nev.*—*Martin v. District Court*, 13 Nev. 85. *Utah.*—*Hammer v. Ballantyne*, 16 Utah 436, 52 Pac. 770, 67 Am. St. Rep. 643.

[a] **Such statute has no application to suits in equity.** *Levystein v. Gerson, Seligman & Co.*, 147 Ala. 251, 41 So. 774; *Opelika v. Daniel*, 59 Ala. 211.

[b] **If the caption of the complaint contains the names of the members of the firm, it is a sufficient compliance with the statute.** *Foreman v. Weil*, 98 Ala. 495, 12 So. 815.

[c] **Such statute is permissive and does not prevent a suit being brought in the names of the individual partners.** *Cassells' Mill v. Strater Bros. Grain Co.*, 166 Ala. 274, 51 So. 969.

[d] **The addition of the firm name to those of the partners is merely descriptive of the persons, or of the subject matter of the suit, and does not make it a suit by the firm.** *Long v. Kansas City, M. & B. R. Co.*, 170 Ala. 635, 54 So. 62; *Johnston, Nesbitt & Co. v. First Nat. Bank*, 145 Ala. 378, 40 So. 78; *McKissack v. Witz*, 120 Ala. 412, 25 So. 21.

26. *U. S.*—*Empire Rice Mill Co. v. Neumond*, 199 Fed. 800 (Louisiana); *Bruett & Co. v. Austin Drainage Excavator Co.*, 174 Fed. 668 (Iowa); *Ralya Market Co. v. Armour & Co.*, 102 Fed. 530, Iowa. *Ga.*—*McDonough v. Carter*, 98 Ga. 703, 25 S. E. 938; *Central R. Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750. *Ill.*—*Watson v. Coon*, 247 Ill. 414, 93 N. E. 289; *United States Exp. Co. v. Bedbury*, 34 Ill. 459. *Ind.*—*Adams Express Co. v. State*, 161 Ind. 328, 67 N. E. 1033, express companies who have recorded statement of individuals composing the

partnerships formed for the purpose of carrying on a trade or business in the state,²⁷ or that hold property therein.²⁸

Certificate as to Fictitious Name.—The statutes in many jurisdictions require a partnership conducting business under a fictitious name to file a certificate giving the names of the partners, as a condition precedent to the maintenance of a suit upon a partnership demand.^{28½}

firm. **Ia.**—*Van Dyk v. Mosterd*, 171 Iowa 3, 153 N. W. 206; *Hallowell v. McLaughlin Bros.*, 121 N. W. 1039; *Ryerson v. Hendrie*, 22 Iowa 480. **Kan.** *Neiswanger v. Ord*, 81 Kan. 63, 105 Pac. 17, 29 L. R. A. (N. S.) 287. **La.**—*Wolf v. New Orleans Tailor-Made Pants Co.*, 52 La. Ann. 1337, 27 So. 893. **Mich.**—*Stirling v. Heintzman*, 42 Mich. 449, 4 N. W. 165; *Barber v. Smith*, 41 Mich. 138, 1 N. W. 992 (rule in justice's court); *Hubbardston Lumb. Co. v. Covert*, 35 Mich. 254, justice's court. **Neb.**—*Heenan v. Parmele*, 118 N. W. 324; *Stelling v. Peddicord*, 78 Neb. 779, 111 N. W. 793; *Chamberlain Banking House v. Noyes*, *Norman & Co.*, 3 Neb. (Unof.) 550, 92 N. W. 175; *Wigton v. Smith*, 57 Neb. 299, 77 N. W. 772. **N. C.**—*Roller v. McKinney*, 159 N. C. 319, 74 S. E. 966; *Heaton v. Wilson*, 123 N. C. 398, 31 S. E. 671. **Ohio.**—*Whitman v. Keith*, 18 Ohio St. 134. **Vt.**—*Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 Atl. 938. **Wyo.**—*Noble v. Hudson*, 20 Wyo. 227, 122 Pac. 901.

[a] **Statute is permissive merely** and does not abrogate the common law rule. **Colo.**—*Peabody v. Oleson*, 15 Colo. App. 346, 62 Pac. 234. **Ia.**—*McCloskey v. Strickland*, 7 Iowa 259. **Ohio.**—*Whitman v. Keith*, 18 Ohio St. 134.

[b] **That security for the costs** must be given where partnership sues in its firm name, see *Peaks v. Graves*, 25 Neb. 235, 41 N. W. 151; *Burlington & M. R. R. Co. v. Dick*, 7 Neb. 242.

[c] **Although a contract is made by them as individuals**, if they subsequently file a certificate of a fictitious partnership they may sue on the contract as a partnership. *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 596, 109 Pac. 113.

27. **U. S.**—*Irvine v. Church*, 227 Fed. 252, Ohio. **Neb.**—*McJunkin v. Placek*, 80 Neb. 373, 114 N. W. 411; *Union Pac. Ry. Co. v. Metcalf*, 50 Neb. 452, 69 N. W. 961; *Church v. Callahan*, 49 Neb. 542, 68 N. W. 932. **Ohio.**

Byers v. Schluppe, 51 Ohio St. 300, 38 N. E. 117, 25 L. R. A. 649; *Smith v. Hoover*, 39 Ohio St. 249; *Haskins v. Alcott*, 13 Ohio St. 210; *Abernathy v. Latimore*, 19 Ohio 286. **Wyo.** *Noble v. Hudson*, 20 Wyo. 227, 122 Pac. 901; *O'Brien v. Foglesong*, 3 Wyo. 57, 31 Pac. 1047.

[a] **Statutes Must Be Strictly Construed and Followed.**—*Meyer v. Omaha F. & C. Co.*, 76 Neb. 405, 107 N. W. 767; *Church v. Callahan*, 49 Neb. 542, 68 N. W. 932; *Burlington & Missouri River R. Co. v. Dick*, 7 Neb. 242.

[b] **An association formed for an illegal purpose** is not a partnership within the meaning of a statute allowing it to be sued in its assumed name. *Jackson v. Akron Brick Assn.*, 53 Ohio St. 303, 41 N. E. 257, 53 Am. St. Rep. 638, 35 L. R. A. 287.

28. **U. S.**—*Irvine v. Church*, 227 Fed. 252, Ohio. **Neb.**—*McJunkin v. Placek*, 80 Neb. 373, 114 N. W. 411; *Union Pac. Ry. Co. v. Metcalf*, 50 Neb. 452, 69 N. W. 961; *Church v. Callahan*, 49 Neb. 542, 68 N. W. 932; *Herron v. Cole Bros.*, 25 Neb. 692, 41 N. W. 765. **Ohio.**—*Byers v. Schluppe*, 51 Ohio St. 300, 38 N. E. 117, 25 L. R. A. 649; *Smith v. Hoover*, 39 Ohio St. 249. **Wyo.**—*Noble v. Hudson*, 20 Wyo. 227, 122 Pac. 901; *O'Brien v. Foglesong*, 3 Wyo. 57, 31 Pac. 1047.

[a] **If the partnership holds property** in the state, it may be sued in its firm name, although not formed for such purpose. *Irvine v. Church*, 227 Fed. 252.

28½. **Ariz.**—*McFadden v. Stanley*, 16 Ariz. 91, 141 Pac. 732. **Cal.**—*Holden v. Mensinger*, 165 Pac. 950; *North v. Moore*, 135 Cal. 621, 67 Pac. 1037. **Mich.**—*Turnbull v. Michigan Cent. R. Co.*, 183 Mich. 213, 150 N. W. 132. **Mont.**—*Vaughan v. Kujath*, 44 Mont. 484, 120 Pac. 1121. **Ohio.**—*Walsh v. J. R. Thomas Sons*, 91 Ohio St. 210, 110 N. E. 454; *Cobble v. Farmers' Bank*, 63 Ohio St. 528, 59 N. E. 221. **Okla.**—*Oklahoma Fire Ins. Co. v. Wagester*, 38 Okla. 291, 132 Pac. 1071; *Choctaw Lumb. Co. v. Gilmore*, 11 Okla.

2. Actions Ex Contractu. — a. *Plaintiffs.* — (I.) *In General.* — As a general rule in a suit upon a partnership contract, all persons who were partners at the time of making such contract are necessary parties plaintiff.²⁹ It is permissible,³⁰ but not necessary, to join either

462, 68 Pac. 733; *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924.

[a] **Statute not applicable (1) to tort actions (Cal.)**—*Ralph v. Lockwood*, 61 Cal. 155. **Colo.**—*Melcher v. Beeler*, 48 Colo. 233, 110 Pac. 181, 139 Am. St. Rep. 273; *Pedroni v. Eppstein*, 17 Colo. App. 424, 68 Pac. 794. **Ohio.** Anonymous, 7 Ohio N. P. 568), (2) nor where an individual is doing business under a fictitious name (*Robinovitz v. Hamill*, 44 Okla. 437, 144 Pac. 1024, L. R. A. 1915D, 981; *Oklahoma Fire Ins. Co. v. Wagester*, 38 Okla. 291, 132 Pac. 1071), (3) nor where a nonresident partnership, not having a place of business in the state, transacts business therein. *Cahn v. Gottschalk*, 14 Daly 542, 2 N. Y. Supp. 13, 16 N. Y. St. 818; *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924.

As to whether an assignee may sue where the statute has not been complied with, see *infra*, II, D, 2, a, (II), note 36.

As to necessity of pleading compliance or non-compliance, see *infra*, II, G, 1, b, (IV); II, G, 2, c.

29. U. S.—*Vinal v. West Virginia Oil & Oil Land Co.*, 110 U. S. 215, 4 Sup. Ct. 4, 28 L. ed. 124; *Seymour v. Western R. Co.*, 106 U. S. 320, 1 Sup. Ct. 123, 27 L. ed. 103; *McAulay v. Moody*, 185 Fed. 144; *Crosby v. Hammerling*, 170 Fed. 857. **Ala.**—*Simmons v. Titcher*, 102 Ala. 317, 14 So. 786; *Cochran v. Cunningham's Exr.*, 16 Ala. 448, 50 Am. Dec. 186; *Monroe v. Ezzell*, 11 Ala. 603. **Ark.**—*Cannon v. Harmon*, 124 Ark. 344, 187 S. W. 164; *Ingham Lumber Co. v. Ingersoll & Co.*, 93 Ark. 447, 125 S. W. 139; *Leola Lumber Co. v. Bozarth*, 91 Ark. 10, 120 S. W. 152. **Ga.**—*Callaway v. Pearson*, 139 Ga. 540, 77 S. E. 816; *Granger v. Knight*, 134 Ga. 839, 68 S. E. 648; *Thompson v. McDonald*, 84 Ga. 5, 10 S. E. 448. **Haw.**—*Silva v. De Freitas*, 18 Hawaii 613. **Ill.**—*American Central Ry. Co. v. Miles*, 52 Ill. 174. **Ky.**—*Dougherty v. Smith, Wilson & Co.*, 4 Mete. 279; *Creel v. Bell & Co.*, 2 J. J. Marsh. 309; *Snodgrass v. Broadwell*, 2 Litt. 353. **La.**—*Dorr v. Jouet*, 20 La. Ann. 27; *Gallot v. McCluskey*, 18 La. Ann. 259; *Cutler*

v. Cochran, 13 La. 482. **Me.**—*Bumpus v. Turgeon*, 98 Me. 550, 57 Atl. 883; *Day v. Swann*, 13 Me. 165. **Md.**—*Smith v. Crichton*, 33 Md. 103; *Armstrong v. Robinson*, 5 Gill & J. 412; *Mitchell v. Dall*, 2 Har. & G. 159. **Mass.**—*Fay v. Duggan*, 135 Mass. 242; *Fish v. Gates*, 133 Mass. 441; *Gage v. Rollins*, 10 Mete. 348; *Halliday v. Doggett*, 6 Pick. 359. **Mo.**—*Hardesty v. Atchison*, T. & S. F. Ry. Co. (Mo. App.), 179 S. W. 725; *Anable v. McDonald Land & Min. Co.*, 144 Mo. App. 303, 128 S. W. 38. **Neb.**—*Burlington & M. R. Co. v. Dick*, 7 Neb. 242. **N. H.** *Kenniston v. Ham*, 29 N. H. 501; *Pearson v. Parker*, 3 N. H. 366. **N. Y.** *Frumes v. Glaser*, 127 N. Y. Supp. 321. **N. C.**—*Roller v. McKinney*, 159 N. C. 319, 74 S. E. 966; *Heaton v. Wilson*, 123 N. C. 398, 31 S. E. 671; *Wiley v. Logan*, 95 N. C. 358. **Ohio.** *Choteau v. Raitt*, 20 Ohio 132. **Okla.** *Cox v. Gille Hdw. & Iron Co.*, 8 Okla. 483, 58 Pac. 645. **Pa.**—*Wilson v. Wallace*, 8 Serg. & R. 53. **Tex.**—*Tynburg v. Cohen*, 67 Tex. 220, 2 S. W. 734; *Speake v. Prewitt*, 6 Tex. 252; *Floore v. Burgher & Co.* (Tex. Civ. App.), 128 S. W. 1152; *Allen v. Fleck*, 54 Tex. Civ. App. 507, 118 S. W. 176; *Hoskins v. Velasco Nat. Bank*, 48 Tex. Civ. App. 246, 107 S. W. 598. **Vt.**—*Sawyer v. Worthington*, 28 Vt. 733. **W. Va.**—*Wetherill v. McCloskey Bros. & Co.*, 28 W. Va. 195. **Wis.** *George v. Benjamin*, 100 Wis. 622, 76 N. W. 619, 69 Am. St. Rep. 963; *De Wit v. Lander*, 72 Wis. 120, 39 N. W. 349; *Jackson v. Bohrmann*, 59 Wis. 422, 18 N. W. 456.

[a] **One who receives a share of the profits of a partnership for his services held not a partner and therefore not a necessary party plaintiff.** *Lewis v. Greider*, 51 N. Y. 231; *Delise v. Palladino*, 16 Misc. 74, 37 N. Y. Supp. 705, 73 N. Y. St. 250.

[b] **But where only one partner is really interested**, the name of the other having been inserted in the contract by inadvertence, the former may sue alone as to the real party in interest. *Ware v. Long*, 24 Ky. L. Rep. 696, 69 S. W. 797.

30. Jones v. Howard, 53 Miss. 707.

a dormant³¹ or a nominal³² partner unless there is a privity of contract between them and the defendant.³³ An infant partner should be made a party plaintiff in his own name upon a demand owing to the partnership.³⁴

(II.) Upon Assigned Claim. — The common law rule requiring action upon an assigned partnership claim to be brought in the name of the assignor³⁵ has been generally changed so as to permit suit by a partner or other person in his own name on a partnership claim assigned to him,³⁶ or a suit in the name of all the partners on a contract made

31. **Ala.**—Bank of St. Marys v. St. John, Powers & Co., 25 Ala. 566; Desha, Smith & Co. v. Holland, 12 Ala. 513, 46 Am. Dec. 261; Monroe v. Ezzell, 11 Ala. 603; Shropshire v. Shepperd, 3 Ala. 733. **Ark.**—Beller v. Block, 19 Ark. 566; Phillips v. Pennywit, 1 Ark. 59. **Del.**—McCabe v. Morrison, 2 Harr. 66. **Ind.**—Goble v. Gale, 7 Blackf. 218, 41 Am. Dec. 219. **La.**—Keane v. Fisher & Co., 9 La. Ann. 70. **Me.**—Bumpus v. Turgeon, 98 Me. 550, 57 Atl. 883; Barstow v. Gray, 3 Me. 409. **Md.**—Smith v. Crichton, 33 Md. 103; Mitchell v. Dall, 2 Har. & G. 159. **Mass.**—Wright v. Herrick, 125 Mass. 154; Wood v. O'Kelley, 8 Cush. 406; Robinson v. Mansfield, 13 Pick. 139. **N. H.**—Joyslin v. Taylor, 24 N. H. 268. **N. J.**—Cammack v. Johnson, 2 N. J. Eq. 163. **N. Y.**—Platt v. Halen, 23 Wend. 456; Warner v. Griswold, 8 Wend. 665; Clark v. Miller, 4 Wend. 628. **Ohio.**—Choteau v. Raitt, 20 Ohio 132; Beach v. Hayward, 10 Ohio 455. **Pa.**—Rogers v. Kichline's Admrs., 36 Pa. 293; Morse v. Chase & Co., 4 Watts 456; Wilson v. Wallace, 8 Serg. & R. 53. **Tex.**—Tynberg v. Cohen, 67 Tex. 220, 2 S. W. 734; Garrett v. Muller & Co., 37 Tex. 589; Jackson v. Alexander, 8 Tex. 109. **Vt.**—Waite & Co. v. Dodge, 34 Vt. 181; Lapham v. Green, 9 Vt. 407; Hilliker v. Loop, 5 Vt. 116, 26 Am. Dec. 286. **Wis.**—Platt v. Iron Exchange Bank, 83 Wis. 358, 53 N. W. 737; Bird v. Fake, 1 Pin. 290. **Eng.**—Lloyd v. Archbowle, 2 Taunt. 324, 127 Eng. Reprint 1102 (dormant partner cannot be joined as defendant's right of set-off may be prejudiced); Loveck v. Shaftoe, 2 Esp. N. P. 468.

[a] An ostensible partner is a trustee of an express trust within the meaning of a statute allowing a trustee of an express trust to sue without joining the beneficiary and so he need not join the dormant partner. Platt v. Iron Exchange Bank, 83 Wis. 358, 53 N. W. 737.

32. **Ark.**—Phillips v. Pennywit, 1 Ark. 59. **Ia.**—Enix v. Hays, 48 Iowa 86. **Mass.**—Bishop v. Hall, 9 Gray 430. **N. H.**—Hatch v. Wood, 43 N. H. 633. **N. Y.**—Beudel v. Hettrick, 3 Jones & S. 405, 45 How. Pr. 198. **Vt.**—Waite & Co. v. Dodge, 34 Vt. 181. **Eng.**—Kell v. Nainby, 10 Barn. & C. 20, 21 E. C. L. 19, 5 Man. & Ry. 76, 8 L. J. K. B. O. S. 99, 109 Eng. Reprint 358.

33. **Ala.**—Monroe v. Ezzell, 11 Ala. 603. **Del.**—McCabe v. Morrison, 2 Harr. 66. **Me.**—Barstow v. Gray, 3 Greenl. 409. **Mass.**—Wood v. O'Kelley, 8 Cush. 406. **N. Y.**—Clarkson v. Carter, 3 Cow. 84. **Tex.**—Jackson v. Alexander, 8 Tex. 109; Speake v. Prewitt, 6 Tex. 252. **Wis.**—Bird v. Fake, 1 Pin. 290.

34. Osburn v. Farr, 42 Mich. 134, 3 N. W. 299, infant's father cannot sue as his substitute. But see dictum in Phillips v. Pennywit, 1 Ark. 59, holding that infant partner is not required to join.

35. See the title "Assignments," and the following cases: **Ala.**—Howell v. Reynolds, 12 Ala. 128. **Ark.**—Molen v. Orr, 44 Ark. 486. **Me.**—Lunt v. Stevens, 24 Me. 534. **Md.**—Allstan's Admr. v. Contee's Exr., 4 Har. & J. 351. **Mass.**—Tate v. Citizens' Mut. F. Ins. Co., 13 Gray 79; Russell v. Swan, 16 Mass. 314. **N. Y.**—Baumert v. Daeschler, 65 Misc. 526, 120 N. Y. Supp. 957. **N. C.**—Gaither v. Caldwell, 21 N. C. 504. **Ore.**—Levins v. Stark, 57 Ore. 189, 110 Pac. 980. **Pa.**—Mogrove v. Golden, 101 Pa. 605; Horbach v. Huey, 4 Watts 455. **S. C.**—Degroot v. Darby, 7 Rich. L. 118. **Tex.**—Cleveland v. Heidenheimer, 92 Tex. 108, 46 S. W. 30. **Can.**—Brougham v. Balfour, 3 U. C. C. P. 72.

36. **Ariz.**—McFadden v. Shanley, 16 Ariz. 91, 141 Pac. 732. **Cal.**—Boyce

with an individual or other firm and subsequently assigned to the partnership.³⁷

(III.) **By Indorsee.** — The general rule that the endorsee of a negotiable instrument may maintain an action thereon in his own name,³⁸ applies where a note made payable to a partnership is indorsed or delivered by the payee to another.³⁹

(IV.) **Where Claim Severed.** — A partner cannot maintain a suit in his own name on what his partners agree is his share of a debt due the firm,⁴⁰ nor on what he believes to be his share of the demand,⁴¹ but if the debtor also agrees to the severance of his joint debt, each partner may maintain individual actions for his share.⁴²

v. Gordon, 11 Cal. App. 771, 106 Pac. 264. **Colo.**—*Walker v. Steele*, 9 Colo. 388, 12 Pac. 423. **Ind.**—*Way v. Fravel*, 61 Ind. 162; *Swails v. Coverdill*, 17 Ind. 337. **La.**—*White v. Jones*, 14 La. Ann. 681. **Mich.**—*McKnight v. Lowitz*, 176 Mich. 452, 142 N. W. 769. **Mo.**—*Carroll v. Campbell*, 110 Mo. 557, 19 S. W. 809. **N. J.**—*Trowbridge v. Denning*, 80 N. J. L. 236, 77 Atl. 1068. **N. Y.**—*Phillips v. Clark*, 48 N. Y. 677; *Baumert v. Daeschler*, 65 Misc. 526, 120 N. Y. Supp. 957. **Ohio.**—*Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 58 N. E. 805; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1, 22 Am. Rep. 294. **Ore.**—*Levins v. Stark*, 57 Ore. 189, 110 Pac. 980. **Tex.**—*Cleveland v. Heidenheimer*, 92 Tex. 108, 46 S. W. 30; *Keels v. Ashworth* (Tex. Civ. App.), 187 S. W. 1008. **Wis.**—*Viles v. Bangs*, 36 Wis. 131.

Assignee as real party in interest, see generally, 3 STANDARD PROC. 112, and the title "Parties."

[a] **Where the assignment is not authorized by law the assignor must be made a party.** *Arnold v. Moss*, 27 Okla. 524, 112 Pac. 995, partnership accounts.

[b] **An assignee of a partner's interest in a particular contract of the partnership is not a necessary party to an action upon such contract, since the attempted assignment makes the assignee but a creditor of the firm.** *Bingel v. Brown*, 15 Colo. App. 241, 61 Pac. 435.

[c] **Where a certificate must be filed by a partnership doing business under a fictitious name before it is permitted to maintain actions on partnership matters** (1), an assignee may maintain an action on the partnership transaction, although no certificate has been filed (*Cheney v. Newberry*, 67 Cal. 126, 7 Pac. 445. See also *Quan Wye v.*

Chin Lin Hee, 123 Cal. 185, 55 Pac. 783. *Contra*, *Choctaw Lumb. Co. v. Gilmore*, 11 Okla. 462, 68 Pac. 733), except (2) where the statute forbids the assignee as well as the partners from suing. **Creditors' Adjustment Co. v. Rossi**, 26 Cal. App. 725, 148 Pac. 528. As to necessity for such certificate, see *supra*, II, D, 1.

37. **Ia.**—*Welsh v. Lemert*, 92 Iowa 116, 60 N. W. 230. **N. Y.**—*Gast v. Johnston*, 3 N. Y. St. 258. **Tex.**—*Cleveland v. Heidenheimer*, 92 Tex. 108, 46 S. W. 30. **Wis.**—*Badger v. Daenicke*, 56 Wis. 678, 14 N. W. 821.

38. See 4 STANDARD PROC. 234.

39. **Ill.**—*American Cent. Ry. Co. v. Miles*, 52 Ill. 174. **La.**—*Dorr v. Jouet*, 20 La. Ann. 27. **Mass.**—*Estabrook v. Smith*, 6 Gray 570, 66 Am. Dec. 443; *Russell v. Swan*, 16 Mass. 314. **Minn.**—*Pease v. Rush*, 2 Minn. 107. **Mo.**—*Canefox v. Anderson*, 22 Mo. 347. **N. H.**—*Burnham v. Whittier*, 5 N. H. 234. **N. Y.**—*Kirby v. Cogswell*, 1 Caines 505. **Colem. & C. Cas.** 320. **Ore.**—*Levins v. Stark*, 57 Ore. 189, 110 Pac. 980. **Wis.**—*Manegold v. Dulau*, 30 Wis. 541.

[a] **Individual indorsement of one partner to another is not sufficient to permit the bringing of the action in his name, where the partnership is the payee.** *Estabrook v. Smith*, 6 Gray (Mass.) 570, 66 Am. Dec. 443.

40. *American Cent. Ry. Co. v. Miles*, 52 Ill. 174; *Rockwood v. Allen*, 7 Mass. 254.

41. **U. S.**—*Vinal v. West Virginia Oil & Oil Land Co.*, 110 U. S. 215, 4 Sup. Ct. 4, 28 L. ed. 124. **Md.**—*Corner v. Gilman*, 53 Md. 364. **Mich.**—*Bigelow v. Reynolds*, 68 Mich. 344, 36 N. W. 95. **Mo.**—*Anable v. McDonald Land & M. Co.*, 144 Mo. App. 303, 128 S. W. 38. **Can.**—*Marsolais v. Willett*, 17 Queb. Sup. Ct. 262.

42. **Mass.**—*Baker v. Jewell*, 6 Mass.

(V.) **Partner as Trustee.** — Where one partner is trustee for the partnership, he need not join the remaining partners in an action involving the subject-matter of the trust.⁴³

(VI.) **Contracts in Name of Partner.** — Where the contract is made on behalf of the partnership as an undisclosed principal, it may bring an action thereon,⁴⁴ or the action may be brought by the partner alone, in whose name the contract was made,⁴⁵ in accordance with the general principles elsewhere discussed.⁴⁶

b. **Defendants.** — (I.) **In General.** — Actions upon partnership contracts should be brought against all the partners who were members of the firm when the contract was entered into⁴⁷ unless they be dor-

460, 4 Am. Dec. 162. **N. J.**—Blair v. Snover, 10 N. J. L. 152. **N. Y.** Bunn v. Morris, 3 Caines 54.

43. **Mich.**—Sheldon v. Bennett, 44 Mich. 634, 7 N. W. 223. **N. Y.**—Howe v. Savory, 49 Barb. 403. **Wis.**—Robbins v. Deverill, 20 Wis. 142.

As to right of a trustee of an express trust to sue alone, see generally the title "Parties."

44. **Ill.**—Havana, R. & E. R. Co. v. Walsh, 85 Ill. 58; Illinois Central R. Co. v. Owens, 53 Ill. 391. **Ind.**—Ward v. Leviston, 7 Blackf. 466. **Mass.** Gage v. Rollins, 10 Metc. 348. **Mich.** Philpott v. Bechtel, 104 Mich. 79, 62 N. W. 174; Gilbert v. Lichtenberg, 98 Mich. 417, 57 N. W. 259. **N. Y.** Beakes v. Da Cunha, 126 N. Y. 293, 27 N. E. 251. **P. I.**—Tuason v. Zamora & Sons, 2 Phil. Isl. 305. **S. C.**—Munroe v. Williams, 35 S. C. 572, 15 S. E. 279. **Wis.**—Badger v. Daenicke, 56 Wis. 678, 14 N. W. 821. **Eng.**—Garrett v. Handley, 3 Barn. & C. 462, 10 E. C. L. 214, 5 D. & R. 319, 3 L. J. K. B. O. S. 47, 107 Eng. Reprint 805.

But see Mead v. Tomlinson, 1 Day (Conn.) 148, 2 Am. Dec. 62, that the contracting partner only can sue.

[a] Where a party refuses to contract with the firm but makes a contract with a single partner only, the latter may sue. Burwitz v. Jeffers, 103 Mich. 512, 61 N. W. 784.

45. **D. C.**—Simmons v. Jaselli, 33 App. Cas. 242. **Ga.**—Council v. Teal, 122 Ga. 61, 49 S. E. 806. **Ill.**—Hair Co. v. Thorne, 27 Ill. App. 502. **Ind.** Ewing v. French, 1 Blackf. 353. **Ia.** Flanders v. Monroe, 172 Iowa 347, 154 N. W. 586, is real party in interest. **La.**—Lejeune v. Vaufrey Sugar Planting & Mfg. Co., 123 La. 871, 49 So. 603. **Mo.**—Taylor v. Steamboat Robert Campbell, 20 Mo. 254; Bryant v. Phillips, 189 Mo. App. 278, 176 S. W.

294. **N. Y.**—Platt v. Halen, 23 Wend. 456. **Tex.**—Missouri Pac. Ry. Co. v. Smith, 84 Tex. 348, 19 S. W. 509; Covington v. Sloan (Tex. Civ. App.), 124 S. W. 690. **Vt.**—Curtis v. Belknap, 21 Vt. 433. **Eng.**—Metcalf v. Rycroft, 6 Maule & Sel. 75, 105 Eng. Reprint 1171.

46. See the titles "Parties;" "Principal and Agent."

47. **U. S.**—Bell v. Donohoe, 17 Fed. 710, 8 Sawy. 435. **Ark.**—Coleman v. Fisher, 67 Ark. 27, 53 S. W. 671. **Cal.** Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456. **Colo.**—Erskine v. Russell, 43 Colo. 449, 96 Pac. 249. **D. C.** Parker v. Heald, 29 App. Cas. 35. **Ga.**—Wiley & Co. v. Sledge, 8 Ga. 532. **Ill.**—Sherburne v. Hyde, 185 Ill. 580, 57 N. E. 776; Sandusky v. Sidwell, 173 Ill. 493, 50 N. E. 1003; Coates v. Preston, 105 Ill. 470; Pettis v. Atkins, 60 Ill. 454; Page v. Brant, 18 Ill. 37; Fleming v. Ross, 125 Ill. App. 265, affirmed in 225 Ill. 149, 80 N. E. 92. **Ky.**—Heavrin v. Lack Malleable Iron Co., 153 Ky. 329, 155 S. W. 729; Nichols & Co. v. Burton, 5 Bush 320. **Md.**—Loney v. Bailey, 43 Md. 10; Smith v. Cooke, 31 Md. 174, 100 Am. Dec. 58; Kent v. Holliday, 17 Md. 387. **Neb.**—Bowen v. Crow, 16 Neb. 556, 20 N. W. 850; Leach v. Milburn Wagon Co., 14 Neb. 106, 15 N. W. 232; Fox v. Abbott, 12 Neb. 328, 11 N. W. 303. **Nev.**—Tinkum v. O'Neale, 5 Nev. 93. **N. J.**—Curtis v. Hollingshead, 14 N. J. L. 402. **N. Y.**—Green v. Lippincott, 53 How. Pr. 33; Farwell v. Davis, 66 Barb. 73; Harris v. Schultz, 40 Barb. 315; Hyde v. Lesser, 93 App. Div. 320, 87 N. Y. Supp. 878; Merrill v. Blanchard, 7 App. Div. 167, 40 N. Y. Supp. 48, 7 N. Y. St. 661. **N. C.**—Heaton v. Wilson, 123 N. C. 398, 31 S. E. 671. **Okla.**—Taby v. McMurray, 30 Okla. 602, 120 Pac. 664; Holden v.

mant⁴⁸ or nominal⁴⁹ partners whom the plaintiff may, but is not compelled to, join as defendants. An infant partner should be made a party in accordance with the general rule in regard to infants.⁵⁰

(II.) **Joint and Several Liability.**—Where the liability of the partners is made joint and several, a person having a demand against the partnership may sue it as such,⁵¹ or may, at his election, bring it against all or either of the individual members thereof,⁵² or against

Lynn, 30 Okla. 663, 120 Pac. 246, 38 L. R. A. (N. S.) 239; Cox v. Gille Hdw. & Iron Co., 8 Okla. 483, 58 Pac. 645. **R. I.**—Nathanson v. Spitz, 19 R. I. 70, 31 Atl. 690. **S. C.**—Pope Mfg. Co. v. Welch, 55 S. C. 528, 33 S. E. 787. **Tex.**—Frank v. Tatum, 87 Tex. 204, 25 S. W. 409; Tynburg v. Cohen, 67 Tex. 220, 2 S. W. 734; Davis v. Willis, 47 Tex. 154; Biggs v. Lee (Tex. Civ. App.), 137 S. W. 138; Floore v. Burgher & Co. (Tex. Civ. App.), 128 S. W. 1152. **Va.**—Ward v. Motter, 2 Rob. (41 Va.) 536. **W. Va.**—Carlson's Admr. v. Ruffner, 12 W. Va. 297.

[a] **Persons holding themselves out as partners** may be joined, though there is no partnership in fact. Cottrill v. Vanduzen, 22 Vt. 511.

[b] **Strangers to the partnership** cannot be made defendants to an action on a partnership obligation. Laird v. Umberger, 1 Phila. (Pa.) 518.

[c] **The husband of a partner** is a proper party. Keller v. Hicks, 22 Cal. 457, 83 Am. Dec. 78. But see 11 STANDARD PROC. 734, et seq.

48. **U. S.**—Bank of Alexandria v. Mandeville, 1 Cranch C. C. 575, 2 Fed. Cas. No. 851. **Cal.**—Tomlinson v. Spencer, 5 Cal. 291. **Ill.**—Page v. Brant, 18 Ill. 37; Conley v. Good, 1 Ill. 135; Baccash v. United States Tent & Awning Co., 135 Ill. App. 121. **Ky.**—Williams v. Rogers, 14 Bush 776. **Md.**—Hopkins v. Kent, 17 Md. 72. **Mass.**—Wright v. Herrick, 125 Mass. 154; Lord v. Baldwin, 6 Pick. 348; Sylvester v. Smith, 9 Mass. 119. **Minn.**—Wood v. Cullen, 13 Minn. 394. **Mo.**—Richardson v. Farmer, 36 Mo. 35, 88 Am. Dec. 129. **N. H.**—Elliot v. Stevens, 38 N. H. 311. **N. J.**—Cammack v. Johnson, 2 N. J. Eq. 163. **N. Y.**—Scott v. Conway, 58 N. Y. 619; Leslie v. Wiley, 47 N. Y. 648; North v. Bloss, 30 N. Y. 374. **Pa.**—Johnston v. Warden, 3 Watts 101. **S. C.**—Reab v. Pool, 30 S. C. 140, 8 S. E. 703. **Tenn.**—Nichols v. Cheairs, 4 Sneed 229. **Tex.**—Tynburg v. Cohen, 67 Tex. 220, 2 S. W.

734; Floore v. Burgher & Co. (Tex. Civ. App.), 128 S. W. 1152; Davis v. Bingham (Tex. Civ. App.), 46 S. W. 840. **Vt.**—Hagar v. Stone, 20 Vt. 106; Blin v. Pierce, 20 Vt. 25; Hicks & Co. v. Cram, 17 Vt. 449. **Va.**—Ward v. Motter, 2 Rob. (41 Va.) 536. **Eng.**—De Mautort v. Saunders, 1 Barn. & A. 398, 20 E. C. L. 534, 9 L. J. K. B. O. S. 51, 109 Eng. Reprint 836; Beckham v. Drake, 9 Mees. & W. 79.

[a] **The nonjoinder of a dormant partner** cannot be questioned by a defendant. **Cal.**—Tomlinson v. Spencer, 5 Cal. 291. **Ill.**—Conley v. Good, 1 Ill. 135. **Md.**—Hopkins v. Kent, 17 Md. 72. **Neu.**—Pinschowers v. Hanks, 18 Nev. 99, 1 Pac. 454. **N. Y.**—New York Dry-Dock Co. v. Treadwell, 19 Wend. 525. **Pa.**—Carey v. Bright, 58 Pa. 70. **Vt.**—Hagar v. Stone, 20 Vt. 106; Hicks & Co. v. Cram, 17 Vt. 449; Cleveland v. Woodward, 15 Vt. 302, 40 Am. Dec. 682; Goddard v. Brown, 11 Vt. 278. **Eng.**—De Mautort v. Saunders, 1 Barn. & A. 398, 20 E. C. L. 534, 9 L. J. K. B. O. S. 51, 109 Eng. Reprint 836.

49. Hatch v. Wood, 43 N. H. 633.

50. Gay v. Johnson, 32 N. H. 167.

As to general rule, see *supra*, II, D, 2, a, (I).

As to judgment rendered in action where plea of infancy is sustained, see *infra*, II, J, 3, c.

51. Hallowell v. McLaughlin Bros. (Iowa), 121 N. W. 1039; Anderson v. Wilson, 142 Iowa 158, 120 N. W. 677; Lewinson v. First Nat. Bank, 11 N. M. 510, 70 Pac. 567; Curran v. Kendall Boot & Shoe Co., 8 N. M. 417, 45 Pac. 1120.

[a] **Substitution of Partners.**—Where plaintiff elects to make the partnership the sole defendant, he cannot be compelled to substitute the partners as defendants, either upon the application of the partnership or the partners. Hallowell v. McLaughlin Bros. (Iowa), 121 N. W. 1039.

52. **Ala.**—Brooks v. Lowenstein, 124 Ala. 158, 27 So. 520; Alexander v.

it and all or any of the members thereof.⁵³

(III.) **Assumption by Partner of Firm Indebtedness.** — The mere fact that one partner assumes the firm liabilities and assets, with knowledge of the creditors, does not prevent the latter from suing all the partners.⁵⁴

(IV.) **Contracts Made With Individual Member.** — The firm should not be made a party to an action upon an individual obligation of one of its members,⁵⁵ nor are the other members of the firm necessary parties to an action upon a contract made in the name of one of the partners, notwithstanding it was in fact made in behalf of the firm.⁵⁶

3. Actions Ex Delicto. — a. *Plaintiffs.* — To redress injuries to the firm, the partnership and not an individual member must sue,⁵⁷

Jones, 90 Ala. 474, 7 So. 903. Ark. Kent v. Wells, 21 Ark. 411; Hicks v. Branton, 21 Ark. 186; Hicks v. Maness, 19 Ark. 701; Burgen v. Dwinall, 11 Ark. 314; Hamilton v. Buxton, 6 Ark. 24. Ga.—Bray v. Peace, 131 Ga. 637, 62 S. E. 1025. Ia.—Hallowell v. McLaughlin Bros., 121 N. W. 1039; Anderson v. Wilson, 142 Iowa 158, 120 N. W. 677; Allen v. Maddox, 40 Iowa 124; Ryerson v. Hendrie, 22 Iowa 480; Sherman v. Christy, 17 Iowa 322. Kan. Crane v. Ring, 48 Kan. 58, 28 Pac. 1010. Ky.—Hunt v. Semonin, 79 Ky. 270; Fulton v. Whitehead, 8 Ky. L. Rep. 525, action upon a promissory note executed in the firm name. Miss. Miller v. Northern Bank, 34 Miss. 412; Keerl v. Bridgers, 10 Smed. & M. 612; Nutt v. Hunt, 4 Smed. & M. 702; Fairchild v. Grand Gulf Bank, 5 How. 597. Mo.—Hutchinson v. Richmond Safety Gate Co., 247 Mo. 71, 152 S. W. 52; Knox County Sav. Bank v. Cottey, 70 Mo. 150; Cannon v. Wing, 150 Mo. App. 12, 129 S. W. 718. N. M.—Lewinson v. First Nat. Bank, 11 N. M. 510, 70 Pac. 567; Curran v. Kendall Boot & Shoe Co., 8 N. M. 417, 45 Pac. 1120. N. Y.—Snow v. Howard, 35 Barb. 55, joint and several promissory note. N. C.—Ruffy v. Claywell, Powell & Co., 93 N. C. 306; Logan v. Wallis, 76 N. C. 416. Tenn.—Saunders v. Wilder, 2 Head 577. Tex.—Webb v. Gregory, 49 Tex. Civ. App. 282, 108 S. W. 478; Hoxie v. Farmers' & Mechanics' Nat. Bank, 20 Tex. Civ. App. 462, 49 S. W. 637. W. Va.—Lee v. Hassett, 41 W. Va. 368, 23 S. E. 559.

[a] **Nominal partners or persons holding themselves out as members of a partnership may be sued alone without joining the actual partners.** Rabitte v. Orr, 83 Ala. 185, 3 So. 420.

[b] **By dismissing the suit as to one partner, the plaintiff elects to proceed against the other partner severally.** Mitchell v. Greenwald, 43 Miss. 167.

53. U. S.—Martin v. Meyer, 45 Fed. 435. Ala.—Rabitte v. Orr, 83 Ala. 185, 3 So. 420. Ia.—Anderson v. Wilson, 142 Iowa 158, 120 N. W. 677. Tex. Webb v. Gregory, 49 Tex. Civ. App. 282, 108 S. W. 478.

54. See *infra*, II, D, 5, a.

55. Ill.—Watt v. Kirby, 15 Ill. 200. Ky.—Lafon v. Chinn, 6 B. Mon. 305. Mo.—Gates v. Watson, 54 Mo. 585. N. Y.—New York Fireproof Tenement Assn. v. Stanley, 105 App. Div. 432, 94 N. Y. Supp. 160. Vt.—Prentiss v. Foster, 28 Vt. 742; Holmes v. Burton, 9 Vt. 252, 31 Am. Dec. 621. Va. Galt's Exrs. v. Calland's Exr., 7 Leigh (34 Va.) 594.

56. Mass.—Sylvester v. Smith, 9 Mass. 119. N. H.—Clark v. Amoskeag Mfg. Co., 62 N. H. 612. N. Y.—Farwell v. Davis, 66 Barb. 73; Clark v. Holmes, 3 Johns. 148. Ohio.—Caldwell v. Devinney, 7 Ohio Dec. (Reprint) 599. Vt.—Cleveland v. Woodward, 15 Vt. 302, 40 Am. Dec. 682; Goddard v. Brown, 11 Vt. 278.

57. Ala.—Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59. Cal.—Hughes v. Boring, 16 Cal. 81; Nightingale v. Scannell, 6 Cal. 506, 65 Am. Dec. 525. Conn.—Leavett v. Sherman, 1 Root 159. Ill.—Lachmann v. Benson, 167 Ill. App. 85. Me.—Gannett v. Cunningham, 34 Me. 56. Mass.—Russell v. Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432; Robinson v. Mansfield, 13 Pick. 139; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141. Mich.—Bigelow v. Reynolds, 68 Mich. 344, 36 N. W. 95; Haynes v. Knowles, 36 Mich. 407.

but the latter must proceed alone for torts resulting in damage to him individually.⁵⁸ When one partner colludes with a stranger to injure his copartners, the latter may maintain a joint action for injury to their common interest in the partnership fund.⁵⁹

Replevin should generally be maintained in the names of all the partners jointly,⁶⁰ but a partner entitled to the possession of firm property may replevy it against a third person.⁶¹

b. *Defendants*.—Liability for a tort being a joint and several one, the plaintiff may, in an action for a tort committed by a partnership, sue any individual member of the firm,⁶² or he may sue all of the part-

Minn.—Cochrane *v.* Quackenbush, 29 Minn. 376, 13 N. W. 154. **Neb.**—Edwards *v.* Hatfield, 93 Neb. 712, 141 N. W. 1020; Peaks *v.* Graves, 25 Neb. 235, 41 N. W. 151. **N. H.**—Newman *v.* Bean, 21 N. H. 93. **N. Y.**—Collier *v.* Postum Cereal Co., 150 App. Div. 169, 134 N. Y. Supp. 847; Moppar *v.* Wiltehik, 56 Misc. 676, 107 N. Y. Supp. 594; Kornblum *v.* Commercial Advertiser Assn., 164 N. Y. Supp. 186. **Tex.**—Barker *v.* Abbott, 2 Tex. Civ. App. 147, 21 S. W. 72. **Vt.**—Farnum *v.* Ewell, 59 Vt. 327, 10 Atl. 527. **Wash.**—Seidell *v.* Taylor, 86 Wash. 645, 151 Pac. 41, complaint held sufficient to state cause of action in partnership. **Eng.**—Harrison *v.* Bevington, 8 Car. & P. 708, 34 E. C. L. 975; Haythorn *v.* Lawson, 3 Car. & P. 196, 14 E. C. L. 523; Williams *v.* Beaumont, 10 Bing. 260, 25 E. C. L. 127, 3 Moo. & Sc. 705, 3 L. J. C. P. 31, 131 Eng. Reprint 904.

58. Ala.—Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59. **Conn.**—Leavet *v.* Sherman, 1 Root 159. **Ga.**—Constitution Pub. Co. *v.* Way, 94 Ga. 120, 21 S. E. 139; Copeland *v.* Tyus, 18 Ga. App. 196, 89 S. E. 188. **Ind.**—Anderson *v.* Evansville Brew. Assn., 49 Ind. App. 403, 97 N. E. 445. **Ind. Ter.**—Carlisle *v.* McAlester, 3 Ind. Ter. 164, 53 S. W. 531. **Ia.**—Hollgren *v.* Des Moines City R. Co., 174 Iowa 568, 156 N. W. 690. **Kan.**—Spalding *v.* Black, 22 Kan. 55; Hogendobler *v.* Lyon, 12 Kan. 276, where partnership property was converted after dissolution, the partner aiding in the conversion need not be joined. **N. Y.**—Calkins *v.* Smith, 48 N. Y. 614, 8 Am. Dec. 575; Collier *v.* Postum Cereal Co., 150 App. Div. 169, 134 N. Y. Supp. 847; Rosenwald *v.* Hammerstein, 12 Daly 377. **Eng.**—Story *v.* Richardson, 6 Bing. N. C. 123, 37 E. C. L. 541, 8 Scott 291, 9 L. J. C. P. 43, 4 Jur. 26, 133 Eng.

Reprint 49; Harrison *v.* Bevington, 8 Car. & P. 708, 34 E. C. L. 975.

59. Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154.

60. Ind.—Ferguson *v.* Day, 6 Ind. App. 138, 33 N. E. 213. **Neb.**—Cinfel *v.* Malena, 67 Neb. 95, 93 N. W. 165. **N. Y.**—Freeman *v.* Abramson, 30 Misc. 101, 61 N. Y. Supp. 839. **N. C.**—Heaton *v.* Wilson, 123 N. C. 398, 31 S. E. 671.

61. Anderson v. Stewart, 108 Md. 340, 70 Atl. 228.

[a] **Interest of Partner Levied on.** Where a writ of attachment was levied on the interest of a partner in the partnership assets, the other partner may replevy the property and in the replevin suit have the value of the partner's interest ascertained, and after paying such value may retain the property. Coggsall *v.* Mungér, 54 Mo. App. 420.

Replevin against another partner, see *supra*, I, A, 5.

62. Cal.—Murphy *v.* Coppieters, 136 Cal. 317, 68 Pac. 970; Rogers *v.* Ponet, 21 Cal. App. 577, 132 Pac. 851. **Colo.**—Rice *v.* Van Why, 49 Colo. 7, 111 Pac. 599. **Conn.**—Pratt *v.* Brewster, 52 Conn. 65. **Ill.**—Heidenreich *v.* Bremner, 260 Ill. 439, 103 N. E. 275, *affirming* judgment in 176 Ill. App. 230. **Md.**—Stockton *v.* Frey, 4 Gill 406, 45 Am. Dec. 138. **Mass.**—Brady *v.* Norcross, 172 Mass. 331, 52 N. E. 528; Patten *v.* Gurney, 17 Mass. 182, 9 Am. Dec. 141. **Mo.**—Hutchinson *v.* Richmond Safety Gate Co., 247 Mo. 71, 152 S. W. 52. **N. Y.**—*In re* Peck, 206 N. Y. 55, 99 N. E. 258, Ann. Cas. 1914A, 798, 41 L. R. A. (N. S.) 1223; Roberts *v.* Johnson, 58 N. Y. 613; Hyde & Sons *v.* Lesser, 93 App. Div. 320, 87 N. Y. Supp. 878. **Okla.**—Holden *v.* Lynn, 30 Okla. 663, 120 Pac. 246, 38 L. R. A. (N. S.) 239. **S. C.**—White *v.* Smith, 12 Rich. L. 595. **Vt.**—Lewes

ners,⁶³ or any number of them,⁶⁴ and he may join the partnership itself where it is a legal entity.⁶⁵ Where, however, the action is upon a tort founded on a breach of a contract by the firm, all the partners are necessary parties defendant to such suit, since the action in effect is upon a joint contract.⁶⁶

4. Where Common Members.—Actions ex contractu were not maintainable at common law between partnerships having a common member,⁶⁷ nor between an individual and a partnership of which he is

v. Crane & Sons, 78 Vt. 216, 62 Atl. 60. **Wis.**—*Wood v. Luscomb*, 23 Wis. 287. **Eng.**—*Edmondson v. Davis*, 4 Esp. N. P. 14.

63. Cal.—*Murphy v. Coppieters*, 136 Cal. 317, 68 Pac. 970; *Rogers v. Ponet*, 21 Cal. App. 577, 132 Pac. 851. **Colo.**—*Rice v. Van Why*, 49 Colo. 7, 111 Pac. 599. **Ga.**—*Page v. Citizens' Banking Co.*, 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463. **Ill.**—*Heidenreich v. Bremner*, 260 Ill. 439, 103 N. E. 275, *affirming* judgment in 176 Ill. App. 230. **Me.**—*Head v. Goodwin*, 37 Me. 181. **Mass.**—*Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141. **Mo.**—*Hutchinson v. Richmond Safety Gate Co.*, 247 Mo. 71, 152 S. W. 52. **N. Y.**—*In re Peck*, 206 N. Y. 55, 99 N. E. 258, Ann. Cas. 1914A, 798, 41 L. R. A. (N. S.) 1223; *Roberts v. Johnson*, 58 N. Y. 613. **S. C.**—*Barfield v. Coker & Co.*, 73 S. C. 181, 53 S. E. 170; *Hyrne v. Erwin*, 23 S. C. 226, 55 Am. Rep. 15; *White v. Smith*, 12 Rich. L. 595. **Wis.**—*Fletcher v. Ingram*, 46 Wis. 191, 50 N. W. 424.

64. Cal.—*Rogers v. Ponet*, 21 Cal. App. 577, 132 Pac. 851. **Ill.**—*Heidenreich v. Bremner*, 260 Ill. 439, 103 N. E. 275. **N. Y.**—*In re Peck*, 206 N. Y. 55, 99 N. E. 258, Ann. Cas. 1914A, 798, 41 L. R. A. (N. S.) 1223; *Roberts v. Johnson*, 58 N. Y. 613; *Bank of Orange v. Brown*, 3 Wend. 158. **S. C.**—*White v. Smith*, 12 Rich. L. 595. **Tex.**—*Biggs v. Lee* (Tex. Civ. App.), 137 S. W. 138; *Webb v. Gregory*, 49 Tex. Civ. App. 282, 103 S. W. 478.

65. Page v. Citizens' Bank Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463.

66. Minn.—*Whittaker v. Collins*, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55. **N. Y.**—*Harris v. Schultz*, 40 Barb. 315; *Orange Bank v. Brown*, 3 Wend. 158. **Eng.**—*Buddle v. Willson*, 6 Term R. 369, 101 Eng. Reprint 600.

See generally the title "Parties."

67. Ala.—*Alexander v. Jones*, 90

Ala. 474, 7 So. 903. **Ill.**—*Haven v. Wakefield*, 39 Ill. 509. **Kan.**—*Frye v. Sanders*, 21 Kan. 26, 30 Am. Rep. 421. **Me.**—*Denny v. Metcalf*, 28 Me. 389. **Md.**—*Thompson v. Young*, 90 Md. 72, 44 Atl. 1037. **Minn.**—*Crosby v. Timolat*, 50 Minn. 171, 52 N. W. 526. **Mo.**—*Willis v. Barron*, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673; *Wilson v. Benedict*, 90 Mo. 208, 2 S. W. 283. **N. H.**—*Blaisdell v. Ladd*, 14 N. H. 129; *Burley v. Harris*, 8 N. H. 233, 29 Am. Dec. 650. **N. Y.**—*Taylor v. Thompson*, 176 N. Y. 168, 68 N. E. 240; *Cole v. Reynolds*, 18 N. Y. 74. **N. C.**—*Rogers v. Rogers*, 40 N. C. 31. **Ohio.**—*Gibson & Co. v. Ohio Farina Co.*, 2 Disn. 499, 13 Ohio Dec. 306. **Ore.**—*Beacannon v. Liebe*, 11 Ore. 443, 5 Pac. 273. **Tenn.**—*Banks v. Mitchell*, 8 Yerg. 111, 29 Am. Dec. 106. **Vt.**—*Green v. Chapman*, 27 Vt. 236. **Eng.**—*Bosanquet v. Wray*, 6 Taunt. 597, 1 E. C. L. 771, 2 Marsh. 319, 128 Eng. Reprint 1167.

[a] **An assignment of the claim by the common partner** (1) to his copartners will not give the assignees the right to maintain a suit against the other firm of which he is a member (*Taylor v. Thompson*, 176 N. Y. 168, 68 N. E. 240; *Englis v. Furniss*, 2 Abb. Pr. [N. Y.] 333, 4 E. D. Smith 587); (2) but where the claim is assigned by the partnership to another person, he may maintain an action thereon. *Beacannon v. Liebe*, 11 Ore. 443, 5 Pac. 273.

[b] **Where one firm contracts with an individual of another firm having a common member**, this principle does not apply and an action is properly maintainable. *Moore v. Gano*, 12 Ohio 300; *Jungk v. Reed*, 9 Utah 49, 33 Pac. 236.

[c] **In case of the death of the common member**, the survivor of one firm may sue the survivor of the debtor firm. *Lacy v. Le Bruce*, 6 Ala. 904.

[d] **Where the contracts of part-**

a member.⁶⁸ The rights between such firms, or firm and individual, could only be adjusted in a court of equity.⁶⁹ Now, however, statutes frequently authorize such suits to be maintained in a court of law,⁷⁰ and in states where the law and equity jurisdiction is no longer separate, such suits may be maintained, the court considering questions both of law and equity.⁷¹

5. Changes in the Firm Before Suit.—a. *Dissolution in General.* After dissolution of the firm the partners should sue and be sued in the same manner as before, that is to say, in their individual names,⁷²

ners are joint and several, a member of a firm may be a coplaintiff in an action on a partnership demand against another firm of which he is a partner, provided he is not also joined in the action as defendant. **Ala.**—*Alexander v. Jones*, 90 Ala. 474, 7 So. 903. **Miss.**—*Morris v. Hillery*, 7 How. 61. **Mo.**—*Willis v. Barron*, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673.

68. Ia.—*Hanley v. Elm Grove Mut. Tel. Co.*, 150 Iowa 198, 129 N. W. 807; *Cooper v. Nelson*, 38 Iowa 440. **Me.**—*Denny v. Metcalf*, 28 Me. 389; *Davis v. Briggs*, 39 Me. 304. **Md.**—*Kennedy v. McFadon*, 3 Har. & J. 194, 5 Am. Dec. 434. **Mass.**—*Thayer v. Buffum*, 11 Mete. 398; *Pitcher v. Barrows*, 17 Pick. 361, 28 Am. Dec. 306. **Mich.**—*Kalamazoo Trust Co. v. Merrill*, 159 Mich. 649, 124 N. W. 597. **Mo.**—*Willis v. Barron*, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673. **N. H.**—*Burley v. Harris*, 8 N. H. 233, 29 Am. Dec. 650.

[a] **The indorsee of the common partner** may maintain such an action. **Me.**—*Davis v. Briggs*, 39 Me. 304. **Mass.**—*Thayer v. Buffum*, 11 Mete. 398; *Pitcher v. Barrows*, 17 Pick. 361, 28 Am. Dec. 306. **Mich.**—*Carpenter v. Greenop*, 74 Mich. 664, 42 N. W. 276, 16 Am. St. Rep. 662, 4 L. R. A. 241. **Mo.**—*Willis v. Barron*, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673. **Vt.**—*Walker v. Wait*, 50 Vt. 668.

[b] **An action of mandamus** is not governed by this technical rule of parties. *Cooper v. Nelson*, 38 Iowa 440.

69. Ia.—*Ford v. Independent District*, 46 Iowa 294; *Cooper v. Nelson*, 38 Iowa 440. **Minn.**—*Crosby v. Timolat*, 50 Minn. 171, 52 N. W. 526. **Mo.**—*Willis v. Barron*, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673. **N. Y.**—*Taylor v. Thompson*, 176 N. Y. 168, 68 N. E. 240; *Cole v. Reynolds*, 18 N. Y. 74; *Schnaier v. Schmidt*, 59 Hun 625,

13 N. Y. Supp. 725, 37 N. Y. St. 638. **Ohio.**—*Gibson & Co. v. Ohio Farina Co.*, 2 Disn. 499, 13 Ohio Dec. 306. **Ore.**—*Beacannon v. Liebe*, 11 Ore. 443, 5 Pac. 273. **Tenn.**—*Banks v. Mitchell*, 8 Yerg. 111, 29 Am. Dec. 106. **Vt.**—*Green v. Chapman*, 27 Vt. 236.

70. Ala.—*Alexander v. Jones*, 90 Ala. 474, 7 So. 903. **Kan.**—*Frye v. Sanders*, 21 Kan. 26, action simple debt where no accounting necessary. **Mich.**—*Carpenter v. Greenop*, 74 Mich. 664, 42 N. W. 276, 16 Am. St. Rep. 662, 4 L. R. A. 241. **Pa.**—*Pennock v. Swayne*, 6 Watts & S. 239. **Utah.**—*Jungk v. Reed*, 9 Utah 49, 33 Pac. 236.

71. Mich.—*Carpenter v. Greenop*, 74 Mich. 664, 42 N. W. 276, 16 Am. St. Rep. 662, 4 L. R. A. 241. **N. Y.**—*First Nat. Bank v. Wood*, 128 N. Y. 35, 27 N. E. 1020; *Cole v. Reynolds*, 18 N. Y. 74; *Mangels v. Shaen*, 21 App. Div. 507, 48 N. Y. Supp. 526; *Schnaier v. Schmidt*, 59 Hun 625, 13 N. Y. Supp. 725, 37 N. Y. St. 638. **Tex.**—*Douglass, Brown & Co. v. Neil & Co.*, 37 Tex. 528. **Utah.**—*Jennings v. Pratt*, 17 Utah 129, 56 Pac. 951.

72. Ala.—*Gooden v. Morrow & Co.*, 8 Ala. 486. **Ark.**—*Mathews v. Paine*, 47 Ark. 54, 14 S. W. 463. **Cal.**—*Braun v. Woollacott*, 129 Cal. 107, 61 Pac. 801. **Colo.**—*Walker v. Steele*, 9 Colo. 388, 12 Pac. 423. **Conn.**—*Whiting v. Farrand*, 1 Conn. 60. **Ga.**—*Thompson v. McDonald*, 84 Ga. 5, 10 S. E. 448. **Haw.**—*Silva v. De Freitas*, 18 Hawaii 613. **Ill.**—*Heidenreich v. Bremner*, 260 Ill. 439, 103 N. E. 275, *affirming judgment*, 176 Ill. App. 230. **Ia.**—*Helm v. O'Rourke*, 46 La. Ann. 178, 15 So. 400. **Me.**—*Gannett v. Cunningham*, 34 Me. 56. **Mass.**—*Hyde v. Moxie Nerve-Food Co.*, 160 Mass. 559, 36 N. E. 585; *Fish v. Gates*, 133 Mass. 441. **Mich.**—*Hayes v. Knox*, 41 Mich. 529, 2 N. W. 670. **Miss.**—*Holmes v. Shands*, 26 Miss. 639. **Mo.**—*Willis Coal & Mining Co. v. Furstenfeld*, 146 Mo.

and not in the name of one of the former partners,⁷³ unless there has been an assignment to him.⁷⁴ Thus where a partnership is dissolved by one partner retiring, he should still be made a party to a suit brought upon a partnership obligation.⁷⁵

Assumption of Firm Indebtedness by One Partner. — Where by agreement between the partners one or more of them assumes the firm liabilities the creditor may still pursue his remedy against all the partners,⁷⁶ except in case of a novation or agreement by the creditor to accept the new arrangement, in which case the retiring partner is discharged from liability and is neither a necessary nor proper party.⁷⁷

Under the principle that a party, for whose benefit a contract was made, may maintain an action thereon,⁷⁸ the creditors of a firm may maintain an action against the remaining partner upon an agreement made by him with the retiring partner to pay the debts of the firm,⁷⁹ and if there is a surety upon such agreement, he may be joined as a party defendant.⁸⁰

App. 279, 129 S. W. 1028. **Neb.**—O'Shea v. Kavanaugh, 65 Neb. 639, 91 N. W. 578. **N. Y.**—Hill v. Packard, 5 Wend. 375. **Okla.**—Moore v. Leigh-Head & Co., 48 Okla. 228, 149 Pac. 1129.

73. **Ark.**—Mathews v. Paine, 47 Ark. 54, 14 S. W. 463. **Conn.**—Soule v. Borelli, 80 Conn. 392, 68 Atl. 979. **Ga.**—Thompson v. McDonald, 84 Ga. 5, 10 S. E. 448. **Me.**—Gannett v. Cunningham, 34 Me. 56. **Mass.**—Hyde v. Moxie Nerve-Food Co., 160 Mass. 559, 36 N. E. 585; Fish v. Gates, 133 Mass. 441. **Mich.**—McKnight v. Lowitz, 176 Mich. 452, 142 N. W. 769. **Neb.**—O'Shea v. Kavanaugh, 65 Neb. 639, 91 N. W. 578. **N. J.**—Wright v. Williamson, 3 N. J. L. 532.

74. McKnight v. Lowitz, 176 Mich. 452, 142 N. W. 769.

75. Smith v. Sheldon, 35 Mich. 42, 24 Am. Rep. 529 (retiring partner becomes surety of partner assuming the firm obligation); Dodd v. Dreyfus, 17 Hun (N. Y.) 600, 57 How. Pr. 319; Briggs v. Briggs, 20 Barb. (N. Y.) 477.

76. **Ala.**—Anniston First Nat. Bank v. Cheney, 114 Ala. 536, 21 So. 1002; Hall v. Jones, 56 Ala. 493; Shorter, Papot & Co. v. Hightower, 48 Ala. 526. **Ind.**—Clark v. Billings, 59 Ind. 508. **Ia.**—McAreavy v. Magril, 123 Iowa 605, 99 N. W. 193. **Mass.**—Ayer v. Kilner, 148 Mass. 468, 20 N. E. 163. **N. J.**—Gulick v. Gulick, 16 N. J. L. 186. **N. Y.**—Umbarger v. Plume, 26 Barb. 461. **Pa.**—Griffiee v. Griffiee, 173 Pa. 434, 34 Atl. 441. **Tex.**—Eastham v. Patty, 29 Tex. Civ. App. 473, 69 S. W. 224; Gill v. Bickel, 10 Tex.

Civ. App. 67, 30 S. W. 919. **W. Va.**—Barnes v. Boyers, 34 W. Va. 303, 12 S. E. 708.

[a] **In New York** the creditor with notice is bound to recognize the relation of principal and surety existing between the partners in such case, and must first pursue the partner who takes the assets and assumes the debts. Carroll v. Sharp, 67 Misc. 254, 122 N. Y. Supp. 694; Phillips v. Mendelsohn, 121 N. Y. Supp. 913.

77. **U. S.**—Regester v. Dodge, 6 Fed. 6, 19 Blatchf. 79, 61 How. Pr. 107. **N. Y.**—Dodd v. Dreyfus, 17 Hun 600, 57 How. Pr. 319; Whitlock v. McKechnie, 1 Bosw. 427. **S. C.**—Anderson & Co. v. Holmes, 14 S. C. 162.

78. See generally the title "Parties."

79. **U. S.**—Fish v. First Nat. Bank, 150 Fed. 524, 80 C. C. A. 266; *In re Downing*, 1 Dill. 33, 7 Fed. Cas. No. 4,044. **Colo.**—Lehow v. Simonton, 3 Colo. 346. **Ind.**—Way v. Fravel, 61 Ind. 162; Haggerty v. Johnston, 48 Ind. 41; Dunlap v. McNeil, 35 Ind. 316; Devol v. McIntosh, 23 Ind. 529; Case v. Ellis, 4 Ind. App. 224, 30 N. E. 907. **Ia.**—Malanaphy v. Fuller & J. Mfg. Co., 125 Iowa 719, 101 N. W. 640, 106 Am. St. Rep. 332. **Mo.**—Meyer v. Lowell, 44 Mo. 328. **Neb.**—McKillip v. Cattle, 12 Neb. 477, 11 N. W. 735. **Pa.**—Bellas v. Fagely, 19 Pa. 273. **Wis.**—Clasgens Co. v. Silber, 93 Wis. 579, 67 N. W. 1122; Kimball v. Noyes, 17 Wis. 695.

80. Dunlap v. McNeil, 35 Ind. 316; Devol v. McIntosh, 23 Ind. 529.

b. *Admission of New Partner.*—It is not proper to join a partner who has become such after the making of the contract sued on,⁸¹ or after the accrual of the cause of action,⁸² unless the new firm becomes the assignee or is substituted by novation in the place of the old firm, in which event, the incoming member may sue or be sued as a member of such new firm.⁸³

6. *Bankruptcy or Insolvency.*—The assignee in bankruptcy,⁸⁴ and not the members of the bankrupt firm,⁸⁵ is the proper person to prosecute or defend suits by or against the firm.

After insolvency or bankruptcy of one partner, the solvent members and the assignee should, except where the statute does not pass title to the property to the assignee,⁸⁶ join as plaintiffs⁸⁷ in the prosecution of

81. **N. Y.**—*Smith v. Douglass*, 4 Daly 191. **Tex.**—*Maverick v. Maury*, 79 Tex. 435, 15 S. W. 686; *Gill v. Bickel*, 10 Tex. Civ. App. 67, 30 S. W. 919. **Eng.**—*Wilsford v. Wood*, 1 Esp. N. P. 182; *Vere v. Ashby*, 10 Barn. & C. 288, 21 E. C. L. 127, Ll. & W. 20, 8 L. J. K. B. O. S. 57, 109 Eng. Reprint 457.

82. **U. S.**—*Atwood v. Lockhart*, 4 McLean 350, 2 Fed. Cas. No. 642. **Ala.** *Hatchett v. Blanton*, 72 Ala. 423; *Shorter, Papot & Co. v. Hightower*, 48 Ala. 526. **Ark.**—*Ringo v. Wing*, 49 Ark. 457, 5 S. W. 787. **Ga.**—*Pfeiffer & Co. v. Hunt*, 75 Ga. 513; *Bracken v. Dillon & Sons*, 64 Ga. 243, 37 Am. Rep. 70. **Md.**—*Firemen's Ins. Co. v. Floss*, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398. **Mass.**—*Armsby v. Farnam*, 16 Pick. 318. **Tex.**—*Neal v. Adkins* (Tex. Civ. App.), 145 S. W. 264.

83. **U. S.**—*Regester v. Dodge*, 6 Fed. 6, 19 Blatchf. 79, 61 How. Pr. 107. **Ark.**—*Ringo v. Wing*, 49 Ark. 457, 5 S. W. 787. **Fla.**—*Tysen v. Somerville*, 35 Fla. 219, 17 So. 567. **Ga.**—*Bracken v. Dillon*, 64 Ga. 243, 37 Am. Rep. 70. **Md.**—*Firemen's Ins. Co. v. Floss*, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398. **Mich.**—*Osborn v. Osborn*, 36 Mich. 48. **S. C.**—*Anderson & Co. v. Holmes*, 14 S. C. 162.

See *supra*, II, D, 5, a. Note 77.

84. **Miss.**—*Sims v. Ross, Strong & Co.*, 8 Smed. & M. 557. **N. Y.**—*Bird v. Caritat*, 2 Johns. 342, 3 Am. Dec. 433; *Bird v. Pierpont*, 1 Johns. 118. **Va.**—*Cannon v. Wellford*, 22 Gratt. (63 Va.) 195. **Eng.**—*Scott v. Franklin*, 15 East 428, 104 Eng. Reprint 906.

[a] Upon a partnership claim the assignee in bankruptcy of the estate of an individual partner cannot sue. *Amsinck v. Bean*, 22 Wall. 395, 22 L. ed. 801.

[b] The assignees of partners, against whom separate commissions of bankruptcy have issued, may be joined in the same suit, to recover a debt due to the bankrupts jointly. *Hancock v. Haywood*, 3 Term Rep. 433, 100 Eng. Reprint 661.

85. **Miss.**—*Sims v. Ross, Strong & Co.*, 8 Smed. & M. 557. **N. Y.**—*Bird v. Pierpont*, 1 Johns. 118. **Va.**—*Cannon v. Wellford*, 22 Gratt. (63 Va.) 195. **Eng.**—*Eckhardt v. Wilson*, 8 Term R. 140, 101 Eng. Reprint 1311.

[a] An assignment in insolvency of the estate of one of the partners which did not extend to partnership assets or demands will not prevent all the partners from maintaining an action previously commenced on a debt due to the partnership. *Cunningham v. Munroe*, 15 Gray (Mass.) 471.

86. *Kirkland & Co. v. Lowe, Pat-tison & Co.*, 33 Miss. 423, 69 Am. Dec. 355. And see *Wonson v. Pew*, 148 Mass. 299, 19 N. E. 522.

87. **Ala.**—*McNutt v. King*, 59 Ala. 597; *Lacy v. Rockett*, 11 Ala. 1002. **Ark.**—*Peel v. Ringgold*, 6 Ark. 546. **Miss.**—*Halsey v. Norton*, 45 Miss. 703, 7 Am. Rep. 745; *Burrus v. Fisher*, 27 Miss. 418. **N. Y.**—*Browning v. Marvin*, 22 Hun 547; *Bird v. Pierpont*, 1 Johns. 118; *Murray v. Murray*, 5 Johns. Ch. 60. **Pa.**—*Merrill v. Tamany*, 3 Pa. 433. **Eng.**—*Eckhardt v. Wilson*, 8 Term R. 140, 101 Eng. Reprint 1311; *Graham v. Robertson*, 2 Term R. 282, 100 Eng. Reprint 154; *Ex parte Owen*, 13 Q. B. Div. 113, 53 L. J. Q. B. 863, 32 W. R. 811.

[a] Neither Can Sue Alone.—*Brown-ing v. Marvin*, 22 Hun (N. Y.) 547.

[b] Amendment.—After all the evidence was before the jury, it is not error for the court to refuse an amend-

partnership demands, and be joined as defendants in suits to enforce firm obligations.⁸⁸

7. Change in the Firm Pendente Lite.—a. *In General.*—A change in the firm pending the action does not abate it as to the parties,⁸⁹ and no revival is necessary, where pending the action, one partner dies. In such case the procedure is to suggest the death on the record and continue the action by⁹⁰ or against⁹¹ the surviving part-

ment making an assignee in bankruptcy one of the parties in place of the bankrupt partner. *Burrus v. Fisher*, 27 Miss. 418.

[c] But if the proceedings in insolvency are pending against one partner, an action upon a partnership demand is properly brought in the name of all the partners. *Russell v. Cole*, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432.

88. *Dorn v. O'Neale*, 6 Nev. 155.

89. *Ala.*—*Southern Ry. Co. v. Hayes*, 73 So. 945; *Long v. Kansas City, M. & B. R. Co.*, 170 Ala. 635, 54 So. 62; *Walton v. Atkinson*, 165 Ala. 644, 51 So. 826. *Colo.*—*Rice v. Van Why*, 49 Colo. 7, 111 Pac. 599. *Fla.*—*Bucki v. Cone*, 25 Fla. 1, 6 So. 160. *Ind.*—*Hess v. Lowery*, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90. *Ky.*—*Robinson v. Bank of Pikeville*, 108 Ky. 389, 56 S. W. 660; *Dougherty v. Smith, Wilson & Co.*, 4 Mete. 279. *Mass.*—*Brown v. Kellogg*, 182 Mass. 297, 65 N. E. 378. *Mo.*—*Crook v. Tull*, 111 Mo. 283, 20 S. W. 8. *Neb.*—*Dineen v. Lanning*, 92 Neb. 545, 138 N. W. 759; *Union Pac. Ry. Co. v. Metcalf*, 50 Neb. 452, 69 N. W. 961. *N. Y.*—*Seligman v. Friedlander*, 199 N. Y. 373, 92 N. E. 1047; *Latz v. Blumenthal*, 50 Misc. 407, 100 N. Y. Supp. 527, affirmed in 116 App. Div. 914, 101 N. Y. Supp. 1128. *Ohio.*—*Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 58 N. E. 805. *Tex.*—*Broussard v. Le Blanc* (Tex. Civ. App.), 182 S. W. 78. *W. Va.*—*Ruffner, Donnelly & Co. v. Hewitt, Kerchival & Co.*, 14 W. Va. 737.

[a] Sale of one party's interest to another partner does not necessitate a change of parties. *Evans Co. v. Reeves*, 6 Tex. Civ. App. 254, 26 S. W. 219.

90. *U. S.*—*Jones v. Pettingill*, 245 Fed. 269, 157 C. C. A. 461. *Ala.*—*Long v. Kansas City, M. & B. R. Co.*, 170 Ala. 635, 54 So. 62; *Walton v. Atkinson*, 165 Ala. 644, 51 So. 826. *Fla.*—*Bucki v. Cone*, 25 Fla. 1, 6 So. 160.

Ga.—*Atlanta v. Dooly*, 74 Ga. 702. *Ill.*—*Moore v. Terhune*, 161 Ill. App. 155. *Ind.*—*Newman v. Gates* (Ind. App.), 67 N. E. 468. *Ky.*—*Robinson v. Bank of Pikeville*, 108 Ky. 389, 56 S. W. 660; *Smith v. Ferguson*, 3 Mete. 424; *McCandless & Co. v. Hadden*, 9 B. Mon. 186. *Md.*—*Keirle v. Shriver*, 11 Gill & J. 405. *Mass.*—*Hathaway v. Stone*, 215 Mass. 212, 102 N. E. 461. *Minn.*—*Northness v. Hillestad*, 87 Minn. 304, 91 N. W. 1112. *Miss.*—*Sprawles v. Barnes*, 1 N. Smed. & M. 629. *Mo.*—*State v. Stratton*, 110 Mo. 426, 19 S. W. 803; *Meriwether v. Quincy, O. & K. C. R. Co.*, 128 Mo. App. 647, 107 S. W. 434. *Mont.*—*Bohm v. Dunphy*, 1 Mont. 333. *Neb.*—*Union Pac. R. Co. v. Metcalf*, 50 Neb. 452, 69 N. W. 961. *N. Y.*—*Seligman v. Friedlander*, 199 N. Y. 373, 92 N. E. 1047; *Callanan v. Keeseville, A. C. & L. C. R. Co.*, 48 Misc. 476, 95 N. Y. Supp. 513. *N. C.*—*Bond v. Hilton*, 51 N. C. 180. *Pa.*—*Stahle v. Poth*, 220 Pa. 335, 69 Atl. 864. *S. C.*—*Sullivan v. Susong*, 40 S. C. 154, 18 S. E. 268. *Tenn.*—*Hammond v. St. John*, 4 Yerg. 107. *Tex.*—*Gunter v. Jarvis*, 25 Tex. 581; *Broussard v. Le Blanc* (Tex. Civ. App.), 182 S. W. 78; *Shivel v. Greer Bros.*, 58 Tex. Civ. App. 115, 123 S. W. 207. *Utah.*—*Sweetser v. Fox*, 43 Utah 40, 134 Pac. 599, Ann. Cas. 1916C, 620, 47 L. R. A. (N. S.) 145. *W. Va.*—*Ruffner, Donnelly & Co. v. Hewitt, Kerchival & Co.*, 14 W. Va. 737.

[a] A nunc pro tunc entry may be made suggesting the death of one of the partners. *Sullivan v. Susong*, 40 S. C. 154, 18 S. E. 268.

[b] Death of partner after *capias* issues in the name of the firm, does not prevent the filing of the declaration in the name of the firm. *Byrñe, Ryan & Co. v. Schwing*, 6 B. Mon. (Ky.) 199.

91. *Ala.*—*Weinstein v. Citizens' Bank of Lexington*, 75 So. 397. *Cal.*—*West Coast Lumb. Co. v. Apfield*, 86 Cal. 335, 24 Pac. 993. *Colo.*—*Rice v. Van Why*, 49 Colo. 7, 111 Pac. 599.

ners, and the legal representatives of the deceased partner should not be made parties.⁹²

b. *Bankruptcy or Insolvency*.—Upon bankruptcy of a partner pending suit, the plaintiff may proceed to judgment against the solvent partners.⁹³ The assignee of the bankrupt partner need not be substituted in his place as defendant.⁹⁴

8. **Objections as to Parties.**—a. *In General*.—A defect of parties apparent on the face of the pleadings is ground for demurrer,⁹⁵

Fla.—First Nat. Bank *v.* Greig, 43 Fla. 412, 31 So. 239; Bucki *v.* Cone, 25 Fla. 1, 6 So. 160. Ind.—Hess *v.* Lowery, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90. Ia.—Bowen *v.* Troy Portable Mill Co., 31 Iowa 460; Childs, Sanford & Co. *v.* Hyde & Co., 10 Iowa 294, 77 Am. Dec. 113. Mass.—Brown *v.* Kellogg, 182 Mass. 297, 65 N. E. 378. Neb. Dineen *v.* Lanning, 92 Neb. 545, 138 N. W. 759. N. Y.—Seligman *v.* Friedlander, 199 N. Y. 373, 92 N. E. 1047; Latz *v.* Blumenthal, 50 Misc. 407, 100 N. Y. Supp. 527, affirmed in 116 App. Div. 914, 101 N. Y. Supp. 1128. Okla. White *v.* Dillinger, 50 Okla. 555, 151 Pac. 194. Pa.—Stahle *v.* Poth, 220 Pa. 335, 69 Atl. 864; Given *v.* Albert, 5 Watts & S. 333; Serrill *v.* Denman, Bright. N. P. 65. S. C.—Sullivan *v.* Susong, 40 S. C. 154, 13 S. E. 268. Tenn.—Hammond *v.* St. John, 4 Yerg. 107. Va.—Townes *v.* Birchett, 12 Leigh (39 Va.) 173. W. Va.—Ruffner, Donnelly & Co. *v.* Hewitt, Kerchival & Co., 14 W. Va. 737.

[a] The fact that the deceased partner was the only one served will not abate the action. Latz *v.* Blumenthal, 50 Misc. 407, 100 N. Y. Supp. 527. But as to service of process on a single partner, see *infra*, II, F, 2.

[b] To substitute the survivor as an individual rather than as surviving partner is erroneous. Pennsylvania Fire Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 97, 10 Ohio Cir. Dec. 225.

92. U. S.—Jones *v.* Pettingill, 245 Fed. 269, 157 C. C. A. 461. Ky.—McCandless & Co. *v.* Hadden, 9 B. Mon. 186. Md.—Keirle *v.* Shriver, 11 Gill & J. 405. Mass.—Hathaway *v.* Stone, 215 Mass. 212, 102 N. E. 461. Minn. Northness *v.* Hillestad, 87 Minn. 304, 91 N. W. 1112. N. Y.—Latz *v.* Blumenthal, 50 Misc. 407, 100 N. Y. Supp. 527. Pa.—Given *v.* Albert, 5 Watts & S. 333; Serrill *v.* Denman, Bright. N. P. 65. Tex.—Dunman *v.* Coleman,

59 Tex. 199. Va.—Townes *v.* Birchett, 12 Leigh (39 Va.) 173.

[a] Misjoinder of parties is effected where legal representative is made party. Bond *v.* Hilton, 51 N. C. 180.

[b] Where the partner misrepresents the firm, however, or has conflicting interests with the estate of the deceased partner, the legal representatives may be made parties. Hausling *v.* Rheinfank, 103 App. Div. 517, 93 N. Y. Supp. 121; Callanan *v.* Keeseville A. C. & L. C. R. Co., 48 Misc. 476, 95 N. Y. Supp. 513.

93. Kan.—Hogendobler *v.* Lyon, 12 Kan. 276. Mont.—Lomme *v.* Kintzing, 1 Mont. 290. Nev.—Tinkum *v.* O'Neale, 5 Nev. 93.

[a] But where the partnership obligation is joint (1), even insolvent partners should be retained as parties (White *v.* Frances, 5 Ohio Dec. [Reprint] 323); (2) the remedy of such insolvent partners is to compel a stay of proceedings against them after judgment. White *v.* Francis, 5 Ohio Dec. (Reprint) 323.

94. Stewart *v.* Spaulding, 72 Cal. 264, 13 Pac. 661.

95. Ark.—Hicks *v.* Branton, 21 Ark. 186; Hamilton & Co. *v.* Buxton, 6 Ark. 24. Cal.—Gilman & Co. *v.* Cosgrove, 22 Cal. 356. Md.—Loney *v.* Bailey, 43 Md. 10; Kent *v.* Holliday, 17 Md. 387; Armstrong *v.* Robinson, 5 Gill & J. 412. Mo.—Iroquois Mfg. Co. *v.* Annan-Burg Milling Co., 179 Mo. App. 87, 161 S. W. 320. N. Y.—Green *v.* Lippincott, 53 How. Pr. 33; Harris *v.* Schultz, 40 Barb. 315.

See generally 6 STANDARD PROC. 897, and the title "Parties."

[a] But in tort actions, under the common law rule, a plea in abatement is necessary though the defect is apparent on the face of the pleading. Deal *v.* Bogue, 20 Pa. 228, 57 Am. Dec. 702.

or motion in arrest of judgment.⁹⁶ If not apparent on the face of the record the error may be reached by a plea in abatement,⁹⁷ or a motion to dismiss,⁹⁸ or, under the codes, by answer.⁹⁹

b. *Waiver of Defect.*—Unless properly taken advantage of an error as to parties will be deemed waived,¹ and is cured by the verdict.²

E. PROCESS.³—1. **Form of Process.**—The summons need not describe the partners as such,⁴ but, except where the statute authorizes suits by and against the partnership as an entity,⁵ it should set out

96. *Hicks v. Branton*, 21 Ark. 186.

97. *Ala.*—*Sims, Harrison & Co. v. Jacobson & Co.*, 51 Ala. 186. *Ark.*—*Hicks v. Branton*, 21 Ark. 186; *Hamilton v. Buxton*, 6 Ark. 24. *Colo.*—*Erskine v. Russell*, 43 Colo. 449, 96 Pac. 249. *D. C.*—*Parker v. Heald*, 29 App. Cas. 35. *Ill.*—*Page v. Brant*, 18 Ill. 37. *Md.*—*Loney v. Bailey*, 43 Md. 10; *Armstrong v. Robinson*, 5 Gill & J. 412. *Nev.*—*Tinkum v. O'Neale*, 5 Nev. 93. *N. Y.*—*Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227. *Pa.*—*Witmer v. Schlatter*, 2 Rawle 359; *McCahan v. Gensemer*, 3 Kulp 40. *Tex.*—*Davis v. Willis*, 47 Tex. 154.

See generally the title "**Abatement, Pleas of.**"

[a] Where the partnership is the defendant, nonjoinder must be taken by plea in abatement. *Ark.*—*Hicks v. Branton*, 21 Ark. 186; *Hamilton v. Buxton*, 6 Ark. 24. *Md.*—*Smith v. Cooke*, 31 Md. 174, 100 Am. Dec. 58; *Kent v. Holliday*, 17 Md. 387. *Mich.*—*Purvis v. Butler*, 87 Mich. 248, 49 N. W. 564. *N. Y.*—*Le Page v. McCrea*, 1 Wend. 164, 19 Am. Dec. 469; *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227. *Vt.*—*Goddard v. Brown*, 11 Vt. 278.

[b] In a suit on a contract made with one partner, and in his name, it is not ground for abatement that the other partner is not joined. *Sylvester v. Smith*, 9 Mass. 119; *Farwell v. Davis*, 66 Barb. (N. Y.) 73; *Clark v. Holmes*, 3 Johns. (N. Y.) 148.

[c] The ostensible partner, if sued alone, cannot plead in abatement that he has a dormant partner. *Cammack v. Johnson*, 2 N. J. Eq. 163.

As to answer in abatement of nonjoinder of partner of defendants, see 9 STANDARD PROC. 914.

98. *Hicks v. Branton*, 21 Ark. 186; *Richardson v. Smith & Co.*, 21 Fla. 336.

99. *Cal.*—*Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456. *Minn.*—*Sandwich Mfg. Co. v. Herriott*, 37 Minn.

214, 33 N. W. 782. *Mont.*—*Parchen v. Peck*, 2 Mont. 567.

[a] A tort action by one member, where the tort results in injury to firm, is subject to plea in abatement for nonjoinder of the other partners. *Ind. Ter.*—*Carlisle v. McAlester*, 3 Ind. Ter. 164, 53 S. W. 531. *N. H.*—*True v. Congdon*, 44 N. H. 48. *Pa.*—*Deal v. Bogue*, 20 Pa. 228, 57 Am. Dec. 702.

1. *Ala.*—*Conn v. Sellers*, 73 So. 961; *Simmons v. Titcher*, 102 Ala. 317, 14 So. 786; *Foreman v. Weil Bros.*, 98 Ala. 495, 12 So. 815; *Moore v. Watts*, 81 Ala. 261, 2 So. 278. *Colo.*—*Simonton v. Rohm*, 14 Colo. 51, 23 Pac. 86. *Ga.*—*De Leon v. Heller*, 77 Ga. 740, 743. *Ill.*—*Robinson v. Magarity*, 28 Ill. 423. *Ind. Ter.*—*Carlisle v. McAlester*, 3 Ind. Ter. 164, 53 S. W. 531. *Mo.*—*Mitchell v. Railton*, 45 Mo. App. 273. *Ohio.*—*Brownson v. Metcalfe & Co.*, 1 Handy 188.

See generally the title "**Parties.**"

2. *Seitz & Co. v. Buffum & Co.*, 14 Pa. 69.

3. See the title "**Process.**"

4. *Tarleton v. Herbert*, 4 Ala. 359.

5. *U. S.*—*Empire Rice Mill Co. v. Neumond*, 199 Fed. 800. *Fla.*—*Thomas v. Nathan*, 65 Fla. 386, 62 So. 206. *Ga.*—*Denton Bros. v. Hannah*, 12 Ga. App. 494, 77 S. E. 672; *Ferry & Co. v. Mattox*, 2 Ga. App. 104, 58 S. E. 291. *Kan.*—*Neiswanger v. Ord*, 81 Kan. 63, 105 Pac. 17, 29 L. R. A. (N. S.) 287. *Mich.*—*Rickman v. Rickman*, 180 Mich. 224, 146 N. W. 609, Ann. Cas. 1915C, 1237. *N. D.*—*Goldstein v. Fox Sons Co.*, 22 N. D. 636, 135 N. W. 180, 40 L. R. A. (N. S.) 566. *N. Y.*—*Lutz v. Kalmus*, 115 N. Y. Supp. 230. *Tenn.*—*Blue Grass Canning Co. v. Wardman*, 103 Tenn. 179, 52 S. W. 137. *Tex.*—*Slaughter v. American Baptist Publication Society* (Tex. Civ. App.), 150 S. W. 224. *Utah.*—*Bingham Coal & Lumber Co. v. Blom*, 43 Utah 584, 137 Pac. 630.

the names of the partners.⁶

2. Service.⁷—Service of process in actions against partnerships is largely regulated by statute. The rule that notice to or service upon one partner, in actions against the partners in their individual names, does not confer jurisdiction over the other partners so as to bind them in any way⁸ has been generally supplanted by statutory provisions authorizing service upon a partnership by leaving a copy of the process at the usual place of business of the firm,⁹ or by serving any member of the partnership,¹⁰ but such service does not authorize

6. Ala.—Tarlton v. Herbert, 4 Ala. 359. **Ill.**—Day v. Cushman, 2 Ill. 475. **Md.**—Mitchell v. Dall, 2 Har. & G. 159. **Mich.**—Smith v. Canfield, 8 Mich. 493. **Mo.**—Johnson Mach. Co. v. Watson, 57 Mo. App. 629. **Okla.**—Holmes v. Alexander, 152 Pac. 819. **Ore.**—Dunham v. Shindler, 17 Ore. 256, 20 Pac. 326.

[a] Where the petition or declaration shows who the members are, a failure of the writ properly to do so will not be fatal. **Ky.**—Keathley v. Stump, 147 Ky. 406, 144 S. W. 87; Bryant v. Cheek, 19 Ky. L. Rep. 749, 41 S. W. 776. **Mich.**—Barber v. Smith, 41 Mich. 138, 1 N. W. 992. **Tex.**—Putman v. Wheeler, 65 Tex. 522; Guimond v. Nast, 44 Tex. 114.

7. See the title "Service of Process and Papers."

8. U. S.—Hall v. Lanning, 91 U. S. 160, 23 L. ed. 271. **Ala.**—Ladiga Saw-Mill Co. v. Smith, 78 Ala. 108; Shapard v. Lightfoot, 56 Ala. 506. **Cal.**—Feder v. Epstein, 69 Cal. 456, 10 Pac. 785; Davidson v. Knox, 67 Cal. 143, 7 Pac. 413. **Fla.**—First National Bank v. Greig, 43 Fla. 412, 31 So. 239. **Ga.**—Clayton v. Roberts, 84 Ga. 149, 10 S. E. 621; Taylor v. Felder, 3 Ga. App. 106, 59 S. E. 328. **Ill.**—Hibbard v. Holloway, 13 Ill. App. 101. **Ia.**—Harford, Thayer & Co. v. Street, 46 Iowa 594; Weaver v. Carpenter, 42 Iowa 343. **Ky.**—Heavrin v. Lack Malleable Iron Co., 153 Ky. 329, 155 S. W. 729; Bal-lou v. Skidmore, 113 S. W. 441, after dissolution. **La.**—Le Blanc v. Marsou-det, 25 La. Ann. 464; Grieff v. Kirk & Co., 15 La. Ann. 320; Scott v. Bogart, 14 La. Ann. 261. **Miss.**—Fuqua v. Tindall, 11 Smed. & M. 465; Demoss v. Brewster, 4 Smed. & M. 661; Pittman v. Planters' Bank, 1 How. 527. **Mo.**—Maclay v. Freeman, 48 Mo. 234; Baseom v. Young, 7 Mo. 1. **Neb.**—Hanna v. Emerson, 45 Neb. 708, 64 N. W. 229; Herron v. Cole Bros., 25 Neb. 692,

41 N. W. 765; Winters v. Means, 25 Neb. 241, 41 N. W. 157, 13 Am. St. Rep. 489. **N. Y.**—Lieber v. Reiss, 174 App. Div. 308, 160 N. Y. Supp. 535. **Pa.**—Walsh v. Kirby, 228 Pa. 194, 77 Atl. 452; Cover v. Brown, Sutter & Co., 7 Pa. Dist. 19. **Vt.**—People's Nat. Bank v. Hall, 76 Vt. 280, 56 Atl. 1012. **Wash.**—McCoy v. Bell, 1 Wash. 504, 20 Pac. 595. **W. Va.**—Ferguson v. Millender, 32 W. Va. 30, 9 S. E. 38; Carlon's Admr. v. Ruffner, 12 W. Va. 297. **Eng.**—Moulston v. Wire, 1 Dowl. & L. 527.

9. U. S.—Irvine v. Church, 227 Fed. 252 (Ohio); United States v. American Bell Tel. Co., 29 Fed. 17. **La.**—Wolf v. New Orleans Tailor-Made Pants Co., 52 La. Ann. 1357, 27 So. 893. **Neb.**—Hanna v. Emerson, 45 Neb. 708, 64 N. W. 229; Herron v. Cole Bros., 25 Neb. 692, 41 N. W. 765; Rosenbaum v. Hayden, 22 Neb. 744, 36 N. W. 147. **Ohio.**—Smith v. Hoover, 39 Ohio St. 249; Shafer v. Hockheimer, 36 Ohio St. 215; Whitman v. Keith, 18 Ohio St. 134. **Eng.**—Pollexfen v. Sibson, L. R. 16 Q. B. Div. 792, where partnership is sued, in its firm name.

[a] Service upon an agent or clerk, is in the absence of such a statute, insufficient. **U. S.**—In re Grossmayer, 177 U. S. 48, 20 Sup. Ct. 535, 44 L. ed. 665. **Mo.**—Huffman v. Sisk, 62 Mo. App. 398, service on manager. **N. Y.**—Sherman v. Oelsner, 135 N. Y. Supp. 592. **Wash.**—Coughlin v. Pinkerton, 41 Wash. 500, 84 Pac. 14.

10. U. S.—Sugg v. Thornton, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. ed. 447 (Texas); D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648, New York. **Ala.**—Ratchford v. Covington County Stock Co., 172 Ala. 461, 55 So. 806; Ladiga Saw-Mill Co. v. Smith, 78 Ala. 108 (partnership sued in firm name); Yarbrough & Co. v. Bush & Co., 69 Ala. 170. **Cal.**—Booth v. Gamble-Robinson Commission Co., 139 Cal. 175, 72 Pac.

a personal judgment against the partners.¹¹ In equity, a service upon one of the partners, where the other has left the jurisdiction or cannot be found, is sufficient to support a decree against the firm.¹²

Non-resident Partners. — Where all the members of a partnership are non-residents, service of process may be made upon an agent of

908. **Colo.**—Barnes *v.* Colorado Springs & C. C. D. Ry. Co., 42 Colo. 461, 94 Pac. 570; Ellsberry *v.* Block, 28 Colo. 477, 65 Pac. 629. **Ga.**—Cunningham *v.* Woodbridge, 76 Ga. 302; Denton Bros. *v.* Hannah, 12 Ga. App. 494, 77 S. E. 672; Warren Brick Co. *v.* Lagarde Lime & Stone Co., 12 Ga. App. 58, 76 S. E. 761; Ferry & Co. *v.* Mattox, 2 Ga. App. 104, 58 S. E. 291. **Ia.** Weaver *v.* Carpenter, 42 Iowa 343; Gregory, Tilton & Co. *v.* Harmon, 10 Iowa 445; Sanders *v.* Bentley, 8 Iowa 516. **La.**—Levy *v.* Rich, 106 La. 243, 30 So. 377; Wolf *v.* New Orleans Tailor-Made Pants Co., 52 La. Ann. 1357, 27 So. 893 (commercial partnership); Anderson *v.* Arnette, 27 La. Ann. 237; Kearney & Co. *v.* Fenner & Co., 14 La. Ann. 870, commercial partnership. **Me.**—Cooper *v.* Bailey, 52 Me. 230. **Mass.**—Parker *v.* Danforth, 16 Mass. 299, where some of the partners are nonresidents. **Mich.**—Smith *v.* Runnells, 94 Mich. 617, 54 N. W. 375; Hubbardston Lumb. Co. *v.* Covert, 35 Mich. 254. **Minn.**—Dimond *v.* Minnesota Sav. Bank, 70 Minn. 298, 73 N. W. 182. **Mo.**—Huffman *v.* Sisk, 62 Mo. App. 398. **Neb.**—Stelling *v.* Peddicord, 78 Neb. 779, 111 N. W. 793; Hanna *v.* Emerson, 45 Neb. 708, 64 N. W. 229; Herron *v.* Cole Bros., 25 Neb. 692, 41 N. W. 765. **Nev.**—Flannery *v.* Anderson, 4 Nev. 437; Whitmore *v.* Shiverick, 3 Nev. 288. **N. M.** Good *v.* Red River Valley Co., 12 N. M. 245, 78 Pac. 46; Lewinson *v.* First Nat. Bank, 11 N. M. 510, 70 Pac. 567. **N. Y.**—Ludwig *v.* Lazarus, 10 App. Div. 62, 41 N. Y. Supp. 773, 75 N. Y. St. 1169; Feldman *v.* Siegel, 43 Misc. 392, 87 N. Y. Supp. 538; Maneely *v.* Mayers, 43 Misc. 380, 87 N. Y. Supp. 471. **Okla.**—Symms Grocer Co. *v.* Burnham, 6 Okla. 618, 52 Pac. 918. **Pa.**—Walsh *v.* Kirby, 228 Pa. 194, 77 Atl. 452. **R. I.**—Nathanson *v.* Spitz, 19 R. I. 70, 31 Atl. 690. **S. C.** Pierce *v.* Varn, Byrd & Co., 76 S. C. 359, 57 S. E. 184; Whitfield *v.* Hovey, 30 S. C. 117, 8 S. E. 840. **Tex.**—Frank *v.* Tatum, 87 Tex. 204, 25 S. W. 409; Sanger Bros. *v.* Overmier, 64 Tex. 57;

Hedges *v.* Armistead, 60 Tex. 276; Burnett *v.* Sullivan, 58 Tex. 535; Guimond *v.* Nast, 44 Tex. 114; Alexander *v.* Stern, 41 Tex. 193. **Wis.**—Young *v.* Krueger, 92 Wis. 361, 66 N. W. 355. **Eng.**—Pollexfen *v.* Sibson, L. R. 16 Q. B. Div. 792; Kitchin *v.* Wilson, 4 C. B. (N. S.) 483, 93 E. C. L. 483, 140 Eng. Reprint 1179, where affidavit shows that absent partner is evading service.

[a] **Service after dissolution** upon one member of the dissolved firm is a valid service authorizing a judgment against the late firm. **Ala.**—Faver *v.* Briggs, 18 Ala. 478; Beal *v.* Snediecor, 8 Port. 523; Duncan *v.* Tombeckbee Bank, 4 Port. 181. **Fla.**—Thomas *v.* Nathan, 65 Fla. 386, 62 So. 206. **Ia.** Harford, Thayer & Co. *v.* Street, 46 Iowa 594. **Me.**—Cooper *v.* Bailey, 52 Me. 230. **Tex.**—Texas, etc. Ry. Co. *v.* McCaughey, 62 Tex. 271. But see Levy *v.* Rich, 106 La. 243, 30 So. 377.

11. **Ala.**—Ratchford *v.* Covington County Stock Co., 172 Ala. 461, 55 So. 806; Comer *v.* Reid, 93 Ala. 391, 9 So. 620; Ladiga Saw-Mill Co. *v.* Smith, 78 Ala. 108; Watts *v.* Rice, 75 Ala. 289; Yarbrough & Co. *v.* Bush & Co., 69 Ala. 170. **Colo.**—Erskine *v.* Russell, 43 Colo. 449, 96 Pac. 249. **N. J.**—Stehr *v.* Albermann, 49 N. J. L. 633, 10 Atl. 547. **N. Y.**—Brandagee *v.* Cleary, 152 N. Y. Supp. 628. **Okla.** Heaton *v.* Schaeffer, 34 Okla. 631, 126 Pac. 797, 43 L. R. A. (N. S.) 540; Sayre Commission Co. *v.* Keen, 26 Okla. 794, 110 Pac. 775.

As to what name partnership may sue or be sued in, see *supra*, II, D.

12. Bank of Hamilton *v.* Blakeslee, 9 Ont. Pr. (Can.) 130; Leese *v.* Martin, L. R. 13 Eq. 77; Kinder *v.* Forbes, 1 Beav. 503, 48 Eng. Reprint 1277; Darwent *v.* Walton, 2 Atk. 510, 26 Eng. Reprint 707; Coles *v.* Gurney, 1 Madd. 187, 56 Eng. Reprint 70 (where one partner is abroad, the subpoena against him, was, on motion, permitted to be served on the resident partner); Henderson *v.* Campbell, 13 Wkly. Rep. 704.

such partnership in the county of the place of business,¹³ and service upon a resident partner is, where the obligation is joint, sufficient to sustain a judgment against the partnership, although a non-resident partner is not served.¹⁴ Service by publication as to a non-resident partner confers no jurisdiction over him, where the firm has no property subject to attachment within the state;¹⁵ but such a judgment has no operation outside the state as against a partner not served and who does not appear.¹⁶

3. Return.¹⁷—Where the action is against the partnership and service is made on one of the members thereof, the return need not show that such member was employed in the general management of the business,¹⁸ but where the service is made upon an agent, it should appear that he was so employed.¹⁹ A return of not found is not a prerequisite to bind the interest of a partner not served as to the partnership property in an action against the copartners.²⁰

4. Amendments.—The process may be amended to correct irregularities therein,²¹ but not to remedy errors of substance.²²

F. APPEARANCE.—**1. In General.**²³—One partner may enter the appearance of the partnership,²⁴ except perhaps in jurisdictions re-

13. *Fox v. Blue-Grass Grocery Co.*, 22 Ky. L. Rep. 1695, 61 S. W. 265, 60 S. W. 414.

[a] **Non-residence of the partners in the county** where the suit is brought is sufficient to permit service to be made on their agent in such county. *Watson v. Coon*, 247 Ill. 414, 93 N. E. 289 (*affirming* 155 Ill. App. 158); *Kamp v. Bartlett*, 164 Ill. App. 338.

14. *Sugg v. Thornton*, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. ed. 447; *Whitfield v. Hovey*, 30 S. E. 117, 8 S. E. 840.

[a] **Service made upon a member of a foreign partnership** who happened to be within the jurisdiction is a good service upon such foreign partnership. *Pollexfen v. Sibson*, L. R. 16 Q. B. Div. 792.

15. *People's Nat. Bank v. Hall*, 76 Vt. 280, 56 Atl. 1012.

16. **U. S.**—*Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517 (judgment has no effect in a court of the United States); *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648. **Ga.**—*Conley v. Chapman*, 74 Ga. 709; *Clein v. Diamond*, 17 Ga. App. 652, 87 S. E. 1101. **Mass.** *Phelps v. Brewer*, 9 Cush. 390, 57 Am. Dec. 56. **Miss.**—*Persons v. Oldfield*, 101 Miss. 110, 57 So. 417. **N. Y.** *Hoffman v. Wight*, 1 App. Div. 514, 37 N. Y. Supp. 262, 72 N. Y. St. 588.

[a] **An action cannot be maintained on such judgment** outside of the state of its rendition against the partner not served. *D'Arcy v. Ketchum*, 11 How. (U. S.) 165, 13 L. ed. 648; *Hoffman v. Wight*, 1 App. Div. 514, 37 N. Y. Supp. 262, 72 N. Y. St. 588. See generally 15 STANDARD PROC. 656.

17. See generally the title "**Returns.**"

18. *Walker v. Clark*, 8 Iowa 474.

19. *Walker v. Clark*, 8 Iowa 474.

20. *Printup Bros. & Co. v. Turner*, 65 Ga. 71.

21. *Goldstein v. Fox Sons Co.*, 22 N. D. 636, 135 N. W. 180, 40 L. R. A. (N. S.) 566, entity changed from corporation to partnership. See more fully the title "**Process.**"

22. *Maritime Bank v. Rand & Son*, 24 Conn. 9.

[a] **A change in the parties** cannot be effected by amendment. *Maritime Bank v. Rand & Son*, 24 Conn. 9.

23. See the titles "**Appearances;**" "**Jurisdiction.**"

24. *Oatis v. Brown*, 59 Ga. 711; *State v. Cloudt* (Tex. Civ. App.), 84 S. W. 415.

[a] **But after dissolution of the firm**, the acknowledgment, by one partner, in the name of the firm, of the service of process, will not authorize a joint judgment against the partners. *De Mott v. Swaim's Admr.*, 5 Stew. & P. (Ala.) 293.

quiring service of process on all the partners.²⁵ Appearance by one partner,²⁶ or by the partnership,²⁷ will not bind personally those not served and who do not appear.

2. Waiver of Defects.—The general rule that defects in the process or service thereof are waived by a general appearance,²⁸ applies in actions against a partnership.²⁹

G. PLEADING.—1. Declaration, Complaint or Petition.—a. Form of.—It should appear from the title or caption whether the action is by or against the firm or the individuals alone.³⁰ If allegations of partnership are necessary, they should be made in the body of the pleading,³¹ and not merely in the caption or title.³²

b. Contents.—(I.) Existence of Partnership.—(A.) NECESSITY OF ALLEGING. An allegation of partnership between plaintiffs is necessary where their right jointly to maintain the suit depends upon the existence

25. *Heavrin v. Lack Malleable Iron Co.*, 153 Ky. 329, 155 S. W. 729. But see dictum in *Southard v. Steele*, 3 Mon. (Ky.) 435.

26. U. S.—*Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *Atchison Sav. Bank v. Templar*, 26 Fed. 580. **Ala.**—*De Mott v. Swaim's Admr.*, 5 Stew. & P. 293. **Mass.**—*Phelps v. Brewer*, 9 Cush. 390, 57 Am. Dec. 56, non-resident. **Mo.**—*Weldon v. Fisher*, 194 Mo. App. 573, 186 S. W. 1153, non-resident. **S. C.**—*Loomis & Co. v. Pearson, Harp. L.* 470; *Haslet v. Street*, 2 McCord 310, 13 Am. Dec. 724. **Va.**—*Bowler v. Huston*, 30 Gratt. (71 Va.) 266, 32 Am. Rep. 673.

27. Ga.—*Fincher v. Hanson*, 12 Ga. App. 608, 77 S. E. 1068. **Ia.**—*Lansing v. Bever Land Co.*, 158 Iowa 693, 138 N. W. 833. **Kan.**—*Wheatley v. Tutt*, 4 Kan. 240. **Mass.**—*Phelps v. Brewer*, 9 Cush. 390, 57 Am. Dec. 56. **Okla.** *Holmes v. Alexander*, 152 Pac. 819. But see *Marks v. Fordyce*, 5 Ohio Dec. (Reprint) 81.

28. See generally 2 STANDARD PROC. 536; 17 STANDARD PROC. 903.

29. Ala.—*Bowin & Co. v. Sutherland*, 44 Ala. 278. **Kan.**—*Anglo-American P. & P. Co. v. Turner Casing Co.*, 34 Kan. 340, 8 Pac. 403. **Tenn.**—*Blue Grass Can. Co. v. Wardman*, 103 Tenn. 179, 52 S. W. 137.

30. Maclay Co. v. Meads, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364.

[a] For complaints held to be against the individuals and not the firm, see the following cases: **Cal.**—*Lee v. Orr*, 70 Cal. 398, 11 Pac. 745; *Feder v. Epstein*, 69 Cal. 456, 10 Pac. 785.

Colo.—*Fryer v. Breeze*, 16 Colo. 323, 26 Pac. 817. **Neb.**—*Wigton v. Smith*, 57 Neb. 299, 77 N. W. 772; *King v. Bell*, 13 Neb. 409, 14 N. W. 141. **N. M.** *Good v. Red River Valley Co.*, 12 N. M. 245, 78 Pac. 46; *Curran v. Kendall Boot & Shoe Co.*, 8 N. M. 417, 45 Pac. 1120. **N. C.**—*Palin v. Small*, 63 N. C. 484. **Utah.**—*Gutheil v. Gilmer*, 27 Utah 496, 76 Pac. 628.

[b] A petition wherein the defendants are described as M. H. S. and E. H. S., "partners doing business as S. Bros.," is not an action against the firm named, but will sustain a personal judgment against the defendants therein named. *First Nat. Bank v. Sloman*, 42 Neb. 350, 60 N. W. 589, 47 Am. St. Rep. 707.

31. Millhisser v. Holleyman, 37 S. C. 572, 16 S. E. 688; *Bischoff & Co. v. Blease*, 20 S. C. 460.

[a] Partnership alleged in the body of the complaint is sufficient although the caption of the complaint does not designate the plaintiffs as partners. *Wise v. Williams*, 72 Cal. 544, 14 Pac. 204. *Compare McCord v. Seale*, 56 Cal. 262; *First Nat. Bank v. Hattenbach*, 13 S. D. 365, 83 N. W. 421; *Van Brunt & Davis Co. v. Harrigan*, 8 S. D. 96, 65 N. W. 421.

32. Millhisser v. Holleyman, 37 S. C. 572, 16 S. E. 688; *Bischoff & Co. v. Blease*, 20 S. C. 460.

[a] But as against a general demurrer it is sufficient if the caption or title recites the fact of partnership. *Atchison, etc. Co. v. Carrow*, 18 Ariz. 92, 156 Pac. 965; *Jaeger v. Hartman*, 13 Minn. 55. *Contra, Bischoff & Co. v. Blease*, 20 S. C. 460.

of a partnership between them,³³ but not otherwise.³⁴

In actions against partners upon a partnership obligation, it is not necessary to allege a partnership between the defendants, a joint liability being alleged,³⁵ nor where the liability of the partners is joint and several, is such allegation necessary.³⁶ Where the plaintiff is suing on a contract which he claims was made by one of the defendants as a partner of the others, he must allege the existence of the partnership as to such transaction.³⁷

33. Ark.—Keith *v.* Pratt, 5 Ark. 661. **Cal.**—Wise *v.* Williams, 72 Cal. 544, 14 Pac. 204; Hallock *v.* Jaudin, 34 Cal. 167. **Ill.**—Wilcox *v.* Woods, 4 Ill. 51. **Ind.**—McIntosh *v.* Zaring, 150 Ind. 301, 49 N. E. 164; Hughes *v.* Walker, Carter & Co., 4 Blackf. 50; Anderson *v.* Evansville Brewing Assn., 49 Ind. App. 403, 97 N. E. 445. **Minn.**—Boosalis *v.* Stevenson, 62 Minn. 193, 64 N. W. 380; Irvine *v.* Myers & Co., 4 Minn. 229; Foerster *v.* Kirkpatrick, 2 Minn. 210. **N. Y.**—Loper *v.* Welch, 3 Duer 644. **Ore.**—Clark *v.* Wick, 25 Ore. 446, 36 Pac. 165. **S. C.**—Millhiser *v.* Holleyman, 37 S. C. 572, 16 S. E. 688; Walter *v.* Godshall, 32 S. C. 187, 10 S. E. 951; Bischoff & Co. *v.* Blease, 20 S. C. 460; Martin *v.* Kelly, Cheves 215.

[a] That at the time of bringing suit, they were partners, need not be averred. Klemik *v.* Henricksen Jewelry Co., 122 Minn. 380, 142 N. W. 871.

34. Cal.—Lee *v.* Orr, 70 Cal. 398, 11 Pac. 745. **Minn.**—Hayward *v.* Grant, 13 Minn. 165, 97 Am. Dec. 228; Jaeger *v.* Hartman, 13 Minn. 55. **N. J.**—Wood *v.* Fithian, 24 N. J. L. 33, 838. **N. Y.**—Loper *v.* Welch, 3 Duer 644. **Ore.**—Clark *v.* Wick, 25 Ore. 446, 36 Pac. 165.

See also Cowan, McClung & Co. *v.* Baird, 77 N. C. 201, demurrer held frivolous.

[a] In a suit on a written instrument where the statute permits a party to sue by the same name by which he is designated in such instrument, it is unnecessary to allege partnership capacity. Wendall & Osborne & Co., 63 Iowa 99, 18 N. W. 709; Harris Mfg. Co. *v.* Marsh, 49 Iowa 11.

35. U. S.—Davis *v.* Abbott, 2 MeLean 29, 7 Fed. Cas. No. 3,622. **Ala.**—Austin *v.* Beall, 167 Ala. 426, 52 So. 657, Ann. Cas. 1912A, 510; Jemison *v.* Dearing's Exr., 41 Ala. 283. **Ark.**

Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623; Kent *v.* Wells, 21 Ark. 411; Swinney *v.* Burnside & Co., 17 Ark. 38. **Cal.**—Pike *v.* Zadig, 171 Cal. 273, 152 Pac. 923; Hunter *v.* Martin, 57 Cal. 365. **Fla.**—Ray *v.* Pollock, 56 Fla. 530, 47 So. 940. **Ind.**—Pollock *v.* Glazier, 20 Ind. 262; Ensminger *v.* Marvin, 5 Blackf. 210. **Mich.**—Danaher *v.* Hitchcock, 34 Mich. 516; Pegg *v.* Bidleman, 5 Mich. 26. **Minn.**—Keene *v.* Masterman, 66 Minn. 72, 68 N. W. 771; Fetz *v.* Clark, 7 Minn. 217. **Miss.**—Nutt *v.* Hunt, 4 Smed. & M. 702. **Mo.**—Fellows *v.* Jernigan, 68 Mo. 434; Stix *v.* Mathews, 63 Mo. 371; Gates *v.* Watson, 54 Mo. 585; Smith *v.* Cain, 180 Mo. App. 457, 166 S. W. 653, question of partnership is one of evidence. **N. H.**—Maynard *v.* Fellows, 43 N. H. 255. **N. Y.**—Ageloff *v.* Lakin, 115 N. Y. Supp. 1082; Wolff *v.* Strahl, 54 Hun 636, 7 N. Y. Supp. 593, 27 N. Y. St. 7, 3 Silvernail 552; Mack *v.* Spencer, 4 Wend. 411; Singleton *v.* Thornton, 45 Hun 589, 9 N. Y. St. 600. **Ore.**—Wallace *v.* Baisley, 22 Ore. 572, 30 Pac. 432. **S. D.**—First Nat. Bank *v.* Hattenbach, 13 S. D. 365, 83 N. W. 421; Van Brunt & Davis Co. *v.* Harrigan, 8 S. D. 96, 65 N. W. 421. **Vt.**—Hawley *v.* Hurd, 56 Vt. 617.

36. See *infra*, this note.

[a] **Tort Actions.**—**Ind.**—Alexandria Min. & E. Co. *v.* Painter, 1 Ind. App. 587, 28 N. E. 113. **Me.**—Head *v.* Goodwin, 37 Me. 181. **S. C.**—Baker *v.* Hornick, 51 S. C. 313, 28 S. E. 941.

37. Ill.—Petrie *v.* Newell, 13 Ill. 647. **Ia.**—McCloskey *v.* Strickland, 7 Iowa 259. **Ky.**—Reid *v.* Lyttle, 150 Ky. 304, 150 S. W. 357. **Neb.**—Stone *v.* Neeley, 42 Neb. 567, 60 N. W. 965. **S. C.**—Harle *v.* Morgan, 29 S. C. 258, 7 S. E. 487. **S. D.**—Van Brunt & Davis Co. *v.* Harrigan, 8 S. D. 96, 65 N. W. 421. **Tex.**—Laing *v.* Craig, 14 Tex. Civ. App. 134, 36 S. W. 142; Mexican Nat. R. Co. *v.* Savage (Tex. Civ. App.), 41 S. W. 663. **Va.**—Gar-

(B.) SUFFICIENCY OF ALLEGATION. — Though contrary to the rule generally laid down in actions between partners where partnership is a material fact,³⁸ it is held in actions by and against partners that the fact of partnership may be alleged generally,³⁹ or the pleader may, of course, set out facts and circumstances from which the existence of the relation follows as a matter of law.⁴⁰

(II.) Names of Partners. — Not only must the pleader aver, in certain cases, the existence of a partnership, but he must further set forth the names of the individuals composing it,⁴¹ but in jurisdictions

land *v. Davidson*, 3 Munf. (17 Va.) 189.

[a] Where a dormant partner is made a party, the plaintiff need not allege that he knew such defendant was a partner at the time the contract was entered into. *Allen & Co. v. Davids*, 70 S. C. 260, 49 S. E. 846.

38. See *supra*, I, C, 6, a, (I).

39. Ga.—*Mims v. Brook & Co.*, 3 Ga. App. 247, 59 S. E. 711. Mo.—See *Meeks v. Clear Jack Min. Co.*, 141 Mo. App. 648, 124 S. W. 1084. S. C.—*Walter v. Godshall*, 32 S. C. 187, 10 S. E. 951. Wis.—*Howard v. Boorman*, 17 Wis. 459.

[a] In the absence of a motion to make specific and certain an averment of partnership is sufficient which states that "said plaintiffs, for several years last past, have been and are now co-partners, doing business under the firm name and style of A. Pfister & Co." *Pfister v. Wade*, 69 Cal. 133, 10 Pac. 369.

[b] That partnerships arising by estoppel must, however, be specially pleaded, see *Hamner v. Barker* (Tex. Civ. App.), 144 S. W. 1180. But see *Cornhauser & Co. v. Roberts*, 75 Wis. 554, 44 N. W. 744.

[c] The statute may authorize the alleging of partnership generally or as a legal conclusion. *Ware v. Leffert*, 151 Iowa 17, 130 N. W. 793; *Sweet, Dempster & Co. v. Ervin & Co.*, 54 Iowa 101, 6 N. W. 156.

[d] That plaintiff is a joint stock company is sufficient allegation. *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. ed. 800. *Contra*, *Coody v. Shawver* (Tex. Civ. App.), 161 S. W. 935.

[e] A distinct and formal allegation of partnership is not necessary. Thus a pleading entitled in the name of certain parties plaintiffs as partners, and which describes them as part-

ners is sufficient. *Campbell v. Blanke*, 13 Kan. 62.

40. See *Kessler v. First Nat. Bank of Yoakum*, 21 Tex. Civ. App. 98, 51 S. W. 62, and 5 STANDARD PROC. 205, 208, and *infra*, this note.

[a] Setting out a contract signed in the firm name of plaintiffs is not alone sufficient to show a partnership. *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164.

[b] An averment that plaintiffs are merchants, engaged in the sale of general merchandise, is not sufficient to show a partnership interest. *Anderson v. Evansville Brewing Assn.*, 49 Ind. App. 403, 97 N. E. 445.

[c] Sharing Profits and Losses. An allegation that two persons conducted a business under the name Wangemann, and shared in the profits and losses, is insufficient in the absence of a general averment of partnership or averment of agreement of partnership. *Kessler v. First Nat. Bank of Yoakum*, 21 Tex. Civ. App. 98, 51 S. W. 162.

41. Ga.—*Bracken v. Dillon & Sons*, 64 Ga. 243, 37 Am. Rep. 70. La.—*Wolf v. New Orleans Tailor-Made Pants Co.*, 52 La. Ann. 1357, 27 So. 893. Md.—*Hirsh v. Thurber & Co.*, 54 Md. 210. N. C.—*Brewer & Co. v. Abernathy, Lyerly & Co.*, 159 N. C. 283, 74 S. E. 1025; *Palin v. Small*, 63 N. C. 484. S. C.—*Walter v. Godshall*, 32 S. C. 187, 10 S. E. 951.

[a] If the title contains the names, it is not necessary to repeat them in the body of the pleading. *Walter v. Godshall*, 32 S. C. 187, 10 S. E. 951.

[b] Objection on this ground is waived (1) unless raised by written demurrer or answer. *Brewer & Co. v. Abernathy, Lyerly & Co.*, 159 N. C. 283, 74 S. E. 1025. (2) A demurrer to the evidence is not a sufficient or timely method of raising the objection that the names of the partners were not alleged. *Brewer & Co. v.*

permitting suits by and against partnerships in the firm name, the rule is otherwise.⁴²

(III.) **Nature and Purpose of Partnership.** — The nature and purpose of the partnership need not be averred,⁴³ except that in certain cases such allegations may be material to the cause of action,⁴⁴ or to the right to sue or be sued in the firm name.⁴⁵

(IV.) **Allegation of Filing Certificate of Fictitious Name.** — Where the filing of a certificate as to the names of partners doing business under a fictitious name, is required,⁴⁶ an allegation of compliance with the statute is not necessary, in a suit by,⁴⁷ or against,⁴⁸ such partnership,

Abernathy, Lyerly & Co., 159 N. C. 283, 74 S. E. 1025; Kochs Co. v. Jackson, 156 N. C. 326, 72 S. E. 382.

42. **Minn.**—Dimond v. Minnesota Sav. Bank, 70 Minn. 298, 73 N. W. 182. **Neb.**—Winters v. Means, 50 Neb. 209, 69 N. W. 753; Church v. Callahan, 49 Neb. 542, 68 N. W. 932. **Ohio.** Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805; Pennsylvania Fire Ins. Co. v. Carnahan, 19 Ohio Cir. Ct. 97, 10 Ohio Cir. Dec. 225. **Wyo.**—Noble v. Hudson, 20 Wyo. 227, 122 Pac. 901.

[a] **Alleging Partners' Names Surplusage.**—Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805. 43. National Ins. Co. v. Bowman, 60 Mo. 252.

44. Alsop v. Central Trust Co., 100 Ky. 375, 18 Ky. L. Rep. 830, 38 S. W. 510.

[a] **A complaint against a non-trading partnership** upon a written obligation signed in the firm name by one of the partners, the plaintiff must affirmatively allege the nature of the partnership. Alsop v. Central Trust Co., 100 Ky. 375, 18 Ky. L. Rep. 830, 38 S. W. 510.

45. McJunkin v. Placek, 80 Neb. 373, 114 N. W. 411.

[a] **Doing Business in the State, etc.** That the partnership was organized for the purpose of doing business in the state or holding property therein, must be alleged in jurisdictions permitting suits by and against the partnership in the firm name, where it is organized for such purpose. McJunkin v. Placek, 80 Neb. 373, 114 N. W. 411; Church v. Callahan, 49 Neb. 542, 68 N. W. 932; Peaks v. Graves, 25 Neb. 235, 41 N. W. 151; Burlington, etc. R. Co. v. Dick, 7 Neb. 242; Jackson v. Akron Brick Assn., 53 Ohio St. 303, 41 N. E. 257, 53 Am. St. Rep. 638, 35 L. R. A. 287; Shafer v. Hock-

heimer, 36 Ohio St. 215; Sanders v. Keber, 28 Ohio St. 630; Haskins v. Alcott, 13 Ohio St. 210; Beers & Co. v. Gurney, 14 Ohio Cir. Ct. 82, 7 Ohio Cir. Dec. 411.

[b] **"Doing Business" Sufficient.** An allegation that the firm "was doing business under that name in the state of O." is sufficient without alleging that it was formed for the purpose of doing business in the state. Globe Rolling Mill v. King & Co., 13 Ohio Dec. 744, 2 Cin. Sup. Ct. 21.

46. See *supra*, II, D, 1.

47. **Cal.**—Holden v. Mensinger, 165 Pac. 950; Cook v. Fowler, 101 Cal. 89, 35 Pac. 431; Phillips v. Goldtree, 74 Cal. 151, 13 Pac. 313, 15 Pac. 451. **Mont.**—Reilly v. Hatheway, 46 Mont. 1, 125 Pac. 417. **Ohio.**—Walsh v. J. R. Thomas' Sons, 91 Ohio St. 210, 110 N. E. 454; Kinsey & Co. v. Ohio Southern Ry. Co., 3 Ohio Dec. 249, 2 Ohio N. P. 175. *Contra*, New Carlisle Bank v. Brown, 11 Ohio Cir. Ct. 77, 5 Ohio Cir. Dec. 94. **Okla.**—Oklahoma Fire Ins. Co. v. Wagester, 38 Okla. 291, 132 Pac. 1071; Swope v. Burnham, 6 Okla. 736, 52 Pac. 924.

[a] **The presumption** is that the law has been complied with. Oklahoma Fire Ins. Co. v. Wagester, 38 Okla. 291, 132 Pac. 1071; Swope v. Burnham, 6 Okla. 736, 52 Pac. 924.

[b] **But where the complaint shows upon its face** that the plaintiffs are doing business under a fictitious name and declares upon a contract made in the firm name, it then devolves upon the plaintiffs to further allege that they have complied with the provisions of the statute. Sweeney v. Stanford, 67 Cal. 635, 8 Pac. 444, discussed in Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 112 Pac. 454.

48. Adams Express Co. v. State, 161 Ind. 328, 67 N. E. 1033.

as non-compliance is matter to be pleaded in defense to defeat the action.⁴⁹

(V.) **Prayer.** — In a suit against a firm it is not necessary to pray for a judgment against each and a judgment against all.⁵⁰

2. Plea or Answer. — a. *Denial of Partnership.* — In many jurisdictions, in actions by or against a partnership, the existence of the partnership must be denied by a plea verified by affidavit in order to make an issue thereon,⁵¹ but such a plea is not necessary to allow a defendant to show a non-joinder of other members composing the partnership,⁵² nor under some of the statutes is such a plea necessary

49. See *infra*, II, G, 2, c.

50. *Tracy v. Symmes*, 7 Ky. L. Rep. 450.

51. **Ala.**—*Guin v. Grasselli Chemical Co.*, 197 Ala. 117, 72 So. 413; *Brantley v. Thomas*, 194 Ala. 646, 70 So. 122. **Ark.**—*Stone v. Kaufman & Co.*, 25 Ark. 186. **Colo.**—*Litchfield v. Daniels*, 1 Colo. 268. **Fla.**—*Smith v. Westcott*, 34 Fla. 430, 16 So. 332. **Ga.**—*Waterman v. Glisson*, 115 Ga. 773, 42 S. E. 95; *De Leon v. Heller*, 77 Ga. 740; *Seymour, Johnson & Co. v. Cobb*, 43 Ga. 525. **Ill.**—*Smith v. Knight*, 71 Ill. 148, 22 Am. Rep. 94; *McKinney v. Peck*, 28 Ill. 174; *Warren v. Chambers*, 12 Ill. 124. **Ia.**—*Richards v. Hellen*, 153 Iowa 66, 133 N. W. 393. **Kan.**—*Hayner v. Eberhardt*, 37 Kan. 308, 15 Pac. 168. **Md.**—*National Bldg. Supply Co. v. Gosnell*, 116 Md. 640, 82 Atl. 557. **Miss.**—*Walker Bros. v. Nix*, 115 Miss. 199, 76 So. 143; *Anderson v. Tarpley*, 6 Smed. & M. 507. **Mo.**—*Curtis v. Sexton*, 252 Mo. 221, 159 S. W. 512; *Nephler v. Woodward*, 200 Mo. 179, 98 S. W. 488; *Commercial Jewelry Co. v. Hite*, 161 Mo. App. 465, 144 S. W. 153; *Meeks v. Clear Jack Min. Co.*, 141 Mo. App. 648, 124 S. W. 1084. **Pa.**—*Stable v. Poth*, 220 Pa. 335, 69 Atl. 864; *Elm City Lumber Co. v. Haupt*, 50 Pa. Super. 489. **Tenn.**—*Richmond v. Boyd*, 130 Tenn. 187, 169 S. W. 755; *Barrett v. Hambright*, 4 Sneed 586. **Tex.**—*Tyler Box & Lumber Mfg. Co. v. City Nat. Bank* (Tex. Civ. App.), 185 S. W. 352; *Houston & Texas Central R. Co. v. Corsicana Fruit Co.* (Tex. Civ. App.), 170 S. W. 849. **Va.**—*Shepherd, Hunter & Co. v. Frys*, 3 Gratt. (44 Va.) 442. **W. Va.**—*Ruffner Bros. v. Montgomery & Co.*, 61 W. Va. 62, 56 S. E. 388; *Hall v. Lyons*, 29 W. Va. 410, 1 S. E. 582. **Wis.**—*Woolsey v. Henke*, 125 Wis. 134, 103 N. W. 267; *Lago v. Walsh*, 98 Wis. 348, 74 N. W. 212.

See 7 STANDARD PROC. 55, note 18.

[a] **Verified denial not necessary** where action is not by or against a partnership. Thus, in an account sued on by the assignees of a partnership, the partnership may be denied without verifying the plea. *Commercial Jewelry Co. v. Hite*, 161 Mo. App. 465, 144 S. W. 153.

[b] **Plaintiff May Waive Requirement.**—*Goebel v. Montgomery & Co.*, 63 Ill. App. 135 (by failing to object to introduction of evidence); *National Bldg. Supply Co. v. Gosnell*, 116 Md. 640, 82 Atl. 557.

[c] **Insufficient Denial.**—**Ia.**—*University of Chicago v. Emmert*, 103 Iowa 500, 79 N. W. 285. **Ky.**—*Craig v. Chipman*, 22 Ky. L. Rep. 322, 57 S. W. 244. **Wis.**—*Martin v. American Exp. Co.*, 19 Wis. 336, unverified denial.

[d] **On a plea of payment** it is not necessary to prove who composed the plaintiff firm. *Stone v. Kaufman & Co.*, 25 Ark. 186.

[e] **Withdrawal of verified denial** effects an admission of the allegation of partnership. *Gay v. Waltman*, 89 Pa. 453.

[f] **A verified plea by one of the defendants denying** (1) that he is a partner is sufficient to place the necessity upon the plaintiff of proving that the defendant so denying was in fact a partner (*Reiter v. Fruh*, 150 Pa. 623, 24 Atl. 347. See also *Bradford v. Taylor*, 61 Tex. 508), and (2) inures to the benefit of all, according to some authorities. *Willis v. Morrison*, 44 Tex. 27; *Hayden Saddlery Hdw. Co. v. Ramsay*, 14 Tex. Civ. App. 185, 36 S. W. 595. But see *Ginners' Mutual Underwriters v. Wiley* (Tex. Civ. App.), 147 S. W. 629. Compare 7 STANDARD PROC. 61.

52. *Tallapoosa County Bank v. Salmon*, 12 Ala. App. 589, 68 So. 542;

where the defendants are sued as partners.⁵³ Under some of the statutes, a denial, verified by affidavit, of the execution of the instrument sued upon will put in issue the fact of partnership.⁵⁴

b. *Denial of Liability*.—If the defendants wish to deny that they are jointly liable upon an instrument, they should deny its execution under oath.⁵⁵

c. *Filing Certificate of Fictitious Name*.—A defense that plaintiffs have no right to maintain a suit for the reason that they have failed to file a certificate of fictitious name must be specially pleaded,⁵⁶ otherwise it will be deemed waived.⁵⁷

Houston & Texas Central R. Co. v. Corsicana Fruit Co. (Tex. Civ. App.), 170 S. W. 849.

53. *Minn.*—McKasy v. Huber, 65 Minn. 9, 67 N. W. 650. *N. Y.*—See Schneider v. Fuchs, 107 N. Y. Supp. 33. *Tenn.*—Richmond v. Boyd, 130 Tenn. 187, 169 S. W. 755.

And see Graham v. Henderson, 35 Ind. 195, in the absence of statute.

54. *Finney v. Erie City Iron Works*, 109 Ala. 485, 20 So. 48; *Cain Lumb Co. v. Standard Dry Kiln Co.*, 108 Ala. 346, 18 So. 882; *Fowlkes & Co. v. Baldwin, Kent & Co.*, 2 Ala. 705; *Rogers v. Nuckolls*, 2 Colo. 281; *Litchfield v. Daniels*, 1 Colo. 268.

55. *Colo.*—Litchfield v. Daniels, 1 Colo. 268. *Ill.*—Zuel v. Bowen, 78 Ill. 234; *Kennedy v. Hall*, 68 Ill. 165; *Davis v. Scarritt*, 17 Ill. 202; *Warren v. Chambers*, 12 Ill. 124, joint liability admitted by those who fail to join in the affidavit. *Ia.*—Byington v. Woodward, 9 Iowa 360. *Mich.*—McRobert v. Crane, 49 Mich. 483, 13 N. W. 826; *Haight v. Arnold*, 48 Mich. 512, 12 N. W. 680; *Wren v. McLaren*, 48 Mich. 197, 12 N. W. 41. *Miss.*—Fairchild v. Grand Gulf Bank, 5 How. 597. *Mo.*—Greene v. Wilhite, 29 Mo. App. 459. *Tenn.*—Barrett v. Hambright, 4 Sneed 586. *Tex.*—Ferguson v. Wood, 23 Tex. 177. *Va.*—Phaup v. Stratton, 9 Gratt. (50 Va.) 615. *Wis.*—Whitman v. Wood, 6 Wis. 676.

[a] The affidavit should not be technically construed, but should be held sufficient if in good faith it seems to be intended to meet the plaintiff's case. *Haight v. Arnold*, 48 Mich. 512, 12 N. W. 680. And see also *Wren v. McLaren*, 48 Mich. 197, 12 N. W. 41.

56. *Cal.*—Cook v. Fowler, 101 Cal. 89, 35 Pac. 431; *Carlock v. Cagnacci*, 88 Cal. 600, 26 Pac. 597, demurrer not proper objection. *Mich.*—Turnbull v.

Michigan Central R. Co., 183 Mich. 213, 150 N. W. 132. *Mont.*—Reilly v. Hatheway, 46 Mont. 1, 125 Pac. 417; *Vaughan v. Kujath*, 44 Mont. 484, 120 Pac. 1121; *Wilson v. Yegen Bros.*, 38 Mont. 504, 100 Pac. 613. *N. Y.*—Stoddart v. Key, 62 How. Pr. 137; *O'Toole v. Garvin*, 1 Hun 92; *Hennequin v. Butterfield*, 11 Jones & S. 411; *Lunt v. Lunt*, 8 Abb. N. C. 76. *Ohio.*—Walsh v. J. R. Thomas' Sons, 91 Ohio St. 210, 110 N. E. 454; *Kinsey & Co. v. Ohio Southern Ry. Co.*, 3 Ohio Dec. 249, 2 Ohio N. P. 175. *Okla.*—Swope v. Burnham, 6 Okla. 736, 52 Pac. 924. *Ore.*—Beamish v. Noon, 76 Ore. 415, 149 Pac. 522. *S. D.*—Drake v. Great Northern Ry. Co., 24 S. D. 19, 123 N. W. 82. *Wash.*—Hale v. City Cab, Carriage & Transfer Co., 66 Wash. 459, 119 Pac. 837; *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192.

See *supra*, II, G, 1, b, (IV).

[a] *Conclusion of Law*.—An allegation that the designation under which the plaintiffs sued is one not showing the names of the persons interested as partners is a mere conclusion of law and insufficient. *Vaughan v. Kujath*, 44 Mont. 484, 120 Pac. 1121.

57. *Cal.*—Cook v. Fowler, 101 Cal. 89, 35 Pac. 43. But see *Sweeney v. Stanford*, 67 Cal. 635, 8 Pac. 444, *supra*, II, H, 1, b, (IV), note. *Mont.*—Reilly v. Hatheway, 46 Mont. 1, 125 Pac. 417. *Ohio.*—Kinsey & Co. v. Ohio Southern Ry. Co., 3 Ohio Dec. 249, 2 Ohio N. P. 175. *Wash.*—Hale v. City Cab, Carriage & Transfer Co., 66 Wash. 459, 119 Pac. 837; *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192.

But compare *Cobble v. Farmers' Bank*, 63 Ohio St. 528, 59 N. E. 221, holding that a judgment taken by a partnership doing business under a fictitious name without complying with the statute is invalid.

d. *Separate Pleas by Partners.*—In an action against partners upon a partnership liability, either partner may separately plead a defense available either to himself alone,⁵⁸ or to all the partners.⁵⁹ A partner may adopt his copartners plea,⁶⁰ and a defense by one partner may inure to the benefit of another partner sued jointly with him.⁶¹

3. *Replication or Reply.*—Plaintiff may in accordance with the general rules where such is the practice, reply to any new matter contained in the plea or answer of defendant.⁶²

4. *Verification.*—Under the theory that one partner is the agent for the firm in so far as he acts within the scope of his authority, one partner may verify the pleadings of the firm.⁶³

5. *Amendments.*—The general rules governing the right to amend pleadings⁶⁴ apply in actions by or against partners. Thus under proper circumstances amendments may be made to show the existence,⁶⁵

58. *Ala.*—*Emanuel v. Martin*, 12 *Ala.* 233; *Plowman v. Riddle*, 7 *Ala.* 775; *Beal v. Suedicor*, 8 *Port.* 523. *Conn.*—*Anderson v. Henshaw*, 2 *Day* 272. *Fla.*—*Friend v. Duryee*, 17 *Fla.* 111, 35 *Am. Rep.* 89. *Ga.*—*Strauss v. Waldo, Barry & Co.*, 25 *Ga.* 641. *Pa.* *Nelson v. Lloyd*, 9 *Watts* 22; *Prior v. Wurzbarger & Co.*, 4 *Kulp* 9. *Tex.* *Walton v. Payne*, 18 *Tex.* 60.

[a] *The failure of one partner to plead*, thus admitting the plaintiff's claim, will not affect the right of another partner to enter a plea denying such claim. *Corcoran v. Trich*, 9 *Sad. (Pa.)* 110, 11 *Atl.* 677; *Prior v. Wurzbarger & Co.*, 4 *Kulp (Pa.)* 9.

59. *Ala.*—*Emanuel v. Martin*, 12 *Ala.* 233. *Fla.*—*Friend v. Duryee*, 17 *Fla.* 111, 35 *Am. Rep.* 89. *Ga.*—*Wynne v. Millers*, 61 *Ga.* 343. *Ill.*—*Yocum v. Benson*, 45 *Ill.* 435 (denial of existence of the partnership); *Davis v. Scarritt*, 17 *Ill.* 202. *Ia.*—*Machinists' Bank v. Krum*, 15 *Iowa* 49, usury. *Ky.*—*Vallandigham v. Duval*, 7 *J. J. Marsh.* 262, statute of limitations.

[a] *One partner may demur while another may answer the complaint upon the merits.* *Allison Bros. Co. v. Hart*, 56 *Hun* 282, 9 *N. Y. Supp.* 692, 30 *N. Y. St.* 697.

60. *Barnett v. Watson*, 1 *Wash. (1 Va.)* 372.

61. *Machinists' Bank v. Krum*, 15 *Iowa* 49; *McRobert v. Crane*, 49 *Mich.* 483, 13 *N. W.* 826.

62. See generally the title "*Replication and Reply*," and *Fordice v. Scribner*, 108 *Ind.* 85, 9 *N. E.* 122.

[a] *Ratification of note sued on may be pleaded where one of the de-*

fendants denied its execution. *Pattison v. Norris*, 29 *Ind.* 165.

[b] *Where one of the defendant partners pleads infancy*, the plaintiff may reply a confirmation of the contract by him after reaching his majority. *Kirby v. Cannon*, 9 *Ind.* 371.

63. *Ala.*—*Garner v. Simpson*, *Minor* 67. *Ia.*—*Lessem, Bro. & Co. v. Wilson*, 43 *Iowa* 488, where the affidavit fails to show that the person verifying the pleading is a member of the firm, the court will, in the absence of proof to the contrary, presume that he is. *N. Y.*—*Mooney v. Ryerson*, 8 *Civ. Proc.* 435. *Tenn.*—*Cheatham v. Pearce*, 89 *Tenn.* 668, 15 *S. W.* 1080; *Moody v. Alter, Winston & Co.*, 12 *Heisk.* 142. *Wis.*—*Garland v. Hickey*, 75 *Wis.* 178, 43 *N. W.* 832.

64. See generally the titles "*Amendments and Jeofails*;" "*New Cause of Action or Defense*."

65. *Colo.*—*Fryer v. Breeze*, 16 *Colo.* 323, 26 *Pac.* 817. *Ga.*—*Heyman v. Decatur Street Bank*, 16 *Ga. App.* 14, 84 *S. E.* 483; *Dublin & S. W. Ry. Co. v. Akerman*, 2 *Ga. App.* 746, 59 *S. E.* 10. *Mo.*—*Gunther Bros. & Co. v. Aylor*, 92 *Mo. App.* 161. *S. C.* *Munroe v. Williams*, 35 *S. C.* 572, 15 *S. E.* 279.

[a] *An allegation that the company is a corporation may be amended by striking the word corporation and making an allegation that the company is a partnership.* *Ala.*—*Manistee Mill Co. v. Hobdy*, 165 *Ala.* 411, 51 *So.* 871, 138 *Am. St. Rep.* 73. *Ga.*—*Perkins Co. v. Shewmake*, 119 *Ga.* 617, 46 *S. E.* 832. *Kan.*—*Anglo-American Pack. & Prov. Co. v. Turner Casing*

or non-existence⁶⁶ of a partnership; to correct an averment of the firm name,⁶⁷ or name of a member thereof,⁶⁸ or to show who the individual members of the firm are.⁶⁹ And an amendment may, within the court's discretion, be allowed converting an action by or against a firm to one by or against the individual members thereof,⁷⁰ or vice versa.⁷¹

H. ISSUES, PROOF AND VARIANCE.⁷² — 1. **Existence of Partnership.** At common law, an averment of partnership had to be proved as alleged.⁷³ Under the statutes it need be proved only when there is a proper denial thereof.⁷⁴ Proof of a partnership by estoppel is suffi-

Co., 34 Kan. 340, 8 Pac. 403. **Mo.** Ward v. Pine, 50 Mo. 38.

66. McDormont v. Hicksen, 9 Ky. L. Rep. 1012.

[a] Where a corporation is sued as a partnership, the complaint may be amended to show that the defendant is a corporation. **Ala.**—Lewis Lumb. Co. v. Camody, 137 Ala. 578, 35 So. 126; Key v. Goodall, Brown & Co., 7 Ala. App. 227, 60 So. 986. **Kan.** Anglo-American P. & P. Co. v. Turner Casing Co., 34 Kan. 340, 8 Pac. 403. **S. D.**—Haggarty v. Strong, 10 S. D. 585, 74 N. W. 1037.

67. Craig v. Chipman, 22 Ky. L. Rep. 322, 57 S. W. 244.

68. Welch v. Hull, 73 Mich. 47, 40 N. W. 797; Dwyer Brick Works v. Flanagan Bros., 87 Mo. App. 340.

69. **U. S.**—Schiffer v. Anderson, 146 Fed. 457, 76 C. C. A. 667. **Ark.** Loewenberg v. Gilliam, 72 Ark. 314, 79 S. W. 1064, allow setting out of names of members. **Cal.**—Bogart v. Crosby, 91 Cal. 278, 27 Pac. 603. **Colo.**—Adamson v. Bergen, 15 Colo. App. 396, 62 Pac. 629, addition of partner. **Conn.** Phelps Mfg. Co. v. Enz, 19 Conn. 58. **Ga.**—Perkins Co. v. Shewmake, 119 Ga. 617, 46 S. E. 832; Smith & Co. v. Columbia Jewelry Co., 114 Ga. 698, 40 S. E. 735. **Ia.**—Padden v. Clark, 124 Iowa 94, 99 N. W. 152, amendment allowed showing that firm was composed of one individual. **Kan.**—Hucklebridge v. Atchison, T. & S. F. R. Co., 66 Kan. 443, 71 Pac. 814; Anglo-American Pack. & Prov. Co. v. Turner Casing Co., 34 Kan. 340, 8 Pac. 403; Henderson v. Stetter, 31 Kan. 56, 2 Pac. 849. **Mich.**—Stirling v. Heintzman, 42 Mich. 449, 4 N. W. 165. **Minn.** Miles v. Wann, 27 Minn. 56, 6 N. W. 417. **Mo.**—Tyrrel v. Milliken, 135 Mo. App. 293, 115 S. W. 512; Gunther Bros. & Co. v. Aylor, 92 Mo. App. 161; Dwyen Brick Works v. Flanagan Bros., 87 Mo. App. 340. **Okla.**—Symus Gro-

cer Co. v. Burnham, 6 Okla. 618, 52 Pac. 918, adding a partner. **Pa.**—Daniel v. Lance, 29 Pa. Super. 454. **Utah.** Brown v. Pickard, 4 Utah 292, 9 Pac. 573, 11 Pac. 512. **Va.**—Murdock v. Herndon's Exrs., 4 Hen. & M. (14 Va.) 200.

70. **Ala.**—Levystein v. Gerson, Seligman & Co., 147 Ala. 251, 41 So. 774. **Mo.**—Tyrrel v. Milliken, 135 Mo. App. 293, 115 S. W. 512. **S. C.**—Baker v. Hornick, 51 S. C. 313, 28 S. E. 941.

But see Emerson v. Wilson, 11 Vt. 357, 34 Am. Dec. 695.

71. **Ala.**—Lister v. Vowell, 122 Ala. 264, 25 So. 564; McCaskey v. Pollock & Co., 82 Ala. 174, 2 So. 674. **Ia.** Van Dyk v. Mosterd, 171 Iowa 3, 153 N. W. 206; Hodges v. Kimball, 49 Iowa 577, 31 Am. Rep. 158; Dixon v. Dixon, 19 Iowa 512. **Mo.**—Tyrrel v. Milliken, 135 Mo. App. 293, 115 S. W. 512. **Ore.**—York v. Nash, 42 Ore. 321, 71 Pac. 59.

72. See generally the title "Variance and Failure of Proof."

73. **Ala.**—Findlay v. Stevenson, 3 Stew. 48. **Del.**—Boswell & Co. v. Dunning, 5 Harr. 231. **Ill.**—King v. Haines, 23 Ill. 340. **Minn.**—Hayward v. Grant, 13 Minn. 165, 97 Am. Dec. 228; Irvine v. Myers & Co., 4 Minn. 229. **Neb.**—McDonald v. Jenkins, 44 Neb. 163, 62 N. W. 444.

74. **U. S.**—Pratt v. Willard, 6 MeLean 27, 19 Fed. Cas. No. 11,378. **Ala.**—Moore v. Burns & Co., 60 Ala. 269. **Ark.**—Stone v. Kaufman & Co., 25 Ark. 186. **Colo.**—Teller v. Hartman, 16 Colo. 447, 27 Pac. 947; Litchfield v. Daniels, 1 Colo. 268. **Fla.** Smith v. Westcott, 34 Fla. 430, 16 So. 332. **Ga.**—Henderson Warehouse Co. v. Brand, 105 Ga. 217, 31 S. E. 551; Wiggins v. McCalla, 20 Ga. App. 739, 93 S. E. 231. **Ill.**—Smith v. Knight, 71 Ill. 148, 22 Am. Rep. 94; Kennedy v. Hall, 68 Ill. 165; Yocum v. Benson, 45 Ill. 435; King v. Haines,

cient to entitle the plaintiffs to recover.⁷⁵

A variance will result between a pleading setting up a partnership and proof showing that at the time of the accrual of the cause of action, the firm was not composed as alleged,⁷⁶ or that it was a corporation instead of a partnership,⁷⁷ but the existence of the partnership being proved, a variance as to the firm name is immaterial.⁷⁸

2. As to Liability.—There is no variance between a declaration against the defendants as joint makers of a note and proof that they made the note as partners,⁷⁹ or that it was executed by one of the partners in the firm name.⁸⁰ An action to recover as upon a partnership demand is, unless the liability is joint and several, fatally variant from proof showing liability of one of the partners individually,⁸¹ and a

23 Ill. 340; *Haywood v. Harmon*, 17 Ill. 477; *Warren v. Chambers*, 12 Ill. 124. **Ind.**—*Hauser v. Smith*, 13 Ind. 532; *Groves v. Train*, 11 Ind. 198; *Rees v. Simons*, 10 Ind. 82. **Ky.**—*Fennell v. Myers*, 25 Ky. L. Rep. 589, 76 S. W. 136; *Craig v. Chipman*, 22 Ky. L. Rep. 322, 57 S. W. 244. **La.**—*Atwater & Co. v. Colton*, 18 La. Ann. 226. **Md.**—*Thorne v. Fox*, 67 Md. 67, 8 Atl. 667. **Minn.**—*Stickney v. Smith*, *Baker & Co.*, 5 Minn. 486; *Irvine v. Myers & Co.*, 4 Minn. 229. **Miss.**—*Walker Bros. v. Nix*, 115 Miss. 199, 76 So. 143. **Mo.**—*Curtis v. Sexton*, 252 Mo. 221, 159 S. W. 512; *Nephler v. Woodward*, 200 Mo. 179, 98 S. W. 488. **Neb.**—*McCann v. McDonald & Co.*, 7 Neb. 305. **N. Y.**—*McCall v. Moschcowitz*, 10 Civ. Proc. 107, 14 Daly 16, 1 N. Y. St. 99; *Anable v. Steam-Engine Co.*, 16 Abb. Pr. 286. **Ohio.**—*Clark v. Kensell*, *Wright* 480. **Pa.**—*Fagely v. Bellas*, 17 Pa. 67. **Tex.**—*Gulf, C. & S. F. Ry. Co. v. Edloff*, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144; *Lindsay v. Jaffray*, 55 Tex. 626. **Va.**—*Phaup v. Stratton*, 9 Gratt. (50 Va.) 615; *Shepherd, Hunter & Co. v. Frys*, 3 Gratt. (44 Va.) 422. **W. Va.**—*Ruffner v. Montgomery*, 61 W. Va. 62, 56 S. E. 388; *Hall v. Lyons*, 29 W. Va. 410, 1 S. E. 582. **Wis.**—*Lago v. Walsh*, 98 Wis. 348, 74 N. W. 212; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Whitman v. Wood*, 6 Wis. 676; *Barnes v. Elmbinger*, 1 Wis. 56.

See *supra*, II, G, 2, a.

75. Ala.—*Cain Lumb. Co. v. Standard Dry Kiln Co.*, 108 Ala. 346, 18 So. 882. **Ark.**—*Brugman v. McGuire*, 32 Ark. 733. **Conn.**—*Salomon v. Hopkins*, 61 Conn. 47, 23 Atl. 716. **Del.**—*Davis v. White*, 1 Houst. 228. **Ill.**—*Smith v. Knight*, 71 Ill. 148, 22 Am. Rep. 94; *Fisher v. Bowles*, 20 Ill. 396.

Ind.—*Henshaw v. Root*, 60 Ind. 220; *Stephenson v. Cornell*, 10 Ind. 475. **Ia.**—*Hancock & Co. v. Hintrager*, 60 Iowa 374, 14 N. W. 725; *Maxwell v. Gibbs*, 32 Iowa 32. **Mass.**—*Rice v. Barrett*, 116 Mass. 312. **Mich.**—*Gray v. Gibson*, 6 Mich. 300. **Mo.**—*Campbell v. Dent*, 54 Mo. 325; *Young v. Smith*, 25 Mo. 341; *Ripley v. Evans*, 22 Mo. 157. **Neb.**—*McDonald v. Jenkins*, 44 Neb. 163, 62 N. W. 444. **N. Y.**—*Halliday v. McDougall*, 22 Wend. 264. **Ohio.**—*Reber v. Columbus Machine Mfg. Co.*, 12 Ohio St. 175. **Pa.**—*Reed v. Kremer*, 111 Pa. 482, 5 Atl. 237. **Vt.**—*Hicks & Co. v. Cram*, 17 Vt. 449. **Wis.**—*Cornhauser & Co. v. Roberts*, 75 Wis. 554, 44 N. W. 744.

76. Neal v. Adkins (Tex. Civ. App.), 145 S. W. 264.

[a] **Such variance is immaterial** where the opposite party is not misled in maintaining his defense on the merits. *Schiffer v. Anderson*, 146 Fed. 457, 76 C. C. A. 667.

77. McGrew & Sons v. Earnest, 167 Ala. 531, 52 So. 639; *Collier v. Postum Cereal Co.*, 150 App. Div. 169, 134 N. Y. Supp. 847.

78. Mass.—*Phipps v. Little*, 213 Mass. 414, 100 N. E. 615. **Minn.**—*Stickney v. Smith*, *Baker & Co.*, 5 Minn. 486. **Pa.**—*Tams v. Hitner*, 9 Pa. 441. **W. Va.**—*Courson v. Parker*, 39 W. Va. 521, 20 S. E. 583.

79. Jemison v. Dearing's Exrs., 41 Ala. 283; *Mack v. Spencer*, 4 Wend. 411.

80. Ala.—*Jemison v. Dearing's Exrs.*, 41 Ala. 283. **Conn.**—*Champion v. Mumford*, *Kirby* 170. **Mass.**—*Nichols v. James*, 130 Mass. 589. **N. Y.**—*Vallett v. Parker*, 6 Wend. 615; *Mack v. Spencer*, 4 Wend. 411.

81. U. S.—*Graves v. Boston Marine Ins. Co.*, 2 Cranch 419, 2 L. ed. 324.

complaint by or against a person in his individual capacity is variant from proof showing a cause of action by or against a firm of which he is a member.⁸² But under statutes allowing a recovery against such defendants, sued jointly, as are shown to be liable,⁸³ the fact that all the defendants sued as partners are not shown to be liable is no variance.⁸⁴

I. TRIAL. — 1. Separate Trials. — The fact that the partners have set up separate defenses does not necessarily entitle them to separate trials.⁸⁵

2. Dismissal, Discontinuance and Nonsuit. — While one partner may, upon an action on a partnership demand, dismiss the action against the will of his co-plaintiff,⁸⁶ he cannot do so when shown to be acting in fraud or collusion with the defendant,⁸⁷ or when it appears that the remaining partner plaintiff will suffer injury.⁸⁸ In an action against a partnership the plaintiff may discontinue as to those partners on whom the writ is not served without effecting a

Ala.—Ulrick *v.* Ragan, 11 Ala. 529. **Ia.**—Ogle *v.* Miller, 128 Iowa 474, 104 N. W. 502; Black *v.* Struthers, 11 Iowa 459. **Md.**—Boyd *v.* Wolff, 88 Md. 341, 41 Atl. 897. **Mich.**—Roberts *v.* People, 55 Mich. 367, 21 N. W. 319. **Miss.** Wilder *v.* Harris, 112 Miss. 164, 72 So. 890. **Mo.**—Michael *v.* Kennedy, 166 Mo. App. 462, 148 S. W. 983. **N. Y.** Menzie *v.* Wolff, 120 N. Y. Supp. 53. **Okla.**—Brown *v.* Williams, 24 Okla. 308, 103 Pac. 588. **S. C.**—Pope Mfg. Co. *v.* Charleston Cycle Co., 55 S. C. 528, 33 S. E. 787. **Va.**—Gordon *v.* Brown's Exrs., 3 Hen. & M. (13 Va.) 219. **Vt.**—Fullerton *v.* Seymour, 5 Vt. 249.

82. U. S.—Barry *v.* Foyles, 1 Pet. 311, 7 L. ed. 157. **Ala.**—Clark *v.* Jones, 87 Ala. 474, 6 So. 362; McCulloch *v.* Judd Sons & Co., 20 Ala. 703. **Cal.**—McCord *v.* Seale, 56 Cal. 262; Kern County Brick & Contract Co. *v.* English, 10 Cal. App. 637, 102 Pac. 960. **Colo.**—Erskine *v.* Russell, 43 Colo. 449, 96 Pac. 249. **Ga.**—Champion *v.* Wilson & Co., 64 Ga. 184, 191. **Ia.**—Smith *v.* James, 72 Iowa 515, 34 N. W. 309; Parsons *v.* Parsons, 66 Iowa 754, 21 N. W. 570, 24 N. W. 564. **La.**—Gallot *v.* McCluskey, 18 La. Ann. 259. **Md.**—Smith *v.* Crichton, 33 Md. 103; Neal's Exrs. *v.* Fisher's Admr., 2 Har. & G. 274. **Mo.**—Lowe *v.* Electric Springs Co., 47 Mo. App. 426. **N. D.**—Lake Grocery Co. *v.* Chiostri, 34 N. D. 386, 158 N. W. 998. **Okla.**—King *v.* Timmons, 23 Okla. 407, 100 Pac. 536. **S. C.**—Simonds *v.* Speed, 6 Rich. L. 390. **Tenn.**—Hyman, Gratz & Co. *v.* Stump, Cooke 494.

Wis.—Slutts *v.* Chafee, 48 Wis. 617, 4 N. W. 763. **Can.**—Marsolais *v.* Willett, 17 Quebec Sup. Ct. 262.

83. See *infra*, II, J, 2, c, and 15 STANDARD PROC. 84.

84. Cal.—Morgan *v.* Righetti, 113 Cal. xvii, 45 Pac. 260. **Mass.**—Taft *v.* Church, 162 Mass. 527, 39 N. E. 283; Wiggin *v.* Lewis, 12 Cush. 486. **Mo.**—Hutchinson *v.* Richmond Safety Gate Co., 247 Mo. 71, 152 S. W. 52; Bagnell Timber Co. *v.* Missouri, K. & T. R. Co., 242 Mo. 11, 145 S. W. 469 (reversing 180 Mo. 420, 79 S. W. 1130); Berkshire Lumb. Co. *v.* Chick Inv. Co., 168 Mo. App. 342, 153 S. W. 1078; Lowe *v.* Electric Springs Co., 47 Mo. App. 426. **N. Y.**—Pruyn *v.* Black, 21 N. Y. 300.

85. Walton *v.* Payne, 18 Tex. 60.

86. Arnold *v.* Greene, 15 R. I. 348, 5 Atl. 503; Noonan *v.* Orton, 31 Wis. 265, one partner may secure a discontinuance as to himself.

87. Ill.—Winslow *v.* Newlan, 45 Ill. 145. **Mass.**—Loring *v.* Brackett, 3 Pick. 403. **Mo.**—Hoover *v.* Missouri Pac. Ry. Co., 16 S. W. 480. **R. I.** Arnold *v.* Greene, 15 R. I. 348, 5 Atl. 503. **Wis.**—Noonan *v.* Orton, 31 Wis. 265.

88. Arnold *v.* Greene, 15 R. I. 348, 5 Atl. 503. See 7 STANDARD PROC. 656.

[a] **Remedy.**—"The most which the plaintiff desiring to discontinue can require, is indemnity from his co-plaintiff in case judgment should go for the defendant." Arnold *v.* Greene, 15 R. I. 348, 5 Atl. 503. To same effect, Winslow *v.* Newlan, 45 Ill. 145.

discontinuance of the action as against the partnership,⁸⁹ though there is authority to the contrary.⁹⁰

3. Province of Court and Jury.—What constitutes a partnership is for the court to determine,⁹¹ as is also the existence of the relation under undisputed facts. But the evidence being conflicting, the question of partnership between the parties should be left⁹² to the

89. U. S.—Mason *v.* Connors, 129 Fed. 831. **Ala.**—Nall *v.* Adams, 7 Ala. 475; Clark *v.* Stoddard, Miller & Co., 3 Ala. 366; Earbee *v.* Evans, 9 Port. 295; Gazzam *v.* Behee & Co., 8 Port. 49. **Ga.**—Warren Brick Co. *v.* Lagarde Lime & Stone Co., 12 Ga. App. 58, 76 S. E. 761. **Kan.**—Silvers *v.* Foster, 9 Kan. 56. **Miss.**—Lyons *v.* Jackson, 1 How. 474. **S. C.**—Bull *v.* Lambson, 5 S. C. 288. **Tenn.**—Link *v.* Allen, 1 Heisk. 318. **Va.**—Brown *v.* Belches, 1 Wash. (1 Va.) 9. **W. Va.**—Carlson's Admr. *v.* Ruffner, 12 W. Va. 297.

See 15 STANDARD PROC. 87; 7 STANDARD PROC. 666. But see Storm *v.* Roberts, 54 Iowa 677, 7 N. W. 124.

90. McManus *v.* Cash, 101 Tex. 261, 108 S. W. 800; Glascock *v.* Price, 92 Tex. 271, 47 S. W. 965; Frank *v.* Tatum, 87 Tex. 204, 25 S. W. 409; Tramel *v.* Guaranty State Bank & Trust Co. (Tex. Civ. App.), 176 S. W. 65. See also Rowse *v.* Woody (Tex. Civ. App.), 197 S. W. 362, wherein two defendants were sued as partners, the plaintiff declaring that his right to recover arose under a contract with them as a firm, and the court held that he could not, by nonsuiting as to one defendant, change his action to one against the other defendant as an individual.

91. Ala.—Peck *v.* Lampkin, 75 So. 580. **Del.**—Davis *v.* White, 1 Houst. 228. **Ind.**—Matthews *v.* Myers (Ind. App.), 115 N. E. 959. **Ia.**—Anfenson *v.* Banks, 163 N. W. 608. **Mo.**—Stundon *v.* Dahlenberg, 184 Mo. App. 381, 171 S. W. 37. **S. C.**—Dulany & Co. *v.* Elford, 22 S. C. 304. **Utah.**—Morgan *v.* Child, Cole & Co., 47 Utah 417, 155 Pac. 451.

92. U. S.—Chick *v.* Robinson, 95 Fed. 619, 37 C. C. A. 205, 52 L. R. A. 833. **Ala.**—Nevers Lumber Co. *v.* Fields, 151 Ala. 367, 44 So. 81; Rabitte *v.* Orr, 83 Ala. 185, 3 So. 420. **Colo.**—De Temple *v.* Mitchell, 15 Colo. App. 127, 61 Pac. 434; Look Ding *v.* Kennedy, 7 Colo. App. 72, 41 Pac. 1112. **Conn.**—Watson *v.* Farley, 85 Conn. 705, 82 Atl. 189. **Del.**—Jones *v.* Purnell,

5 Penne. 444, 62 Atl. 149; Deputy *v.* Harris, 1 Marv. 100, 40 Atl. 714, 1 Hard. 92. **Fla.**—Doggett *v.* Jordan, 2 Fla. 541. **Ga.**—Hutchinson Shoe Co. *v.* Elko Mercantile Co., 143 Ga. 170, 84 S. E. 453; Cary *v.* Simpson, 15 Ga. App. 280, 82 S. E. 918. **Ill.**—Commercial Nat. Bank *v.* Proctor, 98 Ill. 558; Gray's Harbor Commercial Co. *v.* Weise, 86 Ill. App. 125; Bunn *v.* West, 13 Ill. App. 415. **Ind.**—Matthews *v.* Myers (Ind. App.), 115 N. E. 959. **Ia.**—Anfenson *v.* Banks, 163 N. W. 608. **Ky.**—Robertson *v.* Wilhoite, 157 Ky. 58, 162 S. W. 563; Mathis *v.* Bank of Taylorsville, 124 S. W. 876. **Mass.**—Mersick *v.* Bilafsky, 205 Mass. 488, 91 N. E. 889. **Mich.**—Negaunee First Nat. Bank *v.* Freeman, 47 Mich. 408, 11 N. W. 219; Chamberlain *v.* Jackson, 44 Mich. 320, 6 N. W. 683; Gray *v.* Gibson, 6 Mich. 300. **Minn.**—Miller Pub. Co. *v.* Orth, 133 Minn. 139, 157 N. W. 1083; McGray *v.* Cobb, 130 Minn. 434, 152 N. W. 262, 153 N. W. 736. **Miss.**—Jameson *v.* Franklin, 6 How. 376. **Mo.**—Rimel *v.* Hayes, 83 Mo. 200; Hartwell *v.* Becker, 181 Mo. App. 408, 168 S. W. 837; Watts *v.* Pierson, 170 Mo. App. 532, 156 S. W. 724; Thornton *v.* Mersereau, 168 Mo. App. 1, 151 S. W. 212. **Neb.**—Wagoner *v.* First Nat. Bank, 43 Neb. 84, 61 N. W. 112; McCann *v.* McDonald & Co., 7 Neb. 305. **N. J.**—Benoliel *v.* Homae, 87 N. J. L. 375, 94 Atl. 605; Seabury *v.* Bolles, 51 N. J. L. 103, 16 Atl. 54, 11 L. R. A. 136, *modified*, 52 N. J. L. 413, 21 Atl. 952, 11 L. R. A. 136. **N. Y.**—Sheehan *v.* Fleetham, 58 Hun 605, 12 N. Y. Supp. 158, 34 N. Y. St. 665; Drake *v.* Elwyn, 1 Caines 184. **Okla.**—Harmon *v.* National Supply Co., 166 Pac. 80; Moning Dry Goods Co. *v.* Wiseman, 159 Pac. 259; Cassidy *v.* Saline County Bank, 14 Okla. 532, 78 Pac. 324. **Ore.**—North Pacific Lumb. Co. *v.* Spore, 44 Ore. 462, 75 Pac. 890. **Pa.**—Bing *v.* Schmitt, 226 Pa. 622, 75 Atl. 854. **S. C.**—Holliday *v.* Pegram, 89 S. C. 73, 71 S. E. 367, Ann. Cas. 1913A, 33; American Type Founders Co. *v.* Greenwood Print-

jury, as should also other matters depending upon disputed facts.⁹³

4. Instructions.—The general rules relating to the giving of instructions as elsewhere discussed apply in actions by or against firms or partners.⁹⁴ The court should, upon issues arising in respect thereto instruct the jury as to what constitutes a partnership or a partner;⁹⁵ the liability of partners,⁹⁶ and the nature of and the facts which make property partnership property.⁹⁷

The court may direct a verdict for either party where but one conclusion can be drawn from the pleadings and evidence.⁹⁸

J. JUDGMENT.⁹⁹—**1. By Default.**¹—In those jurisdictions where the statutes require service of process upon the individual members of the partnership,² the court, upon service made on the partnership

ing Co., 88 S. C. 308, 70 S. E. 803. **Tex.**—Texas & Pacific Ry. Co. v. Missouri Iron & Metal Co. (Tex. Civ. App.), 178 S. W. 597; Look v. Bailey (Tex. Civ. App.), 164 S. W. 407. **Wash.** Randall v. Gerrick, 93 Wash. 522, 161 Pac. 357. **Wis.**—Moore v. Dickson, 121 Wis. 591, 99 N. W. 322; Manegold v. Grange, 70 Wis. 575, 36 N. W. 263.

93. Citizens' Trust Co. v. Tindle (Mo. App.), 194 S. W. 1066.

See the title "Province of Judge and Jury."

[a] Whether transaction a partnership one or an individual one. **Ga.** Maynard & Son v. Ponder, 75 Ga. 664. **N. Y.**—Boor v. Mosehell, 49 Hun 606, 1 N. Y. Supp. 731, 17 N. Y. St. 310. **Pa.**—Ernest v. Wible, 10 Pa. Super. 576. **S. C.**—Planters' Bank v. Bivingsville Cotton Mfg. Co., 10 Rich. L. 95.

[b] Whether or not a transaction was inconsistent with the general scope of the business of the partnership is a question of fact. **Biggs & Co. v. Hubert & Co.**, 14 S. C. 620.

[c] **The extent of a partner's power** (1) to bind the firm is a question of law in a commercial partnership (Also *v. Central Trust Co.*, 100 Ky. 375, 18 Ky. L. Rep. 830, 38 S. W. 510), while (2) in a non-commercial firm, it is a question for the jury. Also *v. Central Trust Co.*, 100 Ky. 375, 18 Ky. L. Rep. 830, 38 S. W. 510.

94. See the title "Instructions."

95. See the following cases: **Ark.** Kahn Co. v. Bowden & Co., 80 Ark. 23, 96 S. W. 126. **Colo.**—Ashenfelter v. Williams, 12 Colo. App. 345, 55 Pac. 734. **Del.**—Jones v. Purnell, 5 Penne. 444, 62 Atl. 149; Deputy v. Harris, 1 Marv. 100, 40 Atl. 714, 1 Hard. 92. **Ia.**—Sheldon v. Bigelow,

118 Iowa 586, 92 N. W. 701. **Mich.** Weeks v. Hutchinson, 135 Mich. 160, 97 N. W. 695. **Minn.**—Connolly v. Davidson, 15 Minn. 519, 2 Am. Rep. 154. **Mo.**—Fourth Nat. Bank v. Altheimer, 91 Mo. 190, 3 S. W. 858; Campbell v. Dent, 54 Mo. 325. **Mont.** Lawrence v. Westlake, 28 Mont. 503, 73 Pac. 119. **S. C.**—Dulany & Co. v. Elford, 22 S. C. 304. **Tex.**—Coody v. Shawver (Tex. Civ. App.), 161 S. W. 935; Wood v. Samuels, 1 White & W. Civ. Cas., §922. **Wash.**—Willamette Casket Co. v. McGoldrick, 10 Wash. 229, 38 Pac. 1021.

96. Ind.—Jones v. Austin, 26 Ind. App. 399, 59 N. E. 1082. **Mich.**—McPherson v. Bristol, 115 Mich. 258, 73 N. W. 236; Conely v. Wood, 73 Mich. 203, 41 N. W. 259. **Mo.**—Cannon v. Wing, 150 Mo. App. 12, 129 S. W. 718. **Neb.**—Maurer v. Midmay, 25 Neb. 575, 41 N. W. 395. **S. C.**—Hyne v. Erwin, 23 S. C. 226, 55 Am. Rep. 15. **Utah.**—Morgan v. Child, Cole & Co., 47 Utah 417, 155 Pac. 451. **Wash.** Calhoun v. Whitcomb, 90 Wash. 128, 155 Pac. 759.

97. Bacon v. Lloyd, 1 White & W. Civ. Cas. (Tex.) §286.

98. Ill.—Powell Co. v. Finn, 198 Ill. 567, 64 N. E. 1036. **Pa.**—Thompson v. Piot, 52 Pa. Super. Ct. 305. **S. C.**—Holliday v. Pegram, 89 S. C. 73, 71 S. E. 367, Ann. Cas. 1913A, 23.

[a] **Existence of partnership not proved** where such proof is necessary. *Atlanta Trust Co. v. Willingham*, 20 Ga. App. 152, 92 S. E. 759.

99. See generally the title "Judgments."

1. See generally 14 STANDARD PROC. 854; 6 STANDARD PROC. 800.

2. See *supra*, II, E, 2.

itself, does not obtain jurisdiction to enter a default judgment against the partnership.³ A default judgment in favor of a partnership is not void because the names of the individuals composing the firm have not been set forth in the summons.⁴

2. By Confession.⁵—As a general rule one partner cannot confess or consent to a judgment binding upon his associates, without their consent or concurrence,⁶ but a surviving partner can confess judgment which is enforceable by execution against the firm assets under his control as survivor.⁷ A judgment obtained upon the confession of one partner will not reach the partnership effects, but will be effective only against the partners authorizing its entry,⁸ although some courts hold that a confession of judgment by one partner upon whom service is made is enforceable against the joint property as well as his separate property.⁹

3. Form and Sufficiency.—*a. Conformity to Pleadings and Proof.* The general rule that the judgment must conform to the pleadings and the proof,¹⁰ is applicable to actions between firms or partners and third persons.¹¹

b. As to Names of Parties.—**(I.) Generally.**—Under statutes permitting a partnership to sue or be sued in the firm name,¹² a judgment entered in such name is perfectly proper,¹³ and where only the firm as an entity is sued, a judgment against the individual partners is erroneous.¹⁴ But where no such statutes exist a judgment for or against a partnership in the firm name is absolutely void, according

3. *Miller v. First State Bank & Trust Co.* (Tex. Civ. App.), 184 S. W. 614.

4. *Fredlock v. Fredlock*, 70 W. Va. 607, 74 S. E. 865.

5. See generally 14 STANDARD PROC. 791.

6. See 14 STANDARD PROC. 798.

As to whether a judgment confessed without authority by one partner is a bar to another action against the firm, see 15 STANDARD PROC. 569.

Waiver of objection by failure of other partners to make application for vacation, see 15 STANDARD PROC. 185, note.

7. *Stampfle v. Bush*, 71 W. Va. 659, 77 S. E. 283.

8. See 14 STANDARD PROC. 799.

9. See 14 STANDARD PROC. 799.

10. See generally 15 STANDARD PROC. 35.

11. *Cal.*—*Weinreich v. Johnson*, 78 Cal. 254, 20 Pac. 556; *Shirran v. Dallas*, 21 Cal. App. 405, 132 Pac. 454, 462. *Colo.*—*Jansen v. Hyde*, 8 Colo. App. 38, 44 Pac. 760; *Shafer v. Hewitt*, 6 Colo. App. 374, 41 Pac. 509; *Des-*

sauer v. Koppin, 3 Colo. App. 115, 32 Pac. 182. *Ind.*—*Hill v. Marsh*, 46 Ind. 218. *Ia.*—*McDonald v. Franchere*, 102 Iowa 496, 71 N. W. 427. *N. Y.* *Brandagee v. Cleary*, 152 N. Y. Supp. 628. *Okla.*—*Holmes v. Alexander*, 152 Pac. 819; *Heaton v. Schaeffer*, 34 Okla. 631, 126 Pac. 797, 43 L. R. A. (N. S.) 540; *Sayre Commission Co. v. Keen*, 26 Okla. 794, 110 Pac. 775. *Tex.* *Hughes Bros. & Co. v. McDill*, 1 White & W. Civ. Cas., §1266. *Va.*—*Adams & Co. v. Powers, Blair & Co.*, 82 Va. 612.

[a]. **Whether a person is a member of a partnership** and liable as such being an issue in the case, the judgment against the partnership should identify such person as a member of the firm. *Paul v. Commercial Bank*, 66 Fla. 83, 63 So. 265.

12. See *supra*, II, D, 1.

13. *Carrier v. Hampton*, 33 N. C. 307.

14. *Craig v. Smith*, 10 Colo. 220, 15 Pac. 337; *Dessauer v. Koppin*, 3 Colo. App. 115, 32 Pac. 182; *Teller v. Gerry*, 30 Misc. 126, 61 N. Y. Supp. 864.

to some authorities,¹⁵ while others hold it to be merely erroneous,¹⁶ and require a timely objection to render such error available.¹⁷ Under a statute authorizing a judgment against all of the joint debtors or partners, enforceable against those served and the joint or partnership property, the plaintiff is entitled to a judgment in the form thus prescribed.¹⁸

Fictitious Firm Name. — In those jurisdictions requiring the filing of a certificate of names where a partnership is doing business under a fictitious name, before it is permitted to maintain a suit,¹⁹ a judgment entered in the firm name where no such certificate has been filed, has been held void,²⁰ but generally the judgment is not affected by

15. **Del.**—Hitch v. Gray, 1 Marv. 400, 41 Atl. 91, 2 Hard. 113. **Mo.** Weldon v. Fisher, 194 Mo. App. 573, 186 S. W. 1153; Johnson Machinery Co. v. Watson, 57 Mo. App. 629. **N. J.** Tomlinson v. Burke, 10 N. J. L. 295; Williamson v. Wright, 3 N. J. L. 984. **Tex.**—Frank v. Tatum, 87 Tex. 204, 25 S. W. 409; American Express Co. v. North Fort Worth Undertaking Co. (Tex. Civ. App.), 179 S. W. 908.

16. **Ind.**—Meyer v. Wilson, 166 Ind. 651, 76 N. E. 748. **Tenn.**—Marshal v. Hill, 8 Yerg. 101, may be taken advantage of by plea in abatement. **Tex.** Perryman v. Rayburn (Tex. Civ. App.), 30 S. W. 915; Stephens v. Turner, 9 Tex. Civ. App. 623, 29 S. W. 937.

[a] **The person doing business in such name as sole member, is bound.** Easterwood v. Burnett, 59 Tex. Civ. App. 521, 126 S. W. 934.

[b] **If other parts of record show the partners' names, it is sufficient.** Olson v. Veazie, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855.

[c] **Amendment to cure the defect permitted.** Wright v. McCampbell, 75 Tex. 644, 13 S. W. 293.

[d] **Effect Upon Subsequent Purchaser.**—(1) A judgment against a firm, entered upon the judgment docket, without setting forth the names of the several partners, is without effect as a lien, so far as respects subsequent purchasers and encumbrancers without notice. *In re York Bank's Appeal*, 36 Pa. 458. (2) But where the judgment is in favor of the partnership, the fact that it fails to state the names of the partners does not affect the lien, the name of the judgment debtor being correctly described. *Dearborn v. Patton*, 3 Ore. 420.

[e] **Judgment by default, rendered in the name of a partnership, the individual names not appearing, reversed in** *Simmons v. Titcher Bros.*, 102 Ala.

317, 14 So. 786; *Green v. Jones*, 102 Ala. 303, 14 So. 630; *Burden v. Cross & Co.*, 33 Tex. 685.

17. **Ala.**—*Simmons v. Titcher Bros.*, 102 Ala. 317, 14 So. 786. **Ark.** *Spaulding Mfg. Co. v. Godbold*, 92 Ark. 63, 121 S. W. 1063, 135 Am. St. Rep. 168, 29 L. R. A. (N. S.) 282. **Ill.** *Gore v. Muhlenburg*, 135 Ill. App. 525. **Ky.**—*Heavrin v. Lack Malleable Iron Co.*, 153 Ky. 329, 155 S. W. 729. **Mo.**—*Fowler v. Williams*, 62 Mo. 403; *Weldon v. Fisher*, 194 Mo. App. 573, 186 S. W. 1153; *Mitchell v. Railton*, 45 Mo. App. 273; *Conrades & Co. v. Spink*, 38 Mo. App. 309. **N. C.**—*Daniels v. Roanoke R. & Lumber Co.*, 158 N. C. 418, 74 S. E. 331; *Lash v. Arnold*, 53 N. C. 206. **Pa.**—*Morse v. Chase & Co.*, 4 Watts 456; *Porter v. Cresson*, 10 Serg. & R. 257. **Tex.** *Houssels v. Coe* (Tex. Civ. App.), 159 S. W. 864. **Va.**—*Pate v. Bacon & Co.*, 6 Munf. (20 Va.) 219; *Totty's Exr. v. Donald & Co.*, 4 Munf. (18 Va.) 430. **Wis.**—*Frisk v. Reigelman*, 75 Wis. 499, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198; *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692.

[a] **Objection before verdict necessary so as (1) to give the parties an opportunity to amend.** *Fowler v. Williams*, 62 Mo. 403; *Mitchell & Bro. v. Railton*, 45 Mo. App. 273. (2) After verdict the court will presume that the firm name is the name of a real person. *Morse v. Chase & Co.*, 4 Watts (Pa.) 456.

18. *Brawley v. Mitchell*, 92 Wis. 671, 66 N. W. 799.

19. See *supra*, II, D, 1; II, G, 1, b, (IV).

20. *Cobble v. Farmers' Bank*, 63 Ohio St. 528, 59 N. E. 221.

[a] **Compliance with the statute made after the rendition of the judgment will not validate it.** *Cobble v.*

such failure and unless the point is duly raised the objection is waived.²¹

(II.) *After Dissolution.*—After the death of a partner pendente lite, the partnership being dissolved thereby,²² it is erroneous to render a judgment against the former partnership.²³ Judgment should be entered in the name of the surviving partners.²⁴

*c. Joint and Several.*²⁵—The liability of partners at common law is joint, and in an action against two or more partners, where all are served, a verdict or judgment cannot be given against one or more of them without the others,²⁶ unless such others have been discharged on a plea of infancy or some other personal plea which does not go to the discharge of all.²⁷ But in jurisdictions where the obligations of the partnership are joint and several,²⁸ or where the obli-

Farmers' Bank, 63 Ohio St. 528, 59 N. E. 221.

21. See *supra*, II, G, 2, c.

22. See *supra*, II, D, 7, a.

23. *Bowen v. Troy Portable Mill Co.*, 31 Iowa 460; *White v. Dillinger*, 50 Okla. 555, 151 Pac. 194.

[a] The court will award a new trial where the judgment has been rendered against the partnership, one of the members of which died pending the suit. *Bowen v. Troy Portable Mill Co.*, 31 Iowa 460.

24. *Davis v. Davis*, 93 Ala. 173, 9 So. 736.

25. See generally 15 STANDARD PROC. 81, 88.

26. **Cal.**—*Morgan v. Righetti*, 113 Cal. xvii, 45 Pac. 260; *Curry v. Roundtree*, 51 Cal. 184. **Conn.**—*Champlin v. Tilley*, 3 Day 303, 5 Fed. Cas. No. 2,586. **Ga.**—*Francis v. Dickel & Co.*, 68 Ga. 255; *Campbell v. Bowen*, 49 Ga. 417; *Wooten & Co. v. Nall*, 18 Ga. 609. **Ill.**—*Pettis v. Atkins*, 60 Ill. 454; *Yocum v. Benson*, 45 Ill. 435; *Gribbin v. Thompson*, 28 Ill. 61; *Tolman v. Spaulding*, 4 Ill. 13. **Ia.**—*Lansing v. Bever Land Co.*, 158 Iowa 693, 138 N. W. 833; *Anderson v. Wilson*, 142 Iowa 158, 120 N. W. 677. **Minn.**—*Whitney v. Reese*, 11 Minn. 138. **Neb.**—*Morrissey v. Schindler*, 18 Neb. 672, 26 N. W. 476. **N. Y.**—*Knickerbocker Ice Co. v. Theiss*, 23 Misc. 625, 52 N. Y. Supp. 163; *Robertson v. Smith*, 18 Johns. 459, 9 Am. Dec. 227. **Ore.**—*Bertin v. Mattison*, 80 Ore. 354, 157 Pac. 153; *Ah Lep v. Gong Choy*, 13 Ore. 205, 9 Pac. 483. **Pa.**—*Nelson v. Lloyd*, 9 Watts 22. **S. D.**—*North Star Boot & Shoe Co. v. Stebbins*, 3 S. D. 540, 54 N. W. 593. **Eng.**—*Shirreff v. Wilks*, 1 East 47, 102 Eng. Reprint 19.

See 15 STANDARD PROC. 82, et seq.

[a] **Error Not Cured by Confessing Judgment.**—A judgment rendered against one of several partners cannot be cured by the other partners coming in and confessing judgment in the original action, without the consent of their co-defendant. *Nelson v. Lloyd*, 9 Watts (Pa.) 22.

27. See *Robertson v. Smith*, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227, and 15 STANDARD PROC. 82.

[a] **If a plea of infancy is sustained**, the judgment should be entered against the adult partners only. **Ind.**—*Kirby v. Cannon*, 9 Ind. 371. **Mass.**—*Tuttle v. Cooper*, 10 Pick. 281; *Woodward v. Newhall*, 1 Pick. 500. **Va.**—*Cole v. Pennell*, 2 Rand. (23 Va.) 174.

28. **U. S.**—*Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. ed. 819. **Ala.**—*Nevers Lumber Co. v. Fields*, 151 Ala. 367, 44 So. 81; *Gazzam v. Bebee & Co.*, 8 Port. 49; *Johnson v. Green*, 4 Port. 127. **Ark.**—*Brugman v. McGuire*, 32 Ark. 733. **Cal.**—*Morgan v. Righetti*, 113 Cal. xvii, 45 Pac. 260; *Bailey Loan Co. v. Hall*, 110 Cal. 490, 42 Pac. 962; *McNeil v. Kreda*, 31 Cal. App. 76, 159 Pac. 818. **Conn.**—*Salomon v. Hopkins*, 61 Conn. 47, 23 Atl. 716; *Dean v. Savage*, 28 Conn. 359. **Ga.**—*Doody Co. v. Jeffcoat*, 127 Ga. 301, 56 S. E. 421; *Ledbetter v. Dean*, 82 Ga. 790, 9 S. E. 720; *Maynard & Son v. Ponder*, 75 Ga. 664; *Francis v. Dickel & Co.*, 68 Ga. 255; *Wooten & Co. v. Nall*, 18 Ga. 609; *Crockett & Co. v. Garrard & Co.*, 4 Ga. App. 360, 61 S. E. 552. **Ind.**—*Pollock v. Glazier*, 20 Ind. 262. **Ia.**—*Ogle v. Miller*, 128 Iowa 474, 104 N. W. 502; *Poole, Gillam & Co. v. Hintrager*, 60 Iowa 180, 14 N. W. 223; *Crenshaw v. Wickersham*, 15

gation is joint, but the statute allows a recovery against the joint debtors upon whom service is made,²⁹ a judgment rendered is binding upon such members as are served or appear,³⁰ and upon the partner-

Iowa 154, a court of equity will not disturb such a judgment. **Kan.**—*Silvers v. Foster*, 9 Kan. 56. **Ky.**—*Williams v. Rogers*, 14 Bush 776. **Me.**—*Cutts v. Haynes*, 41 Me. 560. **Mass.**—*Taft v. Church*, 162 Mass. 527, 39 N. E. 283; *Wiggin v. Lewis*, 12 Cush. 486. **Minn.**—*Bunce v. Newell*, 56 Minn. 8, 57 N. W. 160; *Keigher v. Dowlan*, 47 Minn. 574, 50 N. W. 823; *Miles v. Wann*, 27 Minn. 56, 6 N. W. 417; *Town v. Washburn*, 14 Minn. 268. **Mo.**—*Hutchinson v. Richmond Safety Gate Co.*, 247 Mo. 71, 152 S. W. 52; *Bagnell Timber Co. v. Missouri, K. & T. R. Co.*, 242 Mo. 11, 145 S. W. 469; *Crews v. Lackland*, 67 Mo. 619. **Mont.**—*Knatz v. Wise*, 16 Mont. 555, 41 Pac. 710; *Wells, Fargo & Co. v. Clarkson*, 5 Mont. 336, 5 Pac. 894. **Neb.**—*Morrissey v. Schindler*, 18 Neb. 672, 26 N. W. 476. **Nev.**—*Conway v. District Court*, 40 Nev. 395, 164 Pac. 1009. **N. Y.**—*Pruyn v. Black*, 21 N. Y. 300; *Brumskill v. James*, 11 N. Y. 294; *Alaska Bank & Safe Deposit Co. v. Van Wyck*, 146 App. Div. 5, 130 N. Y. Supp. 563; *Lapinsky v. Colish*, 61 Misc. 319, 113 N. Y. Supp. 733; *Knickerbocker Ice Co. v. Theiss*, 23 Misc. 625, 52 N. Y. Supp. 163; *Hand v. Rogers*, 11 Misc. 623, 32 N. Y. Supp. 920, 66 N. Y. St. 346; *Parker v. Jackson*, 16 Barb. 33; *Claffin v. Butterly*, 2 Abb. Pr. 446, 5 Duer 327. **N. C.**—*Neil v. Childs*, 32 N. C. 195. **Ore.**—*Bertin v. Mattison*, 80 Ore. 354, 157 Pac. 153; *Ah Lep v. Gong Choy*, 13 Ore. 205, 9 Pac. 483. **S. C.**—*Bull v. Lambson*, 5 S. C. 288. **S. D.**—*North Star Boot & Shoe Co. v. Stebbins*, 3 S. D. 540, 54 N. W. 593. **Tex.**—*Glasscock v. Price*, 92 Tex. 271, 47 S. W. 965. **Utah.**—*Brown v. Pickard*, 4 Utah 292, 9 Pac. 573, 11 Pac. 512. **Vt.**—*People's Nat. Bank v. Hall*, 76 Vt. 280, 56 Atl. 1012. **Wis.**—*Little v. Staples*, 98 Wis. 344, 73 N. W. 653.

29. See generally the statutes and the following: **U. S.**—*Sugg v. Thornton*, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. ed. 447 (Texas); *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648; *Lippincott v. Shaw Carriage Co.*, 25 Fed. 577. **Colo.**—*Sawyer v. Armstrong*, 23 Colo. 287, 47 Pac. 391. **Ill.**—*Fleming v. Ross*, 125 Ill. App. 265, judg-

ment affirmed, 225 Ill. 149, 80 N. E. 92; *Gormley v. Hartray*, 105 Ill. App. 625, 92 Ill. App. 115; *Kling v. Taylor*, 90 Ill. App. 165. **Ky.**—*Nichols & Co. v. Burton*, 5 Bush 320. **Mass.**—*Willock v. Wilson*, 178 Mass. 68, 59 N. E. 757, action on foreign judgment against both partners. **Nev.**—*Davis v. Cook*, 9 Nev. 134. **Okla.**—*Cox v. Gille Hdw. & Iron Co.*, 8 Okla. 483, 58 Pac. 645; *Symms Grocer Co. v. Burnham*, 6 Okla. 618, 52 Pac. 918. **Ore.**—*North Pacific Lumb. Co. v. Spore*, 44 Ore. 462, 75 Pac. 890. **R. I.**—*Nathanson v. Spitz*, 19 R. I. 70, 31 Atl. 690. **S. C.**—*Pope Mfg. Co. v. Welch*, 55 S. C. 528, 33 S. E. 787. **Tex.**—*Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409. See *Burnett v. Sullivan*, 58 Tex. 535; *Kingsland & Douglass Mfg. Co. v. Mitchell* (Tex. Civ. App.), 36 S. W. 757. **Wash.**—*McCoy v. Bell*, 1 Wash. 504, 20 Pac. 595. **Wis.**—*Brawley v. Mitchell*, 92 Wis. 671, 66 N. W. 799; *Blackburn v. Sweet*, 38 Wis. 578; *Fowler v. Bailey*, 14 Wis. 125.

30. **U. S.**—*Sugg v. Thornton*, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. ed. 447; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648; *Romona Oolitic Stone Co. v. Bolger*, 179 Fed. 979 (Pennsylvania); *Lippincott v. Shaw Carriage Co.*, 25 Fed. 577. **Ala.**—*Ladiga Saw-Mill Co. v. Smith*, 78 Ala. 108. **Cal.**—*Alpers v. Schammel*, 75 Cal. 590, 17 Pac. 708; *Davidson v. Knox*, 67 Cal. 143, 7 Pac. 413. **Colo.**—*Blythe v. Cordingley*, 20 Colo. App. 508, 80 Pac. 495; *Ellsberry v. Block*, 28 Colo. 477, 65 Pac. 629; *Sawyer v. Armstrong*, 23 Colo. 287, 47 Pac. 391; *Adamson v. Bergen*, 15 Colo. App. 396, 62 Pac. 629; *Peabody v. Oleson*, 15 Colo. App. 346, 62 Pac. 234. **Fla.**—*Florida Brew. Co. v. Sendoya*, 74 So. 799; *Thomas v. Nathan*, 65 Fla. 386, 62 So. 206; *First National Bank v. Greig*, 43 Fla. 412, 31 So. 239. **Ga.**—*Cheshire v. Milburn Wagon Co.*, 89 Ga. 249, 15 S. E. 311; *Clayton v. Roberts*, 84 Ga. 149, 10 S. E. 621; *Ells v. Bone*, 71 Ga. 466; *Printup Bros. & Co. v. Turner*, 65 Ga. 71; *Fincher v. Hanson*, 12 Ga. App. 608, 77 S. E. 1068; *Denton Bros. v. Hannah*, 12 Ga. App. 494, 77 S. E. 672; *Warren Brick Co. v. Lagarde Lime & Stone Co.*, 12 Ga. App. 58,

ship assets;³¹ at least where the partnership is a legal entity and the

- 76 S. E. 761; *Guy v. Kaulman*, 11 Ga. App. 350, 75 S. E. 269; *Hollister Bros. v. Bluthenthal*, 9 Ga. App. 176, 70 S. E. 970; *Lamar-Rankin Drug Co. v. Copeland*, 7 Ga. App. 567, 67 So. 703; *Griffin v. Colonial Bank*, 7 Ga. App. 126, 66 S. E. 382. **Ill.**—*Sherburne v. Hyde*, 185 Ill. 580, 57 N. E. 776; *Gormley v. Hartray*, 92 Ill. App. 115; *Kling v. Taylor*, 90 Ill. App. 165. **Ia.**—*Lansing v. Bever Land Co.*, 158 Iowa 693, 138 N. W. 833. **La.**—*Grieff v. Kirk & Co.*, 15 La. Ann. 320. **Md.**—*Fersner v. Bradley & Co.*, 87 Md. 488, 40 Atl. 58. **Mass.**—*Willock v. Wilson*, 178 Mass. 68, 59 N. E. 757. **Mo.**—*Kneisley Lumber Co. v. Stoddard Co.*, 113 Mo. App. 306, 88 S. W. 774. **Nev.**—*Davis v. Cook*, 9 Nev. 134; *Flannery v. Anderson*, 4 Nev. 437. **N. M.**—*Lewinson v. First Nat. Bank*, 11 N. M. 510, 70 Pac. 567. **N. Y.**—*Latz v. Blumenthal*, 50 Misc. 407, 100 N. Y. Supp. 527. **N. C.**—*Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307. **N. D.**—*Goldstein v. Peter Fox Sons Co.*, 22 N. D. 636, 135 N. W. 180, 40 L. R. A. (N. S.) 566. **Okla.**—*Cox v. Gille Hdw. & Iron Co.*, 8 Okla. 483, 58 Pac. 645. **Ore.**—*First Nat. Bank v. Manassa*, 80 Ore. 53, 150 Pac. 258; *North Pacific Lumb. Co. v. Spore*, 44 Ore. 462, 75 Pac. 890. **Pa.**—*Walsh v. Kirby*, 228 Pa. 194, 77 Atl. 452; *Cover v. Brown, Sutter & Co.*, 7 Pa. Dist. 19. **R. I.**—*Nathanson v. Spitz*, 19 R. I. 70, 31 Atl. 690. **S. C.**—*Pierce v. Varn, Byrd & Co.*, 76 S. C. 359, 57 S. E. 184; *Pope Mfg. Co. v. Welch*, 55 S. C. 528, 33 S. E. 787; *Simonds v. Speed*, 6 Rich. L. 390. **Tex.**—*Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409; *Sanger Bros. v. Overmier*, 64 Tex. 57; *Hedges v. Armistead*, 60 Tex. 276; *Alexander v. Stern*, 41 Tex. 193; *Slaughter v. American Baptist Publication Society* (Tex. Civ. App.), 150 S. W. 224. **Wash.**—*McCoy v. Bell*, 1 Wash. 504, 20 Pac. 595. **Wis.**—*Brawley v. Mitchell*, 92 Wis. 671, 66 N. W. 799; *Blackburn v. Sweet*, 38 Wis. 578.
- [a] **Several Judgment Upon Joint Contract.**—In a suit against partners upon a joint contract, one being resident the other a non-resident, a several judgment may be rendered against the resident served with process. *Moore v. Estes*, 79 Ky. 282.
- Variance by proof of individual liability**, see *supra*, II, H, 2.
31. **U. S.**—*Sugg v. Thornton*, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. ed. 447; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648; *Lippincott v. Shaw Carriage Co.*, 25 Fed. 577. **Ala.**—*Ladiga Saw-Mill Co. v. Smith*, 78 Ala. 108. **Colo.**—*Ellsberry v. Block*, 28 Colo. 477, 65 Pac. 629; *Sawyer v. Armstrong*, 23 Colo. 287, 47 Pac. 391; *Blythe v. Cordingly*, 20 Colo. App. 508, 80 Pac. 495; *Adamson v. Bergen*, 15 Colo. App. 396, 62 Pac. 629; *Peabody v. Oleson*, 15 Colo. App. 346, 62 Pac. 234. **Fla.**—*Florida Brewing Co. v. Sendoya*, 74 So. 799; *Thomas v. Nathan*, 65 Fla. 386, 62 So. 206; *First National Bank v. Greig*, 43 Fla. 412, 31 So. 239. **Ga.**—*Cheshire v. Milburn Wagon Co.*, 89 Ga. 249, 15 S. E. 311; *Clayton v. Roberts*, 84 Ga. 149, 10 S. E. 621; *Ells v. Bone*, 71 Ga. 466; *Printup Bros. & Co. v. Turner*, 65 Ga. 71; *Fincher v. Hanson*, 12 Ga. App. 608, 77 S. E. 1068; *Denton Bros. v. Hannah*, 12 Ga. App. 494, 77 S. E. 672; *Warren Brick Co. v. Lagarde Lime & Stone Co.*, 12 Ga. App. 58, 76 S. E. 761; *Guy v. Kaulman*, 11 Ga. App. 350, 75 S. E. 269; *Hollister Bros. v. Bluthenthal*, 9 Ga. App. 176, 70 S. E. 970; *Lamar-Rankin Drug Co. v. Copeland*, 7 Ga. App. 567, 67 So. 703. **Ia.**—*Lansing v. Bever Land Co.*, 158 Iowa 693, 138 N. W. 833. **Mich.**—*Rickman v. Rickman*, 180 Mich. 224, 146 N. W. 609, Ann. Cas. 1915C, 1237. **Nev.**—*Davis v. Cook*, 9 Nev. 134; *Flannery v. Anderson*, 4 Nev. 437; *Whitmore v. Shiverick*, 3 Nev. 288. **N. M.**—*Lewinson v. First Nat. Bank*, 11 N. M. 510, 70 Pac. 567. **N. Y.**—*Latz v. Blumenthal*, 50 Misc. 407, 100 N. Y. Supp. 527; *Maneely v. Mayers*, 43 Misc. 380, 87 N. Y. Supp. 471. **N. C.**—*Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307. **N. D.**—*Goldstein v. Fox Sons Co.*, 22 N. D. 636, 135 N. W. 180, 40 L. R. A. (N. S.) 566. **Okla.**—*Cox v. Gille Hdw. & Iron Co.*, 8 Okla. 483, 58 Pac. 645. **Ore.**—*First Nat. Bank v. Manassa*, 80 Ore. 53, 150 Pac. 258. **Pa.**—*Walsh v. Kirby*, 228 Pa. 194, 77 Atl. 452. **R. I.**—*Nathanson v. Spitz*, 19 R. I. 70, 31 Atl. 690. **S. C.**—*Pierce v. Varn, Byrd & Co.*, 76 S. C. 359, 57 S. E. 184; *Pope Mfg. Co. v. Welch*, 55 S. C. 528, 33 S. E. 787; *Simonds v. Speed*, 6 Rich. L. 390. **Tex.**—*Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409; *Sanger Bros. v. Overmier*, 64 Tex. 57; *Alexander v.*

judgment is against it as such.³²

Ex Delicto Actions. — The liability in tort actions being joint and several, judgment may be rendered against those shown to be liable.³³

K. ENFORCEMENT OF JUDGMENT.³⁴ — 1. Against What Property.
a. In General.³⁵ — The partnership property,³⁶ and that of such members as have appeared or been served,³⁷ may be taken in satisfac-

Stern, 41 Tex. 193; *Slaughter v. American Baptist Pub. Society* (Tex. Civ. App.), 150 S. W. 224; *State v. Cloudt* (Tex. Civ. App.), 84 S. W. 415; *Scalfi & Co. v. State* (Tex. Civ. App.), 73 S. W. 441; *Owen v. Kuhn, Loeb & Co.* (Tex. Civ. App.), 72 S. W. 432. **Wash.**—*McCoy v. Bell*, 1 Wash. 504, 20 Pac. 595. **Wis.**—*Brawley v. Mitchell*, 92 Wis. 671, 66 N. W. 799; *Blackburn v. Sweet*, 38 Wis. 578.

32. *Sugg v. Thornton*, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. ed. 447. See *Tay, Brooks & Backus v. Hawley*, 39 Cal. 93, strongly intimating that the interest of the partner not served is not bound in spite of the statute, on constitutional grounds.

33. Ga.—*Phillips v. Wait*, 105 Ga. 848, 32 S. E. 647; *Austin v. Appling*, 68 Ga. 54, 13 S. E. 955. **Ill.**—*Swenson v. Erickson*, 90 Ill. App. 358. **N. Y.** *In re Blackford*, 35 App. Div. 330, 54 N. Y. Supp. 972.

See 15 STANDARD PROC. 83.

34. See generally the title "Judgments and Decrees, Enforcement of."

35. Attachment of partnership property, see *supra*, II, B, and 3 STANDARD PROC. 323.

36. U. S.—*Ralya Market Co. v. Armour & Co.*, 102 Fed. 530; *Inbusch v. Farwell*, 1 Black 566, 17 L. ed. 188. **Ga.**—*Ells v. Bone*, 71 Ga. 466. **Colo.**—*Craig v. Smith*, 10 Colo. 220, 15 Pac. 337; *Dessauer v. Koppin*, 3 Colo. App. 115, 32 Pac. 182. **Ia.**—*Lansing v. Bever Land Co.*, 158 Iowa 693, 138 N. W. 833; *Capital Food Co. v. Globe Coal Co.*, 142 Iowa 134, 120 N. W. 704; *Anderson v. Wilson*, 142 Iowa 158, 120 N. W. 677; *Harford, Thayer & Co. v. Street*, 46 Iowa 594. **Kan.** *Stout v. Baker*, 32 Kan. 113, 4 Pac. 141; *Read v. Jeffries*, 16 Kan. 534. **Mich.**—*Brooks v. McIntyre*, 4 Mich. 316. **N. M.**—*Lewinson v. First Nat. Bank*, 11 N. M. 510, 70 Pac. 567. **N. Y.** *Hofferberth v. Nash*, 117 App. Div. 284, 102 N. Y. Supp. 317; *Rogers v. Ingersoll*, 103 App. Div. 490, 93 N. Y. Supp. 140, *affirmed*, 185 N. Y. 592, 78 N. E. 1111; *Latz v. Blumenthal*, 50

Misc. 407, 100 N. Y. Supp. 527, *affirmed*, 116 App. Div. 914, 101 N. Y. Supp. 1128; *Staiger v. Theiss*, 19 *Misc.* 170, 43 N. Y. Supp. 292; *Souls v. Cornell*, 15 App. Div. 161, 44 N. Y. Supp. 194; *Lahey v. Kingon*, 13 Abb. Pr. 192, 22 How. Pr. 209. **Nev.**—*Flannery v. Anderson*, 4 Nev. 437. **N. C.** *Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307. **Okla.**—*Heaton v. Schaeffer*, 34 Okla. 631, 126 Pac. 797, 43 L. R. A. (N. S.) 540; *Symms Grocer Co. v. Burnham*, 6 Okla. 618, 52 Pac. 918. **Ore.**—*North Pacific Lumb. Co. v. Spore*, 44 Ore. 462, 75 Pac. 890. **Pa.** *Cover v. Brown, Sutter & Co.*, 7 Pa. Dist. 19. **S. C.**—*Pope Mfg. Co. v. Welch*, 55 S. C. 528, 33 S. E. 787; *Whitfield v. Hovey*, 30 S. C. 117, 8 S. E. 840. **Tex.**—*Geo. Scalfi & Co. v. State*, 96 Tex. 559, 31 Tex. Civ. App. 671, 73 S. W. 441; *Blumenthal v. Youngblood*, 24 Tex. Civ. App. 266, 59 S. W. 290. **Wis.**—*Brawley v. Mitchell*, 92 Wis. 671, 66 N. W. 799; *Fowler v. Bailey*, 14 Wis. 125.

37. U. S.—*Ralya Market Co. v. Armour & Co.*, 102 Fed. 530. **Colo.**—*Craig v. Smith*, 10 Colo. 220, 15 Pac. 337. **Ga.**—*Ells v. Bone*, 71 Ga. 466. **Ia.** *Anderson v. Wilson*, 142 Iowa 158, 120 N. W. 677; *Harford, Thayer & Co. v. Street*, 46 Iowa 594. **Kan.**—*Stout v. Baker*, 32 Kan. 113, 4 Pac. 141; *Read v. Jeffries*, 16 Kan. 534. **N. M.** *Lewinson v. First Nat. Bank*, 11 N. M. 510, 70 Pac. 567. **N. Y.**—*Hofferberth v. Nash*, 117 App. Div. 284, 102 N. Y. Supp. 317; *Latz v. Blumenthal*, 50 *Misc.* 407, 100 N. Y. Supp. 527; *Staiger v. Theiss*, 19 *Misc.* 170, 43 N. Y. Supp. 292; *Lahey v. Kingon*, 13 Abb. Pr. 192, 22 How. Pr. 209. **N. C.**—*Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307. **Okla.**—*Heaton v. Schaeffer*, 34 Okla. 631, 126 Pac. 797, 43 L. R. A. (N. S.) 540. **Ore.**—*First Nat. Bank v. Manassa*, 80 Ore. 53, 150 Pac. 258; *North Pacific Lumb. Co. v. Spore*, 44 Ore. 462, 75 Pac. 890. **Pa.**—*Cover v. Brown, Sutter & Co.*, 7 Pa. Dist. 19. **S. C.**—*Pope Mfg. Co. v. Welch*, 55 S. C. 528, 33 S. E. 787. **Tex.**—*Scalfi*

tion of a judgment against the firm, except that where the partnership alone is sued as an entity the judgment recovered can be enforced only against partnership assets.³⁸ Where a judgment is rendered against a firm upon the confession of less than all the partners,³⁹ it is enforceable only against the firm property and the property of the partners making the confession.⁴⁰

In an action against an individual partner his interest in the partnership property is subject to any judgment recovered.⁴¹

b. *Homestead and Exemptions.*⁴²—In many states, undivided partnership property is not, as against a creditor of the firm, exempt from levy on attachment or execution,⁴³ but other courts more liber-

& Co. v. State (Tex. Civ. App.), 73 S. W. 441. **W. Va.**—Lee v. Hassett, 41 W. Va. 368, 23 S. E. 559. **Wis.** Brawley v. Mitchell, 92 Wis. 671, 66 N. W. 799.

[a] That the creditor need not exhaust the partnership before (1) levying upon the separate property of a partner see **Ala.**—Clark v. Johnson, 7 Ala. App. 507, 61 So. 34. **N. J.** National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 13. **Tex.**—Webb v. Gregory, 49 Tex. Civ. App. 282, 108 S. W. 478. (2) To the contrary see **Ala.**—Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. Rep. 97. **Colo.**—Breene v. Booth, 3 Colo. App. 470, 33 Pac. 1007. **Miss.**—Dahlgren v. Duncan, 7 Smed. & M. 280. **Neb.** Leach v. Milburn Wagon Co., 14 Neb. 106, 15 N. W. 232. **N. Y.**—Seligman v. Friedlander, 199 N. Y. 373, 92 N. E. 1047; Teller v. Gerry, 30 Misc. 126, 61 N. Y. Supp. 864. **R. I.**—Pearce v. Cooke, 13 R. I. 184. **Vt.**—Bardwell v. Perry, 19 Vt. 292, 47 Am. Dec. 687.

[b] Property of partners not served and who do not appear, is not liable on the judgment. **U. S.**—D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648. **Fla.**—Thomas v. Nathan, 65 Fla. 386, 62 So. 206; First Nat. Bank v. Greig, 43 Fla. 412, 31 So. 239. **Ga.**—Ells v. Bone, 71 Ga. 466; Flowers v. Strickland, 10 Ga. App. 739, 73 S. E. 1092. **Ia.**—Lansing v. Bever Land Co., 158 Iowa 693, 138 N. W. 833. **Mass.** Phelps v. Brewer, 9 Cush. 390, 57 Am. Dec. 56. **Mich.**—Brooks v. McIntyre, 4 Mich. 316. **Miss.**—Mitchell v. Greenwald, 43 Miss. 167. **N. Y.**—Latz v. Blumenthal, 50 Misc. 407, 100 N. Y. Supp. 527. **N. C.**—Daniel v. Bethell, 167 N. C. 218, 83 S. E. 307. **Okla.** Heaton v. Schaeffer, 34 Okla. 631, 126 Pac. 797, 43 L. R. A. (N. S.) 540; Symms Grocer Co. v. Burnham, 6 Okla.

618, 52 Pac. 918. **Pa.**—Cover v. Brown, Sutter & Co., 7 Pa. Dist. 19. **Tex.** Glascock v. Price, 92 Tex. 271, 47 S. W. 965; Sanger Bros. v. Overmier, 64 Tex. 57; Burnett v. Sullivan, 58 Tex. 535.

38. **Ala.**—Ratchford v. Covington County Stock Co., 172 Ala. 461, 55 So. 806; Yarbrough & Co. v. Bush & Co., 69 Ala. 170. **Ia.**—Anderson v. Wilson, 142 Iowa 158, 120 N. W. 677; Markham v. Buckingham, 21 Iowa 494, 89 Am. Dec. 590. **Neb.**—Herron v. Cole Bros., 25 Neb. 692, 41 N. W. 765; Winters v. Means, 25 Neb. 241, 41 N. W. 157, 13 Am. St. Rep. 489.

39. As to entry of judgment by confession of one partner, see 14 STANDARD PROC. 798.

40. **La.**—Grant v. Hyatt, 22 La. Ann. 411. **Ore.**—Richardson v. Fuller, 2 Ore. 179. **Pa.**—Ross v. Howell, 84 Pa. 129; Hershey, Schwenk & Co. v. Fulmer, 3 Pa. Co. Ct. 442, and cases cited. **Wash.**—Bank of Shelton v. Willey, 7 Wash. 535, 35 Pac. 411.

41. See 15 STANDARD PROC. 862, and the following cases: Dangler's Appeal, 125 Pa. 12, 17 Atl. 184; Brown, Janson & Co. v. Hutchinson & Co., 64 L. J. Q. B. 619, 73 L. T. Rep. N. S. 8, 14 Reports 485, 43 Wkly. Rep. 545.

42. See generally the title "Homesteads and Exemptions."

As to exemptions from levy, generally, see 16 STANDARD PROC. 24, et seq.

43. **U. S.**—*In re* Turnock & Sons, 230 Fed. 985, 145 C. C. A. 179; Crawford v. Sternberg, 220 Fed. 73, 135 C. C. A. 641 (Arkansas); *In re* Bundy & Co., 218 Fed. 711 (Mississippi); *In re* Abrams, 193 Fed. 271 (South Dakota); Jennings v. Stannus & Son, 191 Fed. 347, 112 C. C. A. 91 (Washington); *In re* Novak, 150 Fed. 602 (South Dakota); Short v. McGruder,

ally construe their exemption statutes as extending the right to the partners, to claim, during the existence of the partnership, an individual exemption in the partnership property, when taken under legal process for partnership debts.⁴⁴ In some jurisdictions, while

22 Fed. 46 (Virginia); *In re Handlin*, 3 Dill. 290, 11 Fed. Cas. No. 6,018; *In re Smith*, 2 Hughes 307, 22 Fed. Cas. No. 12,979; *In re Price*, 6 N. B. R. 400, 19 Fed. Cas. No. 11,410, Maryland. **Ala.**—*Aiken v. Steiner*, 98 Ala. 255, 13 So. 510, 39 Am. St. Rep. 58; *Schlapback v. Long*, 90 Ala. 525, 8 So. 113; *Levy & Co. v. Williams*, 79 Ala. 171; *Giovanni v. First Nat. Bank*, 55 Ala. 305, 28 Am. Rep. 723, *overruling* previous cases. **Ark.**—*Farmers' Union Gin & Mill Co. v. Seitz*, 93 Ark. 329, 124 S. W. 780 (partnership property must be segregated before subject to claim of exemption); *Porch v. Arkansas Mill Co.*, 65 Ark. 40, 45 S. W. 51, 67 Am. St. Rep. 895; *Richardson v. Adler, Goldman & Co.*, 46 Ark. 43. **Cal.**—*Cowan v. Creditors*, 77 Cal. 403, 19 Pac. 755, 11 Am. St. Rep. 294. **Colo.**—*McCrimmon v. Linton*, 4 Colo. App. 420; 36 Pac. 300. **Dak.** *Bates v. Callender*, 3 Dak. 256, 16 N. W. 506, statute providing that the partnership can claim an exemption does not extend to allowing the individuals composing the firm to claim a several exemption in the undivided partnership property. **Fla.**—*Lee v. Bradley Fertilizer Co.*, 44 Fla. 787, 33 So. 456; *State ex rel. Peck v. Bowden*, 18 Fla. 17. **Ill.** *Wills v. Downs*, 38 Ill. App. 269; *Fingerhuth v. Lachmann*, 37 Ill. App. 489. **Ind.**—*Goudy v. Werbe*, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114; *Ex parte Hopkins*, 104 Ind. 157, 2 N. E. 587; *State ex rel. Talbott v. Emmons*, 99 Ind. 452; *Love v. Blair*, 72 Ind. 281; *Sharpe v. Baker*, 51 Ind. App. 547, 96 N. E. 627, 99 N. E. 44. **Ind. Ter.**—*Hart v. Hiatt*, 2 Ind. Ter. 245, 48 S. W. 1038. **Kan.**—*Guptil v. McFee*, 9 Kan. 30. **Ky.**—*Green v. Taylor*, 98 Ky. 330, 32 S. W. 945, 56 Am. St. Rep. 375; *Elkins v. Briscoe*, 32 Ky. L. Rep. 197, 105 S. W. 412. **Me.**—*Thurlow v. Warren*, 82 Me. 164, 19 Atl. 158, 17 Am. St. Rep. 472. **Mass.**—*Pond v. Kimball*, 101 Mass. 105. **Minn.**—*Baker v. Sheehan*, 29 Minn. 235, 12 N. W. 704. **Mo.**—*State ex rel. Billingsley v. Spencer*, 64 Mo. 355, 27 Am. Rep. 244; *State ex rel. Hinde v. United States Fidelity & Guaranty Co.*, 135 Mo. App. 160, 115

S. W. 1081; *Fulks v. Pruitt*, 65 Mo. App. 154. **Neb.**—*Miller v. Waite*, 59 Neb. 319, 80 N. W. 907; *Wise v. Frey*, 7 Neb. 134, 29 Am. Rep. 380 (division made by partners after levy made will not permit them to claim exemption); *People ex rel. Till v. Roy*, 3 Neb. 261. **N. H.**—*Bateman v. Edgerly*, 69 N. H. 244, 45 Atl. 95, 76 Am. St. Rep. 162; *Peaslee v. Sanborn*, 68 N. H. 262, 44 Atl. 384. **N. M.**—*In re Spitz*, 8 N. M. 622, 45 Pac. 1122, 34 L. R. A. 604. **Ohio.**—*Gaylord, Son & Co. v. Imhoff & Co.*, 26 Ohio St. 317, 20 Am. Rep. 762. **Pa.**—*Clegg v. Houston*, 1 Phila. 352. **S. C.**—*Ex parte Karish*, 32 S. C. 437, 11 S. E. 298, 17 Am. St. Rep. 865. **Tenn.**—*Gill v. Lattimore*, 9 Lea 381 (partners cannot divide property amongst themselves after the firm becomes insolvent and then claim exemption); *Spiro v. Paxton*, 3 Lea 75, 31 Am. Rep. 630. **Wis.** *Bong v. Parmentier*, 87 Wis. 129, 58 N. W. 243; *Russell v. Lennon*, 39 Wis. 570, 20 Am. Rep. 60 (*overruling Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 76); *Wright v. Pratt*, 31 Wis. 99.

44. **U. S.**—*In re Camp*, 91 Fed. 745 (Georgia); *In re Richardson*, 11 N. B. R. 114, 20 Fed. Cas. No. 11,775; *In re Rupp*, 4 N. B. R. 95, 21 Fed. Cas. No. 12,141 (Ohio); *In re McKercher*, 8 N. B. R. 409 (Dakota Terr.); *In re Young*, 3 N. B. R. 440, 30 Fed. Cas. No. 18,148, Missouri. **Ga.**—*Hahn v. Allen*, 93 Ga. 612, 20 S. E. 74; *Blanchard, Williams & Co. v. Paschal*, 68 Ga. 32, 45 Am. Rep. 474, severance of firm property properly made after levy made. **La.**—*Harrison & Co. v. Mitchell*, 13 La. Ann. 260; *Farmers & Merchants' Bank v. Franklin*, 1 La. Ann. 393. **Mich.**—*McCoy v. Brennan*, 61 Mich. 362, 28 N. W. 129, 1 Am. St. Rep. 589; *Chipman v. Kellogg*, 60 Mich. 438, 27 N. W. 592; *Skinner v. Shannon*, 44 Mich. 86, 6 N. W. 108, 38 Am. Rep. 232. **N. Y.**—*Stewart v. Brown*, 37 N. Y. 350, 93 Am. Dec. 578 (wherein the firm claimed the exemption); *Radeliff v. Wood*, 25 Barb. (N. Y.) 52, wherein the levy was upon a horse used in carrying on the firm business. The execution was for the separate debt

the courts will not allow the partners to claim an exemption out of partnership property where the execution is issued upon a judgment for the debt of the firm,⁴⁵ they will allow one partner to claim his exemption out of his share of the partnership property where the execution is based on a judgment against him for his individual debt,⁴⁶ but other courts adhere strictly to the rule that the property must be individually owned before an exemption therein can be claimed.⁴⁷

Homestead. — Partners have no right of homestead in partnership property.⁴⁸

2. Writ of Execution.⁴⁹ — a. *Generally.* — The issuance of execution follows the general rules elsewhere treated.⁵⁰

of the partner claiming the exemption, and the levy was on his interest only. **N. C.**—*Evans v. Bryan*, 95 N. C. 174, 59 Am. Rep. 233; *State ex rel. Scott v. Kenan*, 94 N. C. 296. **Tex.**—*St. Louis Type Foundry v. International Live-Stock J. Print. & Pub. Co.*, 74 Tex. 651, 12 S. W. 842, 15 Am. St. Rep. 870.

[a] **Dormant partner may claim exemption** out of the firm property. *McCoy v. Brennan*, 61 Mich. 362, 28 N. W. 129, 1 Am. St. Rep. 589.

[b] **With Consent of Partners.** An exemption may be allowed to one partner out of partnership funds. *Pennell v. Robinson*, 164 N. C. 257, 80 S. E. 417, Ann. Cas. 1915D, 77; *Richardson v. Redd*, 118 N. C. 677, 24 S. E. 420; *Stout v. McNeill*, 98 N. C. 1, 3 S. E. 915; *State ex rel. Scott v. Kenan*, 94 N. C. 296; *Allen & Co. v. Grissom*, 90 N. C. 90; *Burns v. Harris*, 67 N. C. 140; *O'Gorman v. Fink*, 57 Wis. 649, 15 N. W. 771, 46 Am. Rep. 58. See *contra*, *Gaylord, Son & Co. v. Imhoff & Co.*, 26 Ohio St. 317, 20 Am. Rep. 762, which sharply criticizes such a doctrine.

[c] **Consent of administrator of a deceased partner** is necessary before the surviving partners are entitled to exemption from execution on a judgment against the partnership. *Richardson v. Redd*, 118 N. C. 677, 24 S. E. 420.

45. See *supra*, this section.

46. **Ky.**—*Southern Jellico Coal Co. v. Smith*, 105 Ky. 769, 49 S. W. 807. **Neb.**—*Wise v. Frey*, 7 Neb. 134, 29 Am. Rep. 380. **S. C.**—*Moyer v. Drummond*, 32 S. C. 165, 10 S. E. 952, 17 Am. St. Rep. 850, 7 L. R. A. 747. **Wash.**—*Dennis v. Kass & Co.*, 11 Wash. 353, 39 Pac. 656, 48 Am. St. Rep. 880.

47. **Colo.**—*McCrimmon v. Linton*, 4 Colo. App. 420, 36 Pac. 300. **Fla.**—*State ex rel. Peck v. Bowden*, 18 Fla. 17. **Ind.**—*Love v. Blair*, 72 Ind. 281. And see *State ex rel. Talbott v. Emmons*, 99 Ind. 452. **Mo.**—*State ex rel. Hinde v. United States Fidelity & Guaranty Co.*, 135 Mo. App. 160, 115 S. W. 1081.

48. **U. S.**—*Short v. McGruder*, 22 Fed. 46, Virginia. **Cal.**—*Kingsley v. Kingsley*, 39 Cal. 665. **Ill.**—*Trowbridge v. Cross*, 117 Ill. 109, 7 N. E. 347. **Ia.**—*Hewitt v. Rankin*, 41 Iowa 35. **Miss.**—*McGrath v. Sinclair*, 55 Miss. 89. **Nev.**—*Rhodes v. Williams*, 12 Nev. 20.

Contra.—*Hunnicutt v. Summey*, 63 Ga. 586; *Newton v. Summey*, 59 Ga. 397; *Harris v. Visscher*, 57 Ga. 229.

Compare.—*Moyer v. Drummond*, 32 S. C. 165, 10 S. E. 952, 17 Am. St. Rep. 850, 7 L. R. A. 747 (wherein a homestead was allowed to the execution debtor out of his interest in the firm assets as against his individual creditors), and *Ex parte Karish*, 32 S. C. 437, 11 S. E. 298, 17 Am. St. Rep. 865, wherein it was held that the partner could have a homestead exemption out of such partnership property as remained after the partnership debts were paid.

49. **Property subject to**, see *supra*, II, K, 1.

50. See generally 15 STANDARD PROC. 721.

[a] **Time of Issuance.**—On a judgment recovered against two partners, where one only appears and is served, he may, in the absence of collusion, consent to the issuance of an execution thereon before the lapse of the statutory stay period. Anonymous, 2 Hill (N. Y.) 378.

b. *Form and Sufficiency of Writ*.⁵¹—The rule that the writ of execution must conform to the judgment rendered,⁵² applies in partnership cases.⁵³ In jurisdictions where judgment is entered against all the partners, even though some are not served,⁵⁴ the execution issued thereon must be in form against all the defendants,⁵⁵ but it should command the officer to levy the same upon the interests of the defendant or defendants in the partnership property,⁵⁶ and the statute may require the attorney to indorse upon the execution a direction to the sheriff containing the name of each defendant not summoned and restricting the enforcement of the execution to the partner served.⁵⁷

c. *Levy*.⁵⁸—(I.) *Manner of Making*.—The levy should be made only in the manner provided for by the statute.⁵⁹ If upon the interest of a partner in partnership property it is made by leaving a notice with one or more of the partners,⁶⁰ or with a clerk of the part-

51. See generally 15 STANDARD PROC. 790.

52. See 15 STANDARD PROC. 811.

53. *Ala.*—*Simmons v. Sharpe*, 148 Ala. 217, 42 So. 441; *Dollins v. Pollock*, 89 Ala. 351, 7 So. 904; *Couch v. Atkinson*, 32 Ala. 633. *Ark.*—*Hawkins v. Taylor*, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82. *Ga.*—*Treadwell v. Beauchamp*, 82 Ga. 736, 9 S. E. 1040; *Smith v. Sweat*, 60 Ga. 539; *Flowers v. Strickland*, 10 Ga. App. 739, 73 S. E. 1092; *Clayton v. May*, 68 Ga. 27. *Ia.*—*Lansing v. Bever Land Co.*, 158 Iowa 693, 138 N. W. 833; *Anderson v. Wilson*, 142 Iowa 158, 120 N. W. 677. *Tex.*—*Smith v. Chenault*, 48 Tex. 455 (execution reciting names of the partners is not, on collateral attack, subject to exception because the judgment upon which it is issued does not contain such names); *Cleveland v. Simpson*, 77 Tex. 96, 13 S. W. 851.

[a] An omission of the name of one of the partners plaintiff in the execution (1) will not render it fatally variant where the evidence aliunde made it clearly appear that such an omission was a clerical error. *Railsback v. Lovejoy*, 116 Ill. 442, 6 N. E. 504. (2) An execution following a judgment against "A. & Co." is good as against A. *Hawkins v. Taylor*, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82.

54. See *supra*, II, J, 3, c.

55. *Sawyer v. Armstrong*, 23 Colo. 287, 47 Pac. 391; *Hoffman v. Wight*, 1 App. Div. 514, 37 N. Y. Supp. 262, 72 N. Y. St. 588; *Latz v. Blumenthal*, 50 Misc. 407, 100 N. Y. Supp.

527; *Matter of Armstrong*, 35 Misc. 327, 71 N. Y. Supp. 951; *Staiger v. Theiss*, 19 Misc. 170, 43 N. Y. Supp. 292; *Crane v. Cranitch*, 3 Misc. 557, 23 N. Y. Supp. 320, 52 N. Y. St. 515.

56. *Crane v. Cranitch*, 3 Misc. 557, 23 N. Y. Supp. 320, 52 N. Y. St. 515; *Dengler's Appeal*, 125 Pa. 12, 17 Atl. 184; *In re Kaine's Appeal*, 92 Pa. 273; *Hare v. Com.*, 92 Pa. 141.

As to directions to sheriff generally, see 15 STANDARD PROC. 804.

[a] The sheriff may rightly refuse to make a levy upon (1) the partnership effects under an ordinary form of writ (*Dengler's Appeal*, 125 Pa. 12, 17 Atl. 184; *Hare v. Com.*, 92 Pa. 141), and (2) the fund raised by such a sale is applicable to the satisfaction of the judgment upon which the ordinary form of execution is issued, as against a subsequently issued execution bearing the special direction. *Dengler's Appeal*, 125 Pa. 12, 17 Atl. 184.

57. *Crane v. Cranitch*, 3 Misc. 557, 23 N. Y. Supp. 320, 52 N. Y. St. 515.

[a] An amendment to supply such indorsement is proper. *Crane v. Cranitch*, 3 Misc. 557, 23 N. Y. Supp. 320, 52 N. Y. St. 515.

58. See generally 15 STANDARD PROC. 901.

Property subject to levy, see *supra*, II, K, 1.

59. *Ark.*—*Noble v. Knobel Hoop Co.*, 85 Ark. 306, 107 S. W. 988. *Ind.*—*Ferguson v. Day*, 6 Ind. App. 138, 33 N. E. 213. *Tex.*—*Middlebrook v. Zapp*, 79 Tex. 321, 15 S. W. 258.

60. *Jones v. First State Bank*, 106 Tex. 572, 173 S. W. 202; *Middlebrook*

nership.⁶¹ A levy made upon partnership assets for the satisfaction of a partner's individual debt must be made upon the partner's interest in the entire assets,⁶² and not upon specific articles of partnership property,⁶³ although some courts maintain that it is not necessary for the sheriff to seize all the partnership property, under process against one of the members, when the sale of the interest of the partner in a quantity less than the whole will satisfy the writ.⁶⁴

(II.) *Effect of Levy on Title and Possession.*⁶⁵ —The title to the partnership property does not, after levy, vest in the officer.⁶⁶ In some

r. Zapp, 79 Tex. 321, 15 S. W. 258; *Radford Grocery Co. v. Owens* (Tex. Civ. App.), 161 S. W. 911; *Seal v. Holcomb*, 48 Tex. Civ. App. 330, 107 S. W. 916; *Adoue v. Wettermark*, 36 Tex. Civ. App. 585, 82 S. W. 797.

61. *Jones v. First State Bank*, 106 Tex. 572, 173 S. W. 202; *Middlebrook v. Zapp*, 79 Tex. 321, 15 S. W. 258; *Radford Grocery Co. v. Owens* (Tex. Civ. App.), 161 S. W. 911; *Adoue v. Wettermark*, 36 Tex. Civ. App. 585, 82 S. W. 797.

62. *Ala.*—*Tait v. Murphy*, 80 Ala. 440, 2 So. 317. *Cal.*—*Clark v. Cushing*, 52 Cal. 617. *Del.*—*Bevan v. Allee*, 3 Harr. 80. *Ill.*—*Weber v. Hertz*, 188 Ill. 68, 58 N. E. 676; *Gerard v. Bates*, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 350; *Swan v. Gilbert*, 67 Ill. App. 236, *affirmed*, 175 Ill. 204, 51 N. E. 604, 67 Am. St. Rep. 208. *Ind.*—*Ferguson v. Day*, 6 Ind. App. 138, 33 N. E. 213. *Mass.*—*Allen v. Wells*, 22 Pick. 450, 33 Am. Dec. 757. *Miss.*—*Blumenfeld v. Seward*, 71 Miss. 342, 14 So. 442; *Atwood v. Meredith*, 37 Miss. 635. *Mo.*—*Wiles v. Maddox*, 26 Mo. 77; *Lester ex rel. Wright v. Givens*, 74 Mo App. 395. *N. H.*—*Morrison v. Blodgett*, 8 N. H. 238, 29 Am. Dec. 653. *Pa.*—*Dengler's Appeal*, 125 Pa. 12, 17 Atl. 184; *Vandike v. Roskam*, 67 Pa. 330; *Smith v. Emerson*, 43 Pa. 456; *Deal v. Bogue*, 20 Pa. 228, 57 Am. Dec. 702.

[a] The fact that the sheriff specifically enumerated the articles levied upon, did not affect the levy where he seized the entire firm assets. *Weber v. Hertz*, 188 Ill. 68, 58 N. E. 676.

63. *Ala.*—*Tait v. Murphy*, 80 Ala. 440, 2 So. 317; *Daniel v. Owens & Co.*, 70 Ala. 297. *Ill.*—*Weber v. Hertz*, 188 Ill. 68, 58 N. E. 676; *Gerard v. Bates*, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 350. *Ind.*—*Williams v. Lewis*, 115 Ind. 45, 17 N. E. 262, 7 Am. St. Rep. 403; *Stumph v. Bauer*,

76 Ind. 157; *Branch v. Wiseman*, 51 Ind. 1; *Ferguson v. Day*, 6 Ind. App. 138, 33 N. E. 213. *La.*—*Levy v. Cowan*, 27 La. Ann. 556; *Marston & Co. v. Dewberry*, 21 La. Ann. 518; *Pittman v. Robicheau*, 14 La. Ann. 108; *Smith v. McMicken*, 3 La. Ann. 319; *Bank of Tennessee v. McKeage*, 11 Rob. 130; *Morgan v. Liddell*, Man. Unrep. Cas. 278. *Mass.*—*Sanborn v. Royce*, 132 Mass. 594. *Mich.*—*Ernest v. Woodworth*, 124 Mich. 1, 82 N. W. 661; *Kunze v. Cox*, 113 Mich. 546, 71 N. W. 864, 67 Am. St. Rep. 480; *Hutchinson v. Dubois*, 45 Mich. 143, 7 N. W. 714; *Haynes v. Knowles*, 36 Mich. 407; *Sirrine v. Briggs*, 31 Mich. 443. *Miss.*—*Blumenfeld v. Seward*, 71 Miss. 342, 14 So. 442. *N. H.*—*Morrison v. Blodgett*, 8 N. H. 238, 29 Am. Dec. 653. *Pa.*—*Dengler's Appeal*, 125 Pa. 12, 17 Atl. 184; *Vandike v. Roskam*, 67 Pa. 330; *In re Whigham's Appeal*, 63 Pa. 194; *Smith v. Emerson*, 43 Pa. 456; *Deal v. Bogue*, 20 Pa. 228, 57 Am. Dec. 702. *Wash.*—*Skavdale v. Moyer*, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481.

64. *Colo.*—*Felt v. Cleghorn*, 2 Colo. App. 4, 29 Pac. 813. *Kan.*—*Hershfield v. H. B. Claflin & Co.*, 25 Kan. 166, 37 Am. Rep. 237. *Me.*—*Fogg v. Lawry*, 68 Me. 78, 28 Am. Rep. 19, may attach specific property but can sell only such interest as the debtor would have in the attached property after partnership debts paid. *Mo.*—*McCoy v. Hyatt*, 80 Mo. 130; *Wiles v. Maddox*, 26 Mo. 77. *N. Y.*—*Phillips v. Cook*, 24 Wend. 389. *Tenn.*—*Johnson v. Wingfield*, 42 S. W. 203 (wherein the court, after pointing out the inconsistencies of this rule, refuses to depart from the rule laid down in previous decisions); *Haskins v. Everett*, 4 Sneed 531.

65. See generally 15 STANDARD PROC. 995.

66. *Ill.*—*White v. Jones*, 38 Ill. 159.

jurisdictions, the possession of the partnership,⁶⁷ or of the member who is the defendant in the writ of attachment, or execution,⁶⁸ is not affected by the levy of an attachment or writ of execution, except for the purpose of making an inventory and appraisalment.⁶⁹ According to many authorities, the sheriff under an execution against one member of a partnership, may take the partnership goods into his exclusive possession,⁷⁰ at least until the other partners present a case for the court of equity to take an accounting for the purpose of ascertaining the interest of the debtor partner.⁷¹

Ky.—*Graves v. McKinney's Admr.*, 6 Ky. L. Rep. 220. **Utah.**—*Hamner v. Ballantyne*, 16 Utah 436, 52 Pac. 770, 67 Am. St. Rep. 643.

67. Ark.—*Summers v. Heard*, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057. **Ia.**—*Richards v. Haines*, 30 Iowa 574. **Ind. Ter.**—*Carlisle v. McAlester*, 3 Ind. Ter. 164, 53 S. W. 531. **N. H.**—*Treadwell v. Brown*, 43 N. H. 290; *Dow v. Sayward*, 14 N. H. 9; *Morrison v. Blodgett*, 8 N. H. 238, 29 Am. Dec. 653. **Tex.**—*Jones v. First State Bank*, 106 Tex. 572, 173 S. W. 202; *Middlebrook v. Zapp*, 79 Tex. 321, 15 S. W. 258; *Radford Grocery Co. v. Owens* (Tex. Civ. App.), 161 S. W. 911.

[a] Prior to the adoption of the revised statutes, the sheriff could, upon an attachment or execution for the separate debt of one partner, actually seize and take possession of the partnership effects. *Lee v. Wilkins*, 65 Tex. 295; *Longcope v. Bruce*, 44 Tex. 434; *Bradford v. Johnson*, 44 Tex. 381; *De Forest, Armstrong & Co. v. Miller*, 42 Tex. 34.

[b] Statutes in some jurisdictions provide that if the defendant in execution owns or is entitled to an interest in any property not exclusively in his own possession, such interest may be levied on and sold by the sheriff without taking the property into his actual possession. *Blumenfeld v. Seward*, 71 Miss. 342, 14 So. 442; *Willis v. Loeb*, 59 Miss. 169. And see *Sanders v. Young*, 31 Miss. 111, for rule prior to the enactment of the statute.

68. Jones v. First State Bank, 106 Tex. 572, 173 S. W. 202; *Seal v. Holcomb*, 48 Tex. Civ. App. 330, 107 S. W. 916.

69. Summers v. Heard, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057; *Aultman v. Fuller*, 53 Iowa 60, 4 N. W. 809; *Richards v. Haines*, 30 Iowa 574.

70. U. S.—*United States v. Williams*, 4 McLean 236, 28 Fed. Cas. No.

16,719. **Ala.**—*Andrews v. Keith*, 34 Ala. 722; *Moore & Co. v. Sample*, 3 Ala. 319. **Cal.**—*Commercial Bank v. Mitchell*, 58 Cal. 42; *Clark v. Cushing*, 52 Cal. 617. **Colo.**—*Felt v. Cleghorn*, 2 Colo. App. 4, 29 Pac. 813. **Del.** *Davis v. White*, 1 Houst. 228. **Ill.** *White v. Jones*, 38 Ill. 159; *Newhall v. Buckingham*, 14 Ill. 405. **Ind.** *Ferguson v. Day*, 6 Ind. App. 138, 33 N. E. 213. **Ia.**—*Edgar v. Caldwell*, Morris 434. **Me.**—*Moore v. Pennell*, 52 Me. 162, 83 Am. Dec. 500. **Minn.** *Wickham v. Davis*, 24 Minn. 167; *Barrett v. McKenzie*, 24 Minn. 20. **Mo.**—*McCoy v. Hyatt*, 80 Mo. 130; *Wiles v. Maddox*, 26 Mo. 77; *Lester ex rel. Wright v. Givens*, 74 Mo. App. 395; *Lloyd v. Tracy*, 53 Mo. App. 175. **N. Y.**—*Atkins v. Saxton*, 77 N. Y. 195; *Smith v. Orser*, 42 N. Y. 132; *Ryder v. Gilbert*, 16 Hun 163; *Waddell v. Cook*, 2 Hill 47, 37 Am. Dec. 372. **Ohio.**—*Nixon v. Nash*, 12 Ohio St. 647, 80 Am. Dec. 390. **Tenn.**—*Jones v. Richardson*, 99 Tenn. 614, 42 S. W. 440; *Johnson v. Wingfield*, 42 S. W. 203; *Saunders v. Bartlett*, 12 Heisk. 316; *Haskins v. Everett*, 4 Sneed 531. **Utah.**—*Snell v. Crowe*, 3 Utah 26, 5 Pac. 522. **Va.**—*Shaver v. White*, 6 Munf. (20 Va.) 110, 8 Am. Dec. 730. **Eng.**—*Parker v. Pistor*, 3 Bos. & Pul. 288, 127 Eng. Reprint 159 (sheriff should put some person in possession of the defendant's share as vendee). *Heydon v. Heydon*, 1 Salk. 392, 91 Eng. Reprint 340.

[a] The power is merely incidental to the right to reach the interest of the debtor, and is to be exercised only as a means to that end. *Atkins v. Saxton*, 77 N. Y. 195.

71. Ala.—*Moore & Co. v. Sample*, 3 Ala. 319. **Ill.**—*White v. Jones*, 38 Ill. 159, and note; *Newhall v. Buckingham*, 14 Ill. 405. **Ohio.**—*Nixon v. Nash*, 12 Ohio St. 647, 80 Am. Dec. 390.

(III.) **Sale of Partner's Interest.**⁷² — Only the debtor partner's undivided interest in the partnership property can be sold.⁷³

Place of Sale. — The statutes in some jurisdictions require that the sale of a partner's interest take place in the county where the chief place of business of the partnership is located.⁷⁴

Advertisement. — The property seized should be advertised and sold as the share of one partner in the property of a named partnership.⁷⁵

Effect of Sale. — A sale of the partner's interest does not divest the other partners of their title to their interest.⁷⁶ The purchaser at an execution sale of a partner's share of a debt due the partnership does not acquire title to the debt itself, and no right to receive payment of it.⁷⁷ After the sale of the partner's undivided interest, the sheriff must put the vendee into the joint possession of the property sold.⁷⁸

Application of Proceeds. — Where the sheriff has in his hands executions against the partnership and another against one member only

72. See generally 15 STANDARD PROC. 160.

As to whether partner may purchase, see 16 STANDARD PROC. 195.

73. **U. S.**—United States *v.* Williams, 4 McLean 236, 28 Fed. Cas. No. 16,719. **Ala.**—Daniel *v.* Owens & Co., 70 Ala. 297. **Cal.**—Clark *v.* Cushing, 52 Cal. 617. **Conn.**—Brewster *v.* Hammet, 4 Conn. 540; Church *v.* Knox, 2 Conn. 514. **Del.**—Bevan *v.* Allee, 3 Harr. 80. **Ill.**—Chandler *v.* Lincoln, 52 Ill. 74; White *v.* Jones, 38 Ill. 159. **Ind.**—Ferguson *v.* Day, 6 Ind. App. 138, 33 N. E. 213. **Ia.**—Edgar *v.* Caldwell, Morris 434. **Kan.**—Hershfield *v.* H. B. Clafin & Co., 25 Kan. 166, 37 Am. Rep. 237. **Ky.**—Eubank *v.* Vance, 6 Ky. L. Rep. 303. **Me.**—Moore *v.* Pennell, 52 Me. 162, 83 Am. Dec. 500. **Mass.**—Allen *v.* Wells, 22 Pick. 450, 33 Am. Dec. 757. **Minn.**—Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515. **Miss.**—Willis *v.* Loeb, 59 Miss. 169; Atwood *v.* Meredith, 37 Miss. 635. **Mo.**—Wiles *v.* Maddox, 26 Mo. 77; Lester *ex rel.* Wright *v.* Givens, 74 Mo. App. 395. **N. H.**—Dow *v.* Sayward, 14 N. H. 9; Gibson *v.* Stevens, 7 N. H. 352. **N. J.**—Clements *v.* Jessup, 36 N. J. Eq. 569; National Bank of the Metropolis *v.* Sprague, 20 N. J. Eq. 13. **N. Y.**—Staats *v.* Bristow, 73 N. Y. 264; Menagh *v.* Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Phillips *v.* Cook, 24 Wend. 389; Serugham *v.* Carter, 12 Wend. 131; Ryder *v.* Gilbert, 16 Hun 163; Berry *v.* Kelly, 4 Rob. 106. **Pa.**—Dengler's Appeal, 125 Pa. 12, 17 Atl. 184. **Tenn.**—Saunders *v.* Bartlett, 12 Heisk. 316; Haskins *v.* Everett, 4 Sneed 531; Johnson *v.* Wingfield, 42

S. W. 203. **Tex.**—Middlebrook *v.* Zapp, 79 Tex. 321, 15 S. W. 258; Rogers *v.* Bradford, 56 Tex. 630. **Utah.**—Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522. **Va.**—Lynch *v.* Hill, 6 Munf. (20 Va.) 114. **Eng.**—Heydon *v.* Heydon, 1 Salk. 392, 91 Eng. Reprint 340.

[a] That goods may be sold in parcels or lots where conducive to the debtor partner's best interest, see Aldrich *v.* Wallace, 8 Dana (Ky.) 287, 33 Am. Dec. 495. As to sale in parcels generally, see 16 STANDARD PROC. 184.

[b] If a less interest is sold than (1) the debtor partner is entitled to, his remaining interest is not affected by the sale (Aldrich *v.* Wallace, 8 Dana [Ky.] 287, 33 Am. Dec. 495); and (2) it is erroneous to decree to the purchaser the entire interest of the debtor partner. Gerard *v.* Bates, 124 Ill. 150, 16 N. E. 258, 7 Am. St. Rep. 350.

74. Hare *v.* Com., 92 Pa. 141.

75. Pittman *v.* Robicheau, 14 La. Ann. 108.

[a] Reason.—The purchaser should be informed that he is buying the partnership interest of an individual partner, and that the property, in his hands, will be subject to the settlement of partnership debts, in a liquidation of the partnership. Pittman *v.* Robicheau, 14 La. Ann. 108.

76. White *v.* Jones, 38 Ill. 159.

77. Barrett *v.* McKenzie, 24 Minn. 20.

78. **Colo.**—Felt *v.* Cleghorn, 2 Colo. App. 4, 29 Pac. 813. **Ill.**—White *v.* Jones, 38 Ill. 159. **Tenn.**—Johnson *v.* Wingfield, 42 S. W. 208; Haskins *v.* Everett, 4 Sneed 531.

for his individual debt, the proceeds of the sale under such executions should be applied first to the payment of the partnership judgment and then to the individual judgment.⁷⁹

3. Subsequent Proceedings Against Partner Not Served.—In jurisdictions allowing a recovery against the joint debtors served, the proper proceeding is to serve a summons in the nature of scire facias upon the defendant not served with the first process, to cause him to appear and show cause why he should not be made a party to such judgment.⁸⁰ The citation in such case should describe the judgment,⁸¹ and require the person to whom it is directed to show cause why he should not be bound by it.⁸² A finding against him must be for the amount remaining unsatisfied on the original judgment.⁸³

4. Accounting to Judgment Creditor or Execution Purchaser. The court will direct an accounting at the instance of a judgment creditor or a purchaser to determine the interest of the debtor partner.⁸⁴

79. U. S.—*Inbusch v. Farwell*, 1 Black 566, 17 L. ed. 188. **Cal.**—*Commercial Bank v. Mitchell*, 58 Cal. 42. **Ind.**—*Louden v. Ball*, 93 Ind. 232. **Ia.**—*Richards v. Haines*, 30 Iowa 574. **Md.**—*Thompson v. Frist*, 15 Md. 24. **N. Y.**—*Ryder v. Gilbert*, 16 Hun 163. **Pa.**—*Coover's Appeal*, 29 Pa. 9, 70 Am. Dec. 149 (such right accrues to the partnership creditors and becomes paramount to the individual creditor if acquired at any time before the sale under the writ against the individual); *Cooper's Appeal*, 26 Pa. 262; *In re Snodgrass' Appeal*, 13 Pa. 471; *In re Overholt's Appeal*, 12 Pa. 222, 51 Am. Dec. 598; *Hershey, Schwenk & Co. v. Fulmer*, 3 Pa. Co. Ct. 442; *Rex, Silves & Co. v. Lomman*, 3 Phila. 287. **S. C.**—*Crawford v. Baum*, 12 Rich. L. 75. **Tex.**—*Blankenship v. Wartelsky*, 6 S. W. 140.

[a] **Money Paid Into Court.**—Where the sheriff has money in his hands made by the sale of the partnership property for the satisfaction of the debt of the individual partners, the plaintiffs in execution of the partnership may ask that the money be paid into court for distribution there. *Hershey, Schwenk & Co. v. Fulmer*, 3 Pa. Co. Ct. 442.

80. Cal.—*Waterman v. Lippman*, 67 Cal. 26, 6 Pac. 875. **Colo.**—*Ellsberry v. Block*, 28 Colo. 477, 65 Pac. 629; *Sawyer v. Armstrong*, 23 Colo. 287, 47 Pac. 391. **Ill.**—*Sherburne v. Hyde*, 185 Ill. 580, 57 N. E. 776; *Sandusky v. Sidwell*, 173 Ill. 493, 50 N. E. 1003 (*affirming* 73 Ill. App. 491); *Fleming v. Ross*, 125 Ill. App. 265, *affirmed* in

225 Ill. 149, 80 N. E. 92; *Gormley v. Hartray*, 105 Ill. App. 625, 92 Ill. App. 115; *Kling v. Taylor*, 90 Ill. App. 165. **N. C.**—*Davis v. Sanderlin*, 119 N. C. 84, 25 S. E. 815. **S. C.**—*Adicks v. Allison*, 21 S. C. 245.

See generally the title "**Summary Proceedings.**"

81. Ellsberry v. Block, 28 Colo. 477, 65 Pac. 629.

82. Ellsberry v. Block, 28 Colo. 477, 65 Pac. 629.

83. Ellsberry v. Block, 28 Colo. 477, 65 Pac. 629.

[a] **Form of Judgment Where One Partner Subsequently Served.**—"The judgment herein of H. F. A., having been recovered against the partnership of A. & B. and also against J. B. A., who alone was served with process, and the other partner, J. R. B., now having been served and heard, it is adjudged, that the said B. be bound by the aforesaid judgment against the partnership of A. & B. from this date; and it is further ordered that the plaintiff have leave to enter execution on said judgment against the said B. personally." *Adickes v. Allison*, 21 S. C. 245.

84. Cal.—*Commercial Bank v. Mitchell*, 58 Cal. 42. **Del.**—*Bevan v. Allee*, 3 Harr. 80. **Ia.**—*Aultman v. Fuller*, 53 Iowa 60, 4 N. W. 809; *Richards v. Haines*, 30 Iowa 574; *Hubbard v. Curtis*, 8 Iowa 1, 74 Am. Dec. 283. **N. Y.**—*Sterrett v. Third Nat. Bank*, 46 Hun 22, 10 N. Y. St. 818; *Phillips v. Cook*, 24 Wend. 389. **Ohio.**—*Nixon v. Nash*, 12 Ohio St. 647, 80 Am. Dec. 390; *Sutcliffe v. Dohrman*, 18 Ohio

5. Remedies of Partners Not Parties Defendant.—Where the partnership property is taken on execution against one partner, the remedy of the remaining partners is not to replevy the property from the officer,⁸⁵ although that has been considered proper,⁸⁶ but they should obtain an injunction against further proceedings until an account can be taken in equity.⁸⁷

As against an execution purchaser of a debtor partner's interest in the partnership property, the other partners cannot, in the name of the firm, maintain conversion⁸⁸ or trespass⁸⁹ against him in respect to such property. Their remedy in such case is to call him to account in equity.⁹⁰

6. Injunction Against Enforcement.—Where no full, complete and adequate remedy at law exists, equity will enjoin the enforcement of a judgment against a partner or partnership.⁹¹ Thus an ordinary⁹²

181, 51 Am. Dec. 450. **Ore.**—Coggswell v. Wilson, 17 Ore. 31, 21 Pac. 388. **Pa.**—Knerr v. Hoffman, 65 Pa. 126; Reinheimer v. Hemingway, 35 Pa. 432; *In re Kelly's Appeal*, 16 Pa. 59. **Tenn.**—Jones v. Richardson, 99 Tenn. 614, 42 S. W. 440; Johnson v. Wingfield, 42 S. W. 203; Haskins v. Everett, 4 Sneed 531.

Accounting between partners, see *supra*, I, C.

[a] The only relief that can be given in such equitable action is that which relates to the interest of the debtor partner in the property seized upon execution, and the satisfaction, in a way authorized by the law, of the judgment by the sale of such property. *Richards v. Haines*, 30 Iowa 574.

[b] A judgment creditor of the partnership may maintain the bill, where the judgment creditor of the individual fails to do so. *Aultman v. Fuller*, 53 Iowa 60, 4 N. W. 809.

85. *Scrugham v. Carter*, 12 Wend. (N. Y.) 131.

86. *Rapp v. Vogel*, 45 Mo. 524; *Coggshall v. Munger*, 54 Mo. App. 420.

[a] The value of the interest levied upon is determinable in such action. *Rapp v. Vogel*, 45 Mo. 524.

87. **N. Y.**—*Scrugham v. Carter*, 12 Wend. 131. **Ohio.**—*Nixon v. Nash*, 12 Ohio St. 647, 80 Am. Dec. 390; *Sutcliffe v. Dohrman*, 18 Ohio 181, 51 Am. Dec. 450; *Place v. Sweetzer*, 16 Ohio 142. **Tenn.**—*Johnson v. Wingfield*, 42 S. W. 203; *Haskins v. Everett*, 4 Sneed 531. **Tex.**—*Middlebrook v. Zapp*, 79 Tex. 321, 15 S. W. 258.

Enjoining enforcement of judgment, see *infra*, II, K, 6.

88. *White v. Woodward*, 8 B. Mon. (Ky.) 484.

89. *Scrugham v. Carter*, 12 Wend. (N. Y.) 131.

90. *White v. Woodward*, 8 B. Mon. (Ky.) 484; *Lamoille Valley R. Co. v. Bixby*, 55 Vt. 235.

91. **Ala.**—*Daniel v. Owens & Co.*, 70 Ala. 297; *Fowlkes & Co. v. Baldwin, Kent & Co.*, 2 Ala. 705. **Fla.**—*Purviance v. Edwards*, 17 Fla. 140. **La.**—*Walworth v. Henderson*, 9 La. Ann. 339. **Md.**—See *Chappell v. Cox*, 18 Md. 513, where officer is responsible, legal remedy is adequate. **Neb.**—*Winters v. Means*, 25 Neb. 241, 41 N. W. 157, 13 Am. St. Rep. 489. **Vt.**—*Shedd & Co. v. Bank of Brattleboro*, 32 Vt. 709.

See generally 16 STANDARD PROC. 450, et seq.; 15 STANDARD PROC. 257, et seq.

[a] Mistake in entering the judgment not sufficient ground, where no prejudice follows. *Crenshaw v. Wick-ersham*, 15 Iowa 154.

[b] Unauthorized Judgment by Confession.—*Christy v. Sherman*, 10 Iowa 535.

92. **Me.**—*Thompson v. Lewis*, 34 Me. 167. **N. J.**—*Blackwell v. Rankin*, 7 N. J. Eq. 152; *Cammaek v. Johnson*, 2 N. J. Eq. 163. **Ohio.**—*Nixon v. Nash*, 12 Ohio St. 647, 80 Am. Dec. 390; *Sutcliffe v. Dohrman*, 18 Ohio 181, 51 Am. Dec. 450. **Vt.**—*Washburn v. Bank of Bellows Falls*, 19 Vt. 278. **Eng.**—*Taylor v. Fields*, 4 Ves. Jr. 396, 31 Eng. Reprint 201.

[a] The injunction will be refused and the creditor allowed to pursue

creditor of the partnership, or the remaining partner or partners,⁹³ may bring a bill against the separate creditor of one of the partners to restrain a sale upon execution, of the partnership property, at least until a partnership account is taken, and the precise interest of the debtor partner ascertained.⁹⁴ Some courts refuse to grant an injunction to stay a sale of partnership property under an execution at law against one of the partners, for the reason that such sale could only place the purchaser, as to the property, in the same situation that the defendant in execution was prior to such sale,⁹⁵ and where the levy of the execution or attachment produces no change in the possession of the property of the partnership by reason of the provisions of the statute,⁹⁶ an injunction will not lie to restrain the levy of an execution upon the interest of a partner.⁹⁷

L. APPEAL AND ERROR.—An appeal from a judgment by or against a partnership is governed in general by the rules respecting appeals elsewhere discussed.⁹⁸ Where the judgment rendered is joint against the partners, all the partners are necessary parties to an appeal therefrom,⁹⁹ and this is true although one of the partners de-

his execution where the equities between him and the partnership creditor are equal. *Lamoille Valley R. Co. v. Bixby*, 55 Vt. 235.

93. U. S.—*Cropper v. Coburn*, 2 Curt. 465, 6 Fed. Cas. No. 3,416 (wherein the partnership was insolvent and the debtor partner had consequently no interest which could pass by a sale); *Crane v. Morrison*, 4 Sawy. 138, 6 Fed. Cas. No. 3,355, 7 N. B. R. 393. **Ga.** *Blood v. Martin*, 21 Ga. 127. **Ind.** *Williams v. Lewis*, 115 Ind. 45, 17 N. E. 262, 7 Am. St. Rep. 403 (specific articles levied on); *Hardy v. Donellan*, 33 Ind. 501. **Me.**—*Crooker v. Crooker*, 46 Me. 250. **Mich.**—*Krupp v. Adams*, 124 Mich. 215, 82 N. W. 894, wherein the execution was levied on specific property of the firm. **N. J.**—*Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221. **N. Y.**—*Turner v. Smith*, 1 Abb. Pr. N. S. 304, where it appears from the complaint that the debtor partner has no interest in the firm assets. **Ohio.**—*Nixon v. Nash*, 12 Ohio St. 647, 80 Am. Dec. 390; *Sutcliffe v. Dohrman*, 18 Ohio 181, 51 Am. Dec. 450; *Place v. Sweetzer*, 16 Ohio 142. **Tex.**—*Rogers v. Nichols*, 20 Tex. 719, decided in 1858 when levy made a change in the possession of the property; see *infra*, for present rule. **Vt.**—*Washburn v. Bank of Bellows Falls*, 19 Vt. 278.

But see *Jones v. Thompson*, 12 Cal. 191.

94. U. S.—*Crane v. Morrison*, 4

Sawy. 138, 6 Fed. Cas. No. 3,355, 7 N. B. R. 393. **Ala.**—*Moore & Co. v. Sample*, 3 Ala. 319. **Ill.**—*Newhall v. Buckingham*, 14 Ill. 405. **Miss.**—*Sanders v. Young*, 31 Miss. 111. **N. H.** *Dow v. Sayward*, 14 N. H. 9. **N. J.** *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221. **Ohio.**—*Nixon v. Nash*, 12 Ohio St. 647, 80 Am. Dec. 390; *Place v. Sweetzer*, 16 Ohio 142. **Tex.**—*Rogers v. Nichols*, 20 Tex. 719. **Vt.**—*Washburn v. Bank of Bellows Falls*, 19 Vt. 278. **Eng.**—*Barker v. Goodair*, 11 Ves. Jr. 78, 32 Eng. Reprint 1017.

95. Minn.—*Wickham v. Davis*, 24 Minn. 167. **Miss.**—*Sitler v. Walker*, Freem. Ch. 77. **N. Y.**—*Saunders v. Irwin*, 17 Hun 342; *Moody v. Payne*, 2 Johns. Ch. 548; *Mowbray v. Lawrence*, 22 How. Pr. 107, 13 Abb. Pr. 317; *Phillips v. Cook*, 24 Wend. 389; *Read v. McLanahan*, 15 Jones & S. 275.

96. See supra, II, K, 2, c, (II).

97. Radford Grocery Co. v. Owens (Tex. Civ. App.), 161 S. W. 911.

98. See 2 STANDARD PROC. 106, et seq.

99. Ga.—*Kline v. Swift Specific Co.*, 118 Ga. 514, 45 S. E. 314. **Kan.**—*Westover v. Dobson*, 47 Pac. 620. **Ohio.** *Beers & Co. v. Gurney*, 14 Ohio Cir. Ct. 82, 7 Ohio Cir. Dec. 411.

And see 2 STANDARD PROC. 225.

How partners described, see 2 STANDARD PROC. 216.

faulted in the trial court.¹ If the partner refuses his consent to join in the appeal, he should be made a defendant, the reason being stated in the petition in error.² In accordance with the general rule that only parties to the record can appeal from the judgment rendered,³ a partnership cannot appeal, where a judgment was rendered in a suit against the partners as individuals.⁴ Where a partner dies after the rendition of judgment, an appeal may be prosecuted by or against the surviving partner.⁵ Where a several judgment may be entered against the members of a firm, the appellate court may affirm the judgment as to some of the partners, and reverse or modify it as to the others.⁶

III. ACTIONS BY OR AGAINST SURVIVING PARTNERS OR REPRESENTATIVES OF DECEASED PARTNERS. — A. BY AND AGAINST WHOM. — 1. At Common Law. — Unless otherwise provided

by statute actions at law to enforce partnership rights and liabilities are upon the death of a member, brought by and against the surviving partners,⁷ and the personal representatives of a deceased part-

1. *Westover v. Dobson* (Kan.), 47 Pac. 620.
2. *Westover v. Dobson* (Kan.), 47 Pac. 620.
3. See generally 2 STANDARD PROC. 194.
4. *Bastian v. Adams*, 5 Neb. (Unof.) 32, 97 N. W. 231.
5. *Robertson v. Ford*, 164 Ind. 538, 74 N. E. 1.
6. *Bridgeford v. Fogg, Shaw, Thayer & Co.*, 10 Ky. L. Rep. 773.
7. **U. S.**—*Wickliffe v. Eve*, 17 How. 468, 15 L. ed. 163; *Bischoffsheim v. Baltzer*, 20 Fed. 890; *Kirby v. Lake Shore & M. S. R. Co.*, 8 Fed. 462. **Ala.**—*Walton v. Atkinson*, 165 Ala. 644, 51 So. 826; *Evans v. Silvey & Co.*, 144 Ala. 398, 42 So. 62; *Winfrey v. Clarke*, 107 Ala. 355, 18 So. 141; *Goldsmith v. Eichhold*, 94 Ala. 116, 10 So. 80, 33 Am. St. Rep. 97; *Davidson v. Weems*, 58 Ala. 187; *Offutt v. Scott*, 47 Ala. 104; *Dixon v. Barclay*, 22 Ala. 370; *Andrews' Heirs v. Brown's Admr.*, 21 Ala. 437, 56 Am. Dec. 252. **Ark.**—*Stillwell v. Gray*, 17 Ark. 473; *McLain v. Carson's Exr.*, 4 Ark. 164, 37 Am. Dec. 777. **Cal.** *Miller v. County of Kern*, 137 Cal. 516, 70 Pac. 549; *Berson v. Ewing*, 84 Cal. 89, 23 Pac. 1112. **Conn.**—*Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703. **Del.**—*Currey v. Warrington's Exr.*, 5 Harr. 147. **Fla.**—*Fillyau v. Laverty*, 3 Fla. 72, 101. **Ga.**—*Knox v. Bates & Co.*, 79 Ga. 425, 5 S. E. 61; *Morrow v. Cloud*, 77 Ga. 114; *City of Atlanta v. Dooly*, 74 Ga. 702; *Bennett v. Woolfolk*, 15 Ga. 213; *Ross v. Everett's Exrs.*, 12 Ga. 30. **Ill.**—*Belton v. Fisher*, 44 Ill. 32. **Ind.**—*McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164; *Needham v. Wright*, 140 Ind. 190, 39 N. E. 510; *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; *Ralston v. Moore*, 105 Ind. 243, 4 N. E. 673; *Anderson v. Ackerman*, 88 Ind. 481; *Willson v. Nicholson*, 61 Ind. 241; *Hayes v. Johnson*, 56 Ind. App. 238, 105 N. E. 164. **Ia.** *Brown v. Allen*, 35 Iowa 306; *Bowen v. Troy Portable Mill Co.*, 31 Iowa 460; *Childs, Sanford & Co. v. Hyde & Co.*, 10 Iowa 294, 77 Am. Dec. 113. **Ky.**—*Southard v. Lewis*, 4 Dana 148; *Broadfoot v. Rowe*, 14 Ky. L. Rep. 895. **Me.**—*Strang v. Hirst*, 61 Me. 9; *Clark v. Howe*, 23 Me. 560. **Md.** *Folsom v. Detrick Fertilizer & Chem. Co.*, 85 Md. 52, 36 Atl. 446; *Harwood v. Jones*, 10 Gill & J. 404, 32 Am. Dec. 180. **Mass.**—*Russell v. Cole*, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432; *Hughes v. Gross*, 166 Mass. 61, 43 N. E. 1031, 55 Am. St. Rep. 375, 32 L. R. A. 620; *Aakman v. Dorchester Mut. Fire Ins. Co.*, 98 Mass. 57; *Peters v. Davis*, 7 Mass. 257; *Rice, Appellant, v. Allen* 112. **Mich.**—*Van Kleeck v. McCabe*, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182; *O'Connell v. Schwanabeck*, 76 Mich. 517, 43 N. W. 599; *Cragin v. Gardner*, 64 Mich. 399, 31 N. W. 206; *Bassett v. Miller*, 39 Mich. 133. **Miss.**—*Freeman v. Stewart*, 41 Miss. 138. **Mo.**—*Hargadine v. Gibbons*, 114 Mo. 561, 21 S. W. 726. **Neb.**—*Lindner v. Adams County Bank*, 49 Neb. 735, 68 N. W. 1028. **Nev.**

ner cannot sue or be sued alone,⁸ except where the surviving partners refuse to sue when they should.⁹

Joinder as plaintiff,¹⁰ of the deceased partner's personal representa-

Maples v. Geller, 1 Nev. 233. **N. H.**—*Gay v. Johnson*, 32 N. H. 167. **N. Y.**—*Nehrboss v. Bliss*, 88 N. Y. 600, 2 Civ. Proc. 39, 2 McCarty Civ. Proc. 106; *Pope v. Cole*, 55 N. Y. 124, 14 Am. Rep. 198; *Farwell v. Davis*, 66 Barb. 73; *Carrere v. Spofford*, 15 Abb. Pr. (N. S.) 47, 46 How. Pr. 294; *Grant v. Shurter*, 1 Wend. 148; *Secor v. Pendleton*, 47 Hun 281, 13 N. Y. St. 387; *Merrill v. Blanchard*, 7 App. Div. 167, 40 N. Y. Supp. 48, 74 N. Y. St. 661; *Callanan v. Keeseville*, A. C. & L. C. R. Co., 48 Misc. 476, 95 N. Y. Supp. 513. **N. C.**—*Felton v. Reid*, 52 N. C. 269. **Okla.**—*White v. Dillinger*, 50 Okla. 555, 151 Pac. 194. **Pa.**—*Davis v. Church*, 1 Watts & S. 240; *Scranton Sav. Bk. v. Scranton*, 20 Pa. Dist. 829. **R. I.**—*Hawkins v. Capron*, 17 R. I. 679, 24 Atl. 466; *Pearce v. Cooke*, 13 R. I. 184. **Tenn.**—*Trundle v. Edwards*, 4 Sneed 572; *Saunders v. Wilder*, 2 Head 577. **Tex.**—*O'Brien v. Gilleland*, 79 Tex. 602, 15 S. W. 681; *Watson v. Miller*, 55 Tex. 289; *Lovelady v. Bennett* (Tex. Civ. App.), 30 S. W. 1124; *Davis v. Schaffner & Co.*, 3 Tex. Civ. App. 121, 22 S. W. 822. **Utah.**—*Cobb v. Hartenstein*, 47 Utah 174, 152 Pac. 424. **Vt.**—*Wood v. Rutland & Addison Mut. Fire Ins. Co.*, 31 Vt. 552; *Meador v. Scott*, 4 Vt. 26; *Meador v. Leslie*, 2 Vt. 569. **Va.**—*Brown's Admr. v. Johnson*, 13 Gratt. (54 Va.) 644. **Wash.**—*Brigham-Hopkins Co. v. Gross*, 30 Wash. 277, 70 Pac. 480 (common law rule unchanged by statute); *Barlow v. Coggan*, 1 Wash. Ter. 257. **Wis.**—*Butler v. Kirby*, 53 Wis. 188, 10 N. W. 373; *Roys v. Vilas*, 18 Wis. 169; *Shields v. Fuller*, 4 Wis. 102, 65 Am. Dec. 293.

[a] **A dormant partner may sue alone upon a partnership contract after the death of his ostensible partner.** *Beach v. Hayward*, 10 Ohio 455.

[b] **Upon the death of the surviving partner, his personal representative is the only proper person to sue or be sued upon the demands of the former partnership.** **Ala.**—*Costley v. Wilkerson's Admr.*, 49 Ala. 210. **Mass.**—*Whitney v. Cook*, 5 Mass. 139. **Miss.**—*Copes v. Fultz*, 1 Smed. & M. 623. **N. Y.**—*Nehrboss v. Bliss*, 88 N. Y.

600, 2 Civ. Proc. 39, 2 McCarty Civ. Proc. 106; *Secor v. Pendleton*, 47 Hun 281, 13 N. Y. St. 387; *Carrere v. Spofford*, 46 How. Pr. 294; *Bridge v. Swain*, 3 Redf. 487. **Tenn.**—*Brooks v. Brooks*, 12 Heisk. 12; *Walker v. Galbreath*, 3 Head 315.

[c] **Failure to file an inventory and appraisement as required by statute does not affect the right of the surviving partner to sue for and collect the debts of the partnership.** *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164. And see *State v. Matthews*, 129 Ind. 281, 28 N. E. 703. But see *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 58 N. E. 805.

8. Ark.—*Stillwell v. Gray*, 17 Ark. 473. **Ga.**—*Bennett v. Woolfolk*, 15 Ga. 213; *Ross v. Everett's Exrs.*, 12 Ga. 30; *Roosevelt v. McDowell*, 1 Ga. 489. **Ind.**—*McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164. **Me.**—*McNally v. Kerswell*, 37 Me. 550. **Mo.**—*Lindell v. Lee*, 34 Mo. 103. **N. Y.**—*Carrere v. Spofford*, 15 Abb. Pr. (N. S.) 47, 46 How. Pr. 294. **Utah.**—*Cobb v. Hartenstein*, 47 Utah 174, 152 Pac. 424.

9. Kirby v. Lake Shore & M. S. R. Co., 8 Fed. 462. And see *Drake v. Blount*, 17 N. C. 353, wherein it was held that where a partnership debt was assigned to one of the partners who thereafter died, and the residence of the survivor is unknown, the executor of the deceased partner could recover the debt in equity.

10. U. S.—*Wickliffe v. Eve*, 17 How. 468, 15 L. ed. 163; *Robinson v. Hintz*, 36 Fed. 752; *Kirby v. Lake Shore & M. S. R. Co.*, 8 Fed. 462. **Ala.**—*Evans v. Silvey & Co.*, 144 Ala. 398, 42 So. 62; *Davidson v. Weems*, 58 Ala. 187. **Ga.**—*Louisville & N. R. Co. v. Morse*, 143 Ga. 110, 84 S. E. 428. **Ill.**—*Belton v. Fisher*, 44 Ill. 32. **Ind.**—*Newman v. Gates*, 165 Ind. 171, 72 N. E. 638; *Nicklaus v. Dahn*, 63 Ind. 87; *Hayes v. Johnson*, 56 Ind. App. 238, 105 N. E. 164, complaint falls as to all plaintiffs, if representative joined. **Ia.**—*Brown v. Allen*, 35 Iowa 306; *Childs, Sanford & Co. v. Hyde & Co.*, 10 Iowa 294, 77 Am. Dec. 113. **Ky.**—*McCandless & Co. v. Hadden*, 9 B. Mon. 186. **Md.**—*Harwood v. Jones*, 10 Gill

tive is improper, as is also his joinder as defendant.¹¹

2. **In Equity.**—In equity the creditor can proceed against the estate of the deceased partner,¹² whether the survivors are solvent or not.¹³

3. **Statutory or Code Provisions.**—a. *In General.*—Statutes sometimes authorize an action upon a firm obligation against the estate of a deceased partner,¹⁴ or require the surviving partner to join the representative of the deceased partner.¹⁵ Under statutes allowing any person to be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, the surviving partner is a necessary party to an action against partnership assets,¹⁶ and the representatives of the deceased partner are properly made parties, because they have an interest in the controversy.¹⁷

b. *Joint and Several Liability.*—In states where the firm obligation is made joint and several, the creditor may proceed against the surviving members alone,¹⁸ or against the personal representatives of

& J. 404, 32 Am. Dec. 180. **Mich.** Bassett v. Miller, 39 Mich. 133; Pfeffer v. Steiner, 27 Mich. 537. **N. Y.** Daby v. Ericsson, 45 N. Y. 786; Voorhis v. Childs' Exr., 17 N. Y. 354; Carere v. Spofford, 15 Abb. Pr. (N. S.) 47, 46 How. Pr. 294. **Tex.**—Watson v. Miller, 55 Tex. 289. **Wis.**—Roys v. Vilas, 18 Wis. 169. **Can.**—Bolekow v. Foster, 25 Grant Ch. U. C. 476.

[a] The objection that the administrator is improperly joined is waived if not raised in the trial court. Belton v. Fisher, 44 Ill. 32; Nicklaus v. Dahn, 63 Ind. 87.

Joinder of parties under statute, see *infra*, III, A, 3.

11. **U. S.**—Brigham-Hopkins Co. v. Gross, 107 Fed. 769, Washington. **Ga.** Ross v. Everett's Exrs., 12 Ga. 30. **Ind.**—Braxton v. State *ex rel.* Albert, 25 Ind. 82, common law rule. **Ky.** Southard v. Lewis, 4 Dana 148. **Miss.** Robertshaw v. Hanway, 52 Miss. 713, where the object of the proceeding is solely to reach the firm property, there is no necessity for joining the administrator. **N. J.**—Rusling v. Brodhead, 55 N. J. Eq. 200, 35 Atl. 841. **N. C.** Burgwin v. Hostler's Admr., 3 N. C. 104, 1 N. C. 124, 1 Am. Dec. 582. **Pa.**—Hoskinson v. Eliot, 62 Pa. 393. **S. C.**—Fisher's Exrs. v. Tucker's Representatives, 1 McCord Eq. 169. **Tex.** Lovelady v. Bennett (Tex. Civ. App.), 30 S. W. 1124.

12. **U. S.**—Nelson v. Hill, 5 How. 127, 12 L. ed. 81. **Ala.**—Smith & Co. v. Mallory's Exr., 24 Ala. 628. **Ark.** McLain v. Carson's Exr., 4 Ark. 164, 37 Am. Dec. 777. **Conn.**—Camp v.

Grant, 21 Conn. 41, 54 Am. Dec. 321. **Mich.**—Manning v. Williams, 2 Mich. 105. **N. Y.**—Ricart v. Townsend, 6 How. Pr. 460.

[a] Statutes do not change this equity jurisdiction. Waldron, Isley & Co. v. Simmons, 28 Ala. 629; Moore Furniture Co. v. Prussing, 71 Ill. App. 666.

13. Fillyau v. Laverty, 3 Fla. 72; Doggett v. Dill, 108 Ill. 560, 48 Am. Rep. 565. But see Alsop v. Mather, 8 Conn. 584.

14. **Ala.**—Smith & Co. v. Mallory's Exr., 24 Ala. 628. **Ark.**—McLain v. Carson's Exr., 4 Ark. 164, 37 Am. Dec. 777. **N. Y.**—Ricart v. Townsend, 6 How. Pr. 460.

[a] Provided insufficient assets remain in the hands of the surviving partners to pay the demand. Beaton v. Wade, 14 Colo. 4, 22 Pac. 1093.

15. Hyde v. Brashear, 19 La. 402; Babcock v. Brashear, 19 La. 404; Connelly v. Cheevers, 16 La. 30; Cutler v. Cochran, 13 La. 482.

[a] Incapacity of the surviving partner to sue alone may be shown under the general issue. Hyde v. Brashear, 19 La. 402; Notrebe v. McKinney, 6 Rob. (La.) 13.

16. Ricart v. Townsend, 6 How. Pr. (N. Y.) 460.

17. **U. S.**—Robinson v. Hintrager, 36 Fed. 752, the representative, in order to be made a party, must have an interest in the chose in action itself. **N. Y.**—Ricart v. Townsend, 6 How. Pr. 460. **Va.**—Jackson v. King's Representatives, 8 Leigh (35 Va.) 689.

18. **U. S.**—Nelson v. Hill, 5 How.

the deceased partner,¹⁹ or against both jointly.²⁰

c. *Bond by Surviving Partner.*—Where a bond is required of the surviving partner,²¹ it may,²² or may not,²³ be considered a prerequisite to his suing in his capacity of survivor.

127, 133, 12 L. ed. 81; Van Reinsdyk v. Kane, 1 Gall. 630, 28 Fed. Cas. No. 16,872. **Ala.**—Goldsmith v. Eichold, 94 Ala. 116, 10 So. 80, 33 Am. St. Rep. 97. **Colo.**—Doty v. Irwin-Phillips Co., 15 Colo. App. 96, 61 Pac. 188. **Fla.**—Fillyau v. Laverty, 3 Fla. 72. **Ill.**—Doggett v. Dill, 103 Ill. 560, 48 Am. Rep. 565; Silverman v. Chase, 90 Ill. 37; Mason v. Tiffany, 45 Ill. 392. **Ind.**—Newman v. Gates, 165 Ind. 171, 72 N. E. 638; Ralston v. Moore, 105 Ind. 243, 4 N. E. 673. **Ia.**—Postlewait v. Howes, 3 Iowa 365. **Ky.**—Fennell v. Myers, 25 Ky. L. Rep. 589, 76 S. W. 136. **Mass.**—Rice, Appellant, 7 Allen 112. **Miss.**—Irby v. Graham, 46 Miss. 425. **Ohio.**—Weil v. Guerin, 42 Ohio St. 299. **Tenn.**—Saunders v. Wilder, 2 Head 577. **Tex.**—Gaut v. Reed Bros. & Co., 24 Tex. 46, 76 Am. Dec. 94. **Eng.**—Devaynes v. Noble, 1 Mer. 529, 35 Eng. Reprint 767.

19. **U. S.**—Nelson v. Hill, 5 How. 127, 133, 12 L. ed. 81; Van Reinsdyk v. Kane, 1 Gall. 630, 28 Fed. Cas. No. 16,872. **Ala.**—Smith & Co. v. Mallory's Exr., 24 Ala. 628. **Ark.**—McLain v. Carson's Exr., 4 Ark. 164, 37 Am. Dec. 777. **Cal.**—Savings & Loan Society v. Gibb, 21 Cal. 595. **Colo.**—Doty v. Irwin-Phillips Co., 15 Colo. App. 96, 61 Pac. 188. **Conn.**—Filley v. Phelps, 18 Conn. 294. **Fla.**—Fillyau v. Laverty, 3 Fla. 72. **Ill.**—Union Trust Co. v. Shoemaker, 258 Ill. 564, 101 N. E. 1050; Doggett v. Dill, 108 Ill. 560, 48 Am. Rep. 565; Silverman v. Chase, 90 Ill. 37; Mason v. Tiffany, 45 Ill. 392. **Ind.**—Newman v. Gates, 165 Ind. 171, 72 N. E. 638; Ralston v. Moore, 105 Ind. 243, 4 N. E. 673; Vance v. Cowing, 13 Ind. 460. **Ia.**—Postlewait v. Howes, 3 Iowa 365. **Ky.**—Maxey v. Averill's Exr., 2 B. Mon. 107. **Miss.**—Irby v. Graham, 46 Miss. 425. **N. J.**—Hamersley v. Lambert, 2 Johns. Ch. 508, if the surviving partner is insolvent. **Ohio.**—Weil v. Guerin, 42 Ohio St. 299. **Pa.**—Blair v. Wood, 108 Pa. 278; Brewster's Admx. v. Sterrett, 32 Pa. 115; Lang v. Keppele, 1 Binn. 123; Creswell v. Blank, 3 Grant Cas. 320, action may be brought pending a

suit against the survivors for the same cause of action. **Tenn.**—Saunders v. Wilder, 2 Head 577. **Tex.**—Gaut v. Reed Bros. & Co., 24 Tex. 46, 76 Am. Dec. 94. **Va.**—Robinson v. Allen, 85 Va. 721, 8 S. E. 835. **Eng.**—Devaynes v. Noble, 1 Mer. 529; 35 Eng. Reprint 767; *In re Hodgson*, L. R. 31 Ch. Div. 177.

20. **U. S.**—Nelson v. Hill, 5 How. 127, 133, 12 L. ed. 81; United States v. Hughes, 161 Fed. 1021. **Ark.**—McLain v. Carson's Exr., 4 Ark. 164, 37 Am. Dec. 777. **Ga.**—Garrard v. Dawson, 49 Ga. 434. **Ind.**—Braxton v. State ex rel. Albert, 25 Ind. 82. **Miss.**—Irby v. Graham, 46 Miss. 425; Freeman v. Stewart, 41 Miss. 138. **N. Y.**—Parker v. Jackson, 16 Barb. 33; Ricart v. Townsend, 6 How. Pr. 460. **N. C.**—Brown v. Clary, 2 N. C. 107. **Ohio.**—Weil v. Guerin, 42 Ohio St. 299. **Okla.**—Walker Dry Goods Co. v. Blake, 158 Pac. 381. **S. C.**—Wiesenfeld, Stern & Co. v. Byrd, 17 S. C. 106. **Tenn.**—Saunders v. Wilder, 2 Head 577.

But see Doty v. Irwin-Phillips Co., 15 Colo. App. 96, 61 Pac. 188; Scranton Sav. Bank v. Scranton, 20 Pa. Dist. 829.

[a] The statute permits the suit to be brought against the personal representatives separately or jointly with the survivors. Freeman v. Stewart, 41 Miss. 138.

21. **U. S.**—Harrington v. Herriek, 64 Fed. 468, 12 C. C. A. 231. **Me.**—Seruta v. Surace, 111 Me. 508, 90 Atl. 328. **Mo.**—Hargadine v. Gibbons, 114 Mo. 561, 21 S. W. 726.

22. Seruta v. Surace, 111 Me. 508, 90 Atl. 328.

[a] Failure to do so is ground for plea in abatement, but is not reached by the general issue. Seruta v. Surace, 111 Me. 508, 90 Atl. 328.

[b] A receiver to wind up the affairs of the partnership, may be appointed at the instance of the legal representative when the survivor fails to file a bond. Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N. E. 805.

23. Hargadine v. Gibbons, 114 Mo.

d. *Where Partner Not Administrator of Firm Assets.*—If pursuant to statutory authorization another than the surviving partner becomes administrator of the firm assets,²⁴ suits in respect to such assets should, according as the statutes are worded or construed, be maintained by or against the administrator,²⁵ or the survivor.²⁶

e. *Probate Authorization To Sue.*—The survivor may be required by statute to obtain authority from the probate court to sue the deceased partner's representatives.²⁷

4. *In Actions Between Survivor and Deceased's Representatives.*²⁸ The surviving partner, entitled to the possession and control of the firm property, may maintain appropriate actions against the personal representatives of a deceased partner to recover and protect such property;²⁹ and after an accounting³⁰ has been had between the partners or between the representative of a deceased partner and the survivor, an action may be maintained either by or against the representative to recover the agreed balance.³¹

B. PLEADINGS.—1. *Complaint or Declaration.*—In some jurisdictions the courts hold that a surviving partner may maintain an action in his own name for a debt incurred to the partnership during

561, 21 S. W. 726; *Crook v. Tull*, 111 Mo. 283, 20 S. W. 8; *Holman v. Nance*, 84 Mo. 674; *Easton v. Courtwright*, 84 Mo. 27; *Bredow v. Mutual Sav. Inst.*, 28 Mo. 181; *Meriwether v. Quincy, O. & K. C. R. Co.*, 128 Mo. App. 647, 107 S. W. 434; *Hargadine v. Gibbons*, 45 Mo. App. 460.

[a] A debtor of the partnership cannot question the right of the surviving partners to proceed without qualifying. *Hargadine v. Gibbons*, 114 Mo. 561, 21 S. W. 726.

24. *Harrington v. Herrick*, 64 Fed. 468, 12 C. C. A. 231; *Bass v. Emery*, 74 Me. 338.

[a] A failure of the survivor to qualify subjects him to being displaced by the administrator of the deceased's partner's estate qualifying as administrator of the partnership estate. *Hargadine v. Gibbons*, 114 Mo. 561, 21 S. W. 726; *Crook v. Tull*, 111 Mo. 283, 20 S. W. 8; *Holman v. Nance*, 84 Mo. 674; *Bredow v. Mutual Sav. Inst.*, 28 Mo. 181; *Meriwether v. Quincy, O. & K. C. R. Co.*, 128 Mo. App. 647, 107 S. W. 434; *Latimer v. Newman*, 69 Mo. App. 76; *Poppleton v. Jones*, 42 Ore. 24, 69 Pac. 919.

25. *Bass v. Emery*, 74 Me. 338.

[a] Such Administrator Necessary Defendant.—*Bass v. Emery*, 74 Me. 338.

[b] After settlement of the estate, but not pending administration the survivor may be sued. *Brigham-Hop-*

kins Co. v. Gross, 30 Wash. 277, 70 Pac. 480; *Brigham-Hopkins Co. v. Gross*, 20 Wash. 218, 54 Pac. 1127.

[c] In a suit upon partnership chose in action, the administrator of the partnership estate is the only necessary party plaintiff. *Latimer v. Newman*, 69 Mo. App. 76.

26. *Harrington v. Herrick*, 64 Fed. 468, 12 C. C. A. 231; *Poppleton v. Jones*, 42 Ore. 24, 69 Pac. 919.

27. *Babcock v. Brashear*, 19 La. 404; *Hyde v. Brashear*, 19 La. 402; *Connelly v. Cheevers*, 16 La. 30.

28. As to actions between partners generally, see *supra*, I.

29. Ala.—*Calvert v. Marlow*, 18 Ala. 67. Nev.—*Reese v. Kinkead*, 17 Nev. 447, 30 Pac. 1087. Ore.—*Gardner v. Gillihan*, 20 Ore. 598, 27 Pac. 220, surviving partner duly qualified as administrator of the partnership estate as required by the statute may maintain such an action. Wis.—*Shields v. Fuller*, 4 Wis. 102, 65 Am. Dec. 293.

[a] Detinue for a note belonging to the firm. *Calvert v. Marlow*, 18 Ala. 67.

30. See *supra*, I, C.

31. *Johnson v. Peck*, 58 Ark. 580, 25 S. W. 865; *Schmidt v. Glade*, 120 Ill. 485, 18 N. E. 762.

[a] Assumpsit.—*Schmidt v. Glade*, 126 Ill. 485, 18 N. E. 762.

[b] An action for contribution will not lie in favor of the representatives

its existence, without alleging the partnership,³² the nature of the debt as a firm one,³³ or the death of his co-partner and his survivorship.³⁴ But other courts hold that such facts must be alleged,³⁵ or, at least, that it is the better practice to do so.³⁶ Non-payment of the claim or demand must be averred.³⁷

In an action upon a co-partnership obligation the survivor should be sued as such,³⁸ and the contract sued upon should be described as made with the firm.³⁹ In an action against the representative of a deceased partner, if insolvency of the surviving partner is a condition precedent, it must be alleged.⁴⁰ Where both the surviving partner and the representatives of the deceased are made defendants, the

where no accounting has been had. *Harris v. Harris*, 39 N. H. 45.

32. *Smith v. Barrow*, 2 Term 476, 100 Eng. Reprint 256; *Hyat v. Hare*, Comb. 383, 90 Eng. Reprint, 543.

33. *Jemison v. Dearing's Exrs.*, 41 Ala. 283; *Ward v. Dow*, 44 N. H. 45.

34. Conn.—*Vandenheuev v. Storrs*, 3 Conn. 203. Ind.—*Culbertson v. Townsend*, 6 Ind. 64. Nev.—*Reese v. Kinkead*, 17 Nev. 447, 30 Pac. 1087. N. H. *Joys's v. Taylor*, 24 N. H. 268; *Ledden v. Colby*, 14 N. H. 33, 40 Am. Dec. 173, death must be proved, although it need not be alleged. N. Y.—*Grant v. Shurter*, 1 Wend. 148; *Berolzheimer v. Strauss*, 19 Jones & S. 96, 7 Civ. Proc. 225. R. I.—*Hawkins v. Capron*, 17 R. I. 679, 24 Atl. 466, amendment allowing the partner to state that he is the surviving member is unnecessary. Vt.—*Meador v. Leslie*, 2 Vt. 569. Wis.—*Butler v. Kirby*, 53 Wis. 188, 10 N. W. 373.

[a] The omission to describe himself as a survivor cannot affect the surviving partner's right to recover upon a partnership demand. *Farwell v. Davis*, 66 Barb. (N. Y.) 73.

35. Ark.—*Keith v. Pratt*, 5 Ark. 661. Colo.—*Smith v. Salomon*, 1 Colo. 176, 91 Am. Dec. 711. Mich.—*Teller v. Wetherell*, 9 Mich. 464.

[a] The names of all the partners should appear. *Hubbell v. Skiles*, 16 Ind. 138.

[b] **Erroneous Appellation.**—Where plaintiffs in their petition style themselves "successors" instead of surviving partners but allege that they were the only partners of the deceased partner at the time of his death, it states facts that would upon his death make them the surviving partners and is sufficient. *Wright v. McCampbell*, 75 Tex. 644, 13 S. W. 293.

36. *Reese v. Kinkead*, 17 Nev. 447, 30 Pac. 1087.

[a] **Form.**—"That plaintiff and one R. H. C., now deceased, were co-partners in business preceding and at the time of said C's death, which occurred on or about October 17, 18—, and as such copartners did business under the style of C. & R., and were the owners in copartnership of the personal property hereinafter described; that plaintiff is the sole surviving partner of said copartnership, and now is the owner and entitled to the immediate possession" of the property described, etc. *Reese v. Kinkead*, 17 Nev. 447.

37. *Massey v. Pike*, 20 Ark. 92. See generally the title "Payment."

[a] **Should aver (1) non-payment to firm** or to the surviving partner. *Massey v. Pike*, 20 Ark. 92. (2) Where, in a suit by a surviving partner, he alleges the note sued on to have been made after the death of the partner, he need not negative payment to the deceased partner. *Bonne v. Kay*, 5 Ark. 19.

38. *Black v. Struthers*, 11 Iowa 459.

39. *Black v. Struthers*, 11 Iowa 459.

[a] **Reason.**—The contract should be described as made with the firm so that the defendant may later use the judgment as evidence against the estate of the deceased partner for contribution. *Black v. Struthers*, 11 Iowa 459.

40. *Pearson v. Keedy*, 6 B. Bon. (Ky.) 128, 43 Am. Dec. 160.

[a] **Sufficient Allegation.**—An averment that the surviving partner has been sued to insolvency, is equivalent to an allegation that the firm is insolvent. *Daniel v. Townsend, Arnold & Co.*, 21 Ga. 155.

prayer should specify the relief sought against each party.⁴¹

2. **Replication or Reply.**—A replication by the administrator of a surviving partner, to a general plea of payment, must aver that payment was made to neither the surviving nor the deceased partner.⁴²

3. **Amendments.**—Where a surviving partner brings a suit in the name of the former firm, he may be allowed to amend by declaring as surviving partner.⁴³

C. **JUDGMENT.**—A judgment in a suit brought in the name of the surviving partner should be in favor of or against such partner individually.⁴⁴ A judgment against a surviving partner is enforceable by execution against the firm assets under his control,⁴⁵ and in the absence of partnership assets is enforceable against his individual property.⁴⁶

IV. LIMITED PARTNERSHIPS.—A. **ACTIONS BY OR AGAINST LIMITED PARTNERSHIPS.**⁴⁷—1. **Parties.**—Statutes may permit limited partnerships to sue and be sued in the partnership name,⁴⁸ or again they may authorize such suits to be prosecuted or defended in the name of the general partners,⁴⁹ without joining the special partners, and these latter are neither necessary nor proper parties,⁵⁰ and

41. *Ricart v. Townsend*, 6 How. Pr. (N. Y.) 460.

42. *Lang v. Lewis' Admr.*, 1 Rand. (22 Va.) 277.

43. *O'Connell v. Schwanabeck*, 76 Mich. 517, 43 N. W. 599.

44. *Green v. Jones*, 102 Ala. 303, 14 So. 630.

[a] If entered in favor of the partnership, it is irregular. *Green v. Jones*, 102 Ala. 303, 14 So. 630.

45. *Colo.*—*Thompson v. White*, 25 Colo. 226, 54 Pac. 718; *Beaton v. Wade*, 14 Colo. 4, 22 Pac. 1093. *N. J.*—*Hoffman v. Westlecraft*, 85 N. J. L. 484, 89 Atl. 1006. *W. Va.*—*Stampfle v. Bush*, 71 W. Va., 659, 77 S. E. 283.

46. *Stampfle v. Bush*, 71 W. Va. 659, 77 S. E. 283.

47. As to actions by or against a general partnership, see *supra*, II.

48. *U. S.*—*Imperial Refining Co. v. Wyman*, 38 Fed. 574, 3 L. R. A. 503, Pennsylvania statute. *Mich.*—*Sarmiento v. The Catherine C.*, 110 Mich. 120, 67 N. W. 1085. *Pa.*—*Street Ry. Pub. Co. v. Conner*, 29 Pa. Co. Ct 241; *Ladner v. Gibbon & Co.*, 5 Wkly. N. Cas. 127.

49. *Kan.*—*Spalding v. Black*, 22 Kan. 55. *Md.*—*Safe Deposit & Trust Co. v. Cahn*, 102 Md. 530, 62 Atl. 819. *Mass.*—*Lawrence v. Batcheller*, 131 Mass. 504. *N. Y.*—*Fuhrmann v. Von Pustau*, 126 App. Div. 629, 111 N. Y. Supp. 34; *Madison County Bank v. Gould*, 53 Hall 309. *Va.*—*McArthur v.*

Chase, 13 Gratt. (54 Va.) 683. *Can.* *Howland v. Bethune*, 13 U. C. Q. B. 270.

[a] Where one of the general partners is sued, he may plead in abatement the non-joinder of the other general partners. *Howland v. Bethune*, 13 U. C. Q. B. 270.

50. *Kan.*—*Spalding v. Black*, 22 Kan. 55. *La.*—*In re Dunn*, 115 La. 1084, 40 So. 466; *Burt & Co. v. Laplace*, 114 La. 489, 38 So. 429. *Mass.*—*Lawrence v. Batcheller*, 131 Mass. 504. *N. Y.*—*Richter v. Poppenhausen*, 42 N. Y. 373 (executor of deceased special partner not a proper party); *Fuhrmann v. Von Pustau*, 126 App. Div. 629, 111 N. Y. Supp. 34; *Schulten v. Lord*, 4 E. D. Smith 206; *Phillips v. Stewart*, Anth. N. P. (2d Ed.) 337. And see *Durant v. Abendroth*, 97 N. Y. 132, wherein the court queried whether a special partner is a necessary party to proceedings in bankruptcy against the firm. *Pa.*—*Street Ry. Pub. Co. v. Conner*, 29 Pa. Co. Ct. 241. *W. Va.*—*Wetherill v. McCloskey Bros. & Co.*, 28 W. Va., 195.

[a] Statutes apply only to domestic partnerships, so (1) when a special partnership formed under the laws of one state sues in another jurisdiction, all the parties in interest must be made plaintiffs. *Rosenberg v. Block*, 18 Jones & S. (N. Y.) 357. And (2) the fact that the law of the state under which it was formed provides that only the general partners are to be made

can neither be sued alone for the debts of the firm,⁵¹ nor maintain actions respecting the transactions of the limited partnership.⁵² But a special partner whose contribution to the firm capital has been withdrawn on the dissolution of the partnership may be joined in an equity suit based upon the firm debt.⁵³

2. Pleadings. — Declaration or Complaint. — As a limited or special partnership is a creature purely of the statutes,⁵⁴ the plaintiff, where he attempts to set up a limited partnership, must allege that all the steps requisite to the formation of such a partnership were taken.⁵⁵ But where a general partnership results from an attempt to form a limited partnership, by reason of failure to comply with the law governing the latter, a plaintiff may sue the members as general partners without pleading the unsuccessful attempt to create a limited partnership.⁵⁶

Plea or Answer.⁵⁷ — A defendant partner relying on the liability of a special partner must aver that he is such,⁵⁸ and set out all the facts showing compliance with the statute as to limited partnership.⁵⁹

A replication where necessary should follow the general rules elsewhere treated.⁶⁰

3. Judgment. — Since a special partner is neither a necessary nor proper party to actions with respect to the firm rights and obligations, a judgment against the firm is binding on the special partner to the

parties will not render the special partner an improper or unnecessary party in the jurisdiction where the suit is instituted. *Rosenberg v. Block*, 18 Jones & S. (N. Y.) 357.

51. *In re Dunn*, 115 La. 1084, 40 So. 466.

[a] **Even after a dissolution** while the cash contribution still forms part of the partnership assets, the liabilities due by the firm should be enforced by suits against the general partners only. *Safe Deposit & Trust Co. v. Cahn*, 102 Md. 530, 62 Atl. 819.

52. *Spalding v. Black*, 22 Kan. 55; *Brenes v. Hartman & Co.*, 8 Porto Rico 360.

53. *Safe Deposit & Trust Co. v. Cahn*, 102 Md. 530, 62 Atl. 819.

54. See generally the statutes.

55. *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; *Henkel v. Heyman*, 91 Ill. 96.

56. *Continental Nat. Bank v. Strauss*, 28 Jones & S. 151, 17 N. Y. Supp. 188 (*affirmed*, 137 N. Y. 148, 553, 32 N. E. 1066) *Sharp v. Hutchinson*, 100 N. Y. 533, 3 N. E. 500, 17 Jones & S. 50; *Loomis v. Hoyt*, 20 Jones & S. (N. Y.) 287; *Stone v. De Puga*, 4 Sandf. (N. Y.) 681; *Merchants' & Traders Bank v. Gardner*, 31 Pa. Super. 143.

57. See generally the titles "**Answers;**" "**Denials;**" "**Pleas;**" and titles dealing with particular kinds of pleas.

58. *Rawitzer v. Wyatt*, 42 Fed. 287 (answer held sufficient to withstand demurrer); *Loomis v. Hoyt*, 20 Jones & S. (N. Y.) 287; *Stone v. De Puga*, 4 Sandf. (N. Y.) 681; *Williams v. Kilpatrick*, 21 Abb. N. C. (N. Y.) 61.

[a] **Where plaintiffs plead an unsuccessful attempt** by defendants to form a limited partnership, defendants' denial must cover every material allegation showing the non-existence of a limited partnership. *Siegel Bros. v. Wood*, 3 Pa. Dist. 463.

59. *Conrow v. Gravenstine*, 1 Sad. (Pa.) 480, 5 Atl. 43; *Bergner & Engel Brew. Co. v. Cobb*, 12 Pa. Co. Ct. 460. But see *Bausman v. Rogers*, 2 W. N. C. (Pa.) 428, an affidavit of defense stating generally that the law regulating limited partnerships has been complied with, is sufficient.

60. See the title "**Replication and Reply.**"

[a] **Where defendant pleads that he is a special partner** in a limited partnership formed in the statutory manner, plaintiff should reply alleging the specific violation of the statute relied on. *Williams v. Kilpatrick*, 21 Abb. N. C. (N. Y.) 61.

extent of his interest in the firm,⁶¹ but if he is made a party and not personally served, no valid personal judgment can be rendered against him.⁶² Where both general and special partners are sued and it appears at the trial that only the former are liable, judgment may go against them alone as though they were the only defendants.⁶³

B. ACTIONS BY OR BETWEEN SPECIAL AND GENERAL PARTNERS. The statutory rule that the special partner cannot maintain an action in his own name,⁶⁴ does not apply to any individual wrongs against him, though such wrongs arise out of the partnership relation;⁶⁵ thus, a special partner may maintain an action in his own name against the general partners under the same circumstances, and for the same reasons, that one general partner can against another.⁶⁶

V. JOINT ADVENTURES.—**A. ACTIONS OR SUITS BETWEEN PARTIES TO.**⁶⁷—**1. Nature of Remedy.**—One party to a joint adventure may sue the other at law for a breach of the contract,⁶⁸ or a share of the profits,⁶⁹ or for a contribution for advances made in

61. *In re Dunn*, 115 La. 1084, 40 So. 466; *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 553.

[a] A judgment against an improperly joined special partner, may on proper showing be opened to such special partner to make his defense. *Street Ry. Pub. Co. v. Conner*, 29 Pa. Co. Ct. 241; *Hunt v. Joy*, *Hazleton & Co.*, 1 W. N. C. (Pa.) 219.

[b] The entire partnership property may be taken in satisfaction of judgment against the general partners. *Phillips v. Stewart*, Anth. N. P. 2d Ed. (N. Y.) 337.

[c] Where a special partner has become liable as a general partner a judgment against the other partners does not merge or bar his individual liability. *McArthur v. Chase*, 13 Gratt. (54 Va.) 683.

62. *Burt & Co. v. Laplace*, 114 La. 489, 38 So. 429.

63. *Safe Deposit & Trust Co. v. Cahn*, 102 Md. 530, 62 Atl. 819 (statute); *Lawrence v. Merrifield*, 10 Jones & S. (N. Y.) 36.

[a] **Costs.**—The special partner is entitled to his costs in such event. *Safe Deposit & Trust Co. v. Cahn*, 102 Md. 530, 62 Atl. 819.

64. See *supra*, IV, A, 1.

65. *Spalding v. Black*, 22 Kan. 55.

66. **Kan.**—*Spalding v. Black*, 22 Kan. 55. **La.**—*In re Dunn*, 115 La. 1084, 40 So. 466 (accounting and dissolution); *Latting v. Fassman*, *Bryant & Co.*, 29 La. Ann. 280. **N. Y.**—*Continental Nat. Bank v. Strauss*, 20 Jones & S. 151, 17 N. Y. Supp. 188, 43 N. Y. St. 68 (accounting and appointment of

receiver); *Walkenshaw v. Perzel*, 4 Rob. 426, 32 How. Pr. 233 (action for money lent to the partnership); *Hogg v. Ellis*, 8 How. Pr. 473, accounting. **Pa.**—*Smith v. Ervin*, 168 Pa. 271, 31 Atl. 1067 (account); *McGeorge v. Chemical Mfg. Co.*, 141 Pa. 575, 21 Atl. 671, action for debt.

As to actions between partners generally, see *supra*, I, A.

[a] **Insolvency of Firm.**—Where the statutes relating to limited partnerships generally provide that in case of the insolvency or bankruptcy of the partnership, a special partner cannot be allowed to claim as a creditor, until the claims of all the other creditors are satisfied, a special partner cannot under such circumstances maintain an action against the general partners for advances made to the firm over and above the amount of his contribution. *Ward v. Newell*, 42 Barb. (N. Y.) 482, 28 How. Pr. 102.

67. As to suits by or between partners generally, see *supra*, I, A.

68. **Ala.**—*Saunders v. McDonough*, 191 Ala. 119, 67 So. 591. **Colo.**—*Beckwith v. Talbot*, 2 Colo. 639. **Ga.** *Sloan v. Haley*, 18 Ga. App. 631, 90 S. E. 74. **Nev.**—*Lind v. Webber*, 36 Nev. 623, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, Ann. Cas. 1916A, 1202, 50 L. R. A. (N. S.) 1046; *Botsford v. Van Riper*, 33 Nev. 156, 110 Pac. 705. **N. Y.** *Taylor v. Bradley*, 39 N. Y. 129, 4 Abb. Dec. 363, 100 Am. Dec. 415. **Pa.** *Waring v. Cram*, 1 Pars. Eq. Cas. 516. **U. S.**—*Noyes v. Barnard*, 63 Fed. 782, 11 C. C. A. 424; *Mann v. Kelly*, 5 Fed. 584, 2 McCrary 628;

excess of his share.⁷⁰ An action of account stated,⁷¹ or assumpsit,⁷² may be maintained by one party to a joint adventure against his associates where a balance has been agreed upon between them. Equity will where necessary order an accounting between the parties.⁷³

2. Parties.—In an action by one of three joint adventurers to recover from one associate a proportionate share of losses borne by the plaintiff, the other associate need not be made a party.⁷⁴

3. Pleading.—The bill for accounting of the transactions of a joint adventure must state facts showing a cause of action in the

Hourquebie v. Girard, 2 Wash. C. C. 212, 12 Fed. Cas. No. 6,732. **Ala.**—*Saunders v. McDonough*, 191 Ala. 119, 67 So. 591. **Ill.**—*Southworth v. People*, 183 Ill. 621, 56 N. E. 407; *Gottschalk v. Smith*, 156 Ill. 377, 40 N. E. 937; *Hurley v. Walton*, 63 Ill. 260; *Barton v. Coulson*, 196 Ill. App. 212. **Nev.**—*Lind v. Webber*, 36 Nev. 623, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, Ann. Cas. 1916 A, 1202, 50 L. R. A. (N. S.) 1046; *Botsford v. Van Riper*, 33 Nev. 156, 110 Pac. 705. **N. Y.**—*Felbel v. Kahn*, 29 App. Div. 270, 51 N. Y. Supp. 435. **N. C.**—*Ledford v. Emerson*, 140 N. C. 288, 52 S. E. 641, 4 L. R. A. (N. S.) 130, 6 Ann. Cas. 107. **Pa.**—*Wright v. Cumpsty*, 41 Pa. 102; *Galbreath v. Moore*, 2 Watts 86; *Cleveland v. Farrar*, 4 Brewst. 27. **W. Va.**—*Annon v. Brown*, 65 W. Va. 34, 63 S. E. 691.

Action between partners on single transaction, see *supra*, I, A, 3 and 4.

70. Ala.—*Saunders v. McDonough*, 191 Ala. 119, 67 So. 591. **Cal.**—*Hum-burg v. Lotz*, 4 Cal. App. 438, 88 Pac. 510. **Ind.**—*Brown v. Budd*, 2 Ind. 442. **Mass.**—*Williams v. Henshaw*, 11 Pick. 79, 22 Am. Dec. 366. **Mo.**—*Seehorn v. Hall*, 130 Mo. 257, 32 S. W. 643, 51 Am. St. Rep. 562. **Nev.**—*Lind v. Webber*, 36 Nev. 623, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, Ann. Cas. 1916A, 1202, 50 L. R. A. (N. S.) 1046; *Botsford v. Van Riper*, 33 Nev. 156, 110 Pac. 705. **N. Y.**—*Kimball v. Williams*, 51 App. Div. 616, 65 N. Y. Supp. 69; *Burleigh v. Bevin*, 22 Misc. 38, 48 N. Y. Supp. 120; *Peltier v. Sewall*, 12 Wend. 386. **Pa.**—*Wright v. Cumpsty*, 41 Pa. 102; *Brady v. Colhoun*, 1 Pen. & W. 140. **R. I.**—*Fry v. Potter*, 12 R. I. 542. **Tex.**—*Garrison v. Bowman* (Tex. Civ. App.), 183 S. W. 70. **Wash.**—*Peterson v. Nichols*, 90 Wash. 398, 156 Pac. 406. **W. Va.**—*Kaufman v. Catzen*, 94 S. E. 388. **Wis.**

Jones v. Kinney, 146 Wis. 130, 131 N. W. 339, Ann. Cas. 1912 C, 200.

71. MacPherson v. Harding, 40 App. Cas. (D. C.) 404.

72. Cleveland v. Farrar, 4 Brewst. (Pa.) 27.

73. U. S.—*Bernitt v. Smith-Powers Logging Co.*, 213 Fed. 378; *Hourquebie v. Girard*, 2 Wash. C. C. 212, 12 Fed. Cas. No. 6,732, if joint adventure transaction is not closed, accounting is the proper remedy. **Ala.**—*Saunders v. McDonough*, 191 Ala. 119, 67 So. 591. **Cal.**—*Bedolla v. Williams*, 15 Cal. App. 738, 115 Pac. 747. **Ill.**—*Edwards v. Hudson*, 165 Ill. App. 521. **Kan.**—*Painter v. Hines*, 86 Kan. 832, 122 Pac. 1036. **Mich.**—*Turnbull v. Monaghan*, 94 Mich. 87, 53 N. W. 924; *Petrie v. Torrent*, 88 Mich. 43, 49 N. W. 1076; *Cochrane v. Adams*, 50 Mich. 16, 14 N. W. 681. **Nev.**—*Lind v. Webber*, 36 Nev. 623, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, Ann. Cas. 1916 A, 1202, 50 L. R. A. (N. S.) 1046; *Botsford v. Van Riper*, 33 Nev. 156, 110 Pac. 705. **N. J.**—*Vermeule v. Vermeule*, 82 N. J. Eq. 434, 89 Atl. 535; *Simmons v. Lima Oil Co.*, 71 N. J. Eq. 174, 63 Atl. 258; *Warwick v. Stockton*, 55 N. J. Eq. 61, 36 Atl. 488; *Scudder v. Budd*, 52 N. J. Eq. 320, 26 Atl. 904; *Ross v. Stevens*, 45 N. J. Eq. 231, 11 Atl. 114, 13 Atl. 225, 19 Atl. 622. **N. Y.**—*Marston v. Gould*, 69 N. Y. 220; *Lobsitz v. Lissberger Co.*, 168 App. Div. 840, 154 N. Y. Supp. 556; *Hill v. Curtis*, 154 App. Div. 662, 139 N. Y. Supp. 428; *Bowman v. Furber*, 152 App. Div. 647, 137 N. Y. Supp. 560; *Rice v. Peters*, 128 App. Div. 776, 113 N. Y. Supp. 40; *Bradley v. Wolff*, 40 Misc. 592, 83 N. Y. Supp. 13.

As to accounting between partners see *supra*, I, C.

74. Burleigh v. Bevin, 22 Misc. 38, 48 N. Y. Supp. 120.

[a] **Non-resident Associate.**—*Angell v. Lawton*, 76 N. Y. 540.

plaintiff.⁷⁵ Thus a bill to compel an accounting under a contract by which complainant is to receive a portion of the profits of the adventure must show that the joint venture had reached determination and profit had been made,⁷⁶ or that the venture had reached a point where the defendant had been reimbursed his outlay, so that a profit was being currently made,⁷⁷ or that defendant was misconducting himself with respect to the business.⁷⁸

Set-off or Counterclaim. — Any claim or demand arising out of the transaction of the joint adventure may be set off by the defendant against the demand of his associate.⁷⁹

B. ACTIONS BY OR AGAINST THIRD PERSONS.⁸⁰ — Usually all the joint adventurers must join in an action against a third person for a debt due the joint enterprise,⁸¹ but where one member of a joint adventure carries on the business in his name and is dealt with as the only party in interest, he may maintain an action, without joining his associate, for a breach of a contract arising out of the joint adventure,⁸² and an action may be maintained against him without joining his associates.⁸³

75. *Lobsitz v. Lissberger Co.*, 168 App. Div. 840, 154 N. Y. Supp. 556; *Jones v. McNally*, 53 Misc. 59, 103 N. Y. Supp. 1011; *Parker v. Turner*, 8 N. Y. St. 500, cause of action stated.

76. *Simmons v. Lima Oil Co.*, 71 N. J. Eq. 174, 63 Atl. 258.

77. *Simmons v. Lima Oil Co.*, 71 N. J. Eq. 174, 63 Atl. 258.

78. *Simmons v. Lima Oil Co.*, 71 N. J. Eq. 174, 63 Atl. 258.

79. *Parker v. Turner*, 8 N. Y. St. 500; *Botsford v. Van Riper*, 33 Nev. 156, 110 Pac. 705.

[a] An amount spent in furtherance of the transaction may be counterclaimed for by defendant in an action to recover an interest in the pro-

ceeds of the adventure. *Botsford v. Van Riper*, 33 Nev. 156, 110 Pac. 705.

[b] A claim of the defendant against firms of which plaintiff is a member cannot be set off in a suit for an accounting of a joint adventure. *Turner v. Weston*, 61 Hun 624, 16 N. Y. Supp. 772, 40 N. Y. St. 962.

80. As to partnership actions by or against third persons generally, see *supra*, II.

81. *Bernitt v. Smith-Powers Logging Co.*, 184 Fed. 139.

82. *Howe v. Savory*, 49 Barb. (N. Y.) 403; *Kreisle v. Wilson* (Tex. Civ. App.), 148 S. W. 1132.

83. *Secor v. Law*, 4 Abb. Dec. (N. Y.) 188, 3 Keyes 525.

PART PERFORMANCE. — See **Frauds, Statute of; Specific Performance.**

PARTY WALLS

By the Editorial Staff.

I. NATURE AND FORM OF ACTIONS, 111

II. PARTIES, 112

III. PLEADINGS, 112

IV. QUESTIONS FOR COURT AND JURY, 112

CROSS-REFERENCES:

Adjoining Landowners.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

Scope Note. — This article treats only of suits or actions relating to party walls.

I. NATURE AND FORM OF ACTIONS. — An action at law, such as assumpsit, is a proper remedy to recover the proportionate cost of a party wall, built under a party-wall agreement.¹ An adjoining owner may be restrained by injunction from the use of the party wall until the price is paid.² Injunction may be resorted to when one adjoining owner threatens to increase the height of a party wall or make other alterations which will cause irreparable injury to an adjoining owner;³ but equity will not compel the removal of projections from a party wall where the adjoining owner has been tardy in asserting his rights.⁴ Mandatory injunction is the proper remedy

1. Ark.—See *Rugg v. Lemly*, 78 Ark. 65, 93 S. W. 570, 115 Am. St. Rep. 17, 8 Ann. Cas. 291. **Ill.**—*Evans v. Howell*, 211 Ill. 85, 71 N. E. 854. **Ia.**—*Swift v. Calnan*, 102 Iowa 206, 71 N. W. 233, 63 Am. St. Rep. 443, 37 L. R. A. 462. **Mass.**—*Walker v. Stetson*, 162 Mass. 86, 38 N. E. 18, 44 Am. St. Rep. 350; *Richardson v. Tobey*, 121 Mass. 457, 23 Am. Rep. 283. **N. Y.** *Rindge v. Baker*, 57 N. Y. 209, 15 Am. Rep. 475. See also *Brown v. McKee*, 57 N. Y. 684.

2. Roberts v. Bye, 30 Pa. 375, 72 Am. Dec. 710.

[a] But equity will not enjoin the use of a party wall as long as it is al-

lowed to project over defendant's land. *Esecondido Bank v. Thomas* (Cal.), 41 Pac. 462; *Guttenberger v. Woods*, 51 Cal. 523.

3. Ala.—*Graves v. Smith*, 87 Ala. 450, 6 So. 308, 13 Am. St. Rep. 60, 5 L. R. A. 298. **Md.**—*Coggins v. Carey*, 106 Md. 204, 66 Atl. 673, 124 Am. St. Rep. 468, 10 L. R. A. (N. S.) 1191. **Mo.**—*Harber v. Evans*, 101 Mo. 661, 14 S. W. 750, 20 Am. St. Rep. 646, 10 L. R. A. 41. **Neb.**—*Calmelet v. Siehl*, 48 Neb. 505, 67 N. W. 467, 58 Am. St. Rep. 700.

4. Walsh v. Luburg, 10 Pa. Co. Ct. 641, proper remedy is by action for damages.

to compel a party to a party-wall agreement to construct a solid wall, as required by the contract, where the wall constructed has numerous openings and necessarily depreciates the value of the other's property.⁵ Ejectment will lie by an adjoining owner for the encroachment of a party wall on his lot.⁶ Case is the proper action to recover for negligent construction of a party wall causing damage to adjoining land.⁷

II. PARTIES to suits or actions relating to party walls are governed, in the main, by the general rules governing parties.⁸

III. PLEADINGS in suits or actions relating to party walls are governed, in the main, by the general rules.⁹

IV. QUESTIONS FOR COURT AND JURY.—The general rule obtains in actions relating to party walls that questions of fact upon which the evidence is conflicting are for the jury to determine.¹⁰

5. **III.**—*Springer v. Darlington*, 207 Ill. 238, 69 N. E. 946. **Md.**—*Coggins v. Carey*, 106 Md. 204, 66 Atl. 673, 124 Am. St. Rep. 468, 10 L. R. A. (N. S.) 1191. **N. Y.**—*Cutting v. Stokes*, 72 Hun 376, 25 N. Y. Supp. 365, 55 N. Y. St. 184.

See, however, *Reynolds v. Union Sav. Bank*, 155 Iowa 519, 136 N. W. 529, 49 L. R. A. (N. S.) 194, holding that equity will merely require that if at any time the adjoining owner desires to utilize the wall for building purposes, the other owner shall close all apertures therein at his own expense.

As to injunctions generally, see the title "**Injunctions.**"

6. *Cautley v. Morgan*, 51 W. Va. 304, 41 S. E. 201.

Action of ejectment generally, see the title "**Ejectment.**"

7. *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770.

8. See generally the title "**Parties,**" and *infra*, this note.

[a] Where the party erecting the wall is dead, his administrator may bring an action to recover one-half the expense of erection due from the adjoining owner. *Burlock v. Peck*, 2 Duer (N. Y.) 90.

[b] In an action between joint-owners of a party wall to compel the removal of an addition to the wall, mortgagees of the defendant's lot are

necessary parties to the suit. *Everett v. Edwards* (Mass.), 22 N. E. 52.

9. See generally the titles "**Answers;**" "**Bills and Answers;**" "**Declaration and Complaint,**" etc.

[a] A bill in equity to enforce contribution is defective when there is no allegation of any agreement for such contribution. *McCord v. Herrick*, 18 Ill. App. 423.

[b] In a complaint for infringement of the right to support of a party wall, allegations of negligence in making the excavations which affected plaintiff's wall are unnecessary, and do not change the nature of the action. *Cartwright v. Adair*, 27 Ind. App. 293, 61 N. E. 240.

10. See *infra*, this note, and generally the title "**Province of Judge and Jury.**"

[a] Thus (1) in an action to recover one-half the cost of a party-wall under an agreement for its erection, the question whether the wall is capable of similar use by both parties is one of fact for the jury. *Hammann v. Jordan*, 129 N. Y. 61, 29 N. E. 294. So (2) the question, whether a wall was fairly built, half and half, or unfairly built and intentionally encroaching on the defendant's premises, is one for the jury. *Reading v. Barnard*, 1 Moody & M. 71, 22 E. C. L. 475.

PASSENGERS

By the Editorial Staff.

I. ACTIONS BY CARRIERS, 116

- A. *For Fares and Relating to Nontransferable Tickets*, 116
- B. *Enforcing and Obtaining Relief From Rates Fixed by Legislative Power*, 117

II. ACTIONS AGAINST CARRIERS, 117

- A. *Matters Relating to Actions Generally*, 117
 - 1. *Form of Action*, 117
 - 2. *Process*, 118
 - 3. *Declaration or Complaint*, 118
 - a. *Alleging Corporate Capacity of Defendant*, 118
 - b. *Showing Relation of Carrier and Passenger*, 118
 - (I.) *Necessity for*, 118
 - (II.) *Manner of*, 118
 - c. *Alleging Contract*, 120
 - 4. *Plea or Answer*, 120
 - 5. *Issues, Proof and Variance*, 121
 - 6. *Questions of Law and Fact*, 121
 - 7. *Costs*, 122
- B. *Particular Actions*, 122
 - 1. *Actions Ex Contractu*, 122
 - a. *Jurisdiction and Venue*, 122
 - b. *Parties*, 122
 - c. *Declaration or Complaint*, 123
 - d. *Answer or Plea*, 123
 - e. *Issues, Proof and Variance*, 123
 - 2. *Actions Ex Delicto*, 123
 - a. *Actions Arising Out of Breach of Contract or Duty To Transport*, 123
 - (I.) *Generally*, 123
 - (A.) *For Refusal To Carry*, 123
 - (B.) *Where Passenger Presents Improper Ticket or Transfer*, 124
 - (C.) *Where Passenger Is Given Incorrect Information as to Trains*, 125
 - (II.) *Jurisdiction and Venue*, 126
 - (III.) *Parties*, 126
 - (IV.) *Declaration or Complaint*, 126
 - (A.) *Generally*, 126
 - (B.) *For Refusal of Carriage*, 126
 - (C.) *For Failure To Give Passenger Time To Board or Alight*, 127

- (D.) *For Setting Passenger Down at Wrong Destination*, 127
- (E.) *For Negligent Giving of Wrong Tickets or Information*, 128
- (F.) *For Denial of Accommodations*, 128
- (V.) *Demurrer and Answer*, 128
- (VI.) *Variance*, 128
- (VII.) *Questions of Law and Fact*, 128
- b. *Actions for Personal Injuries*, 129
 - (I.) *Form of Action*, 129
 - (II.) *Conditions Precedent*, 129
 - (III.) *Jurisdiction and Venue*, 130
 - (A.) *Generally*, 130
 - (B.) *Change of Venue*, 130
 - (IV.) *Parties*, 131
 - (V.) *Declaration or Complaint*, 132
 - (A.) *Matters Relating to Complaints Generally*, 132
 - (1.) *Generally*, 132
 - (2.) *Alleging Relation of Carrier and Passenger*, 132
 - (3.) *Alleging Duties of Carrier*, 133
 - (4.) *Alleging Negligence*, 133
 - (5.) *Allegations as to Employes*, 134
 - (a.) *Generally*, 134
 - (b.) *Alleging Acts To Be in Scope of Employment*, 135
 - (6.) *Negating Contributory Negligence*, 136
 - (7.) *Injury and Damage*, 136
 - (8.) *Joinder of Actions and Duplicity*, 136
 - (9.) *Amendment*, 137
 - (B.) *Allegations in Particular Cases*, 137
 - (1.) *Defective Condition of Premises and Insufficient Accommodations at Stations*, 137
 - (2.) *Failure To Assist Passengers To Board or Alight and From Alighting at Unsafe Places*, 137
 - (3.) *Alighting From Crowded Cars*, 139
 - (4.) *Sudden Starting, Jerking, or Lurching of Train or Car*, 139
 - (5.) *Alighting From Moving Train or Car*, 141
 - (6.) *Collision*, 142

- (7.) *Derailment*, 143
- (8.) *Jostling of Passengers*, 144
- (9.) *Failure To Properly Heat Cars*, 144
- (10.) *Jumping From Cars on Appearance of Danger*, 144
- (11.) *Assault by Employes and Servants*, 144
- (12.) *Assault and Disorderly Conduct of Fellow Passengers*, 145
- (13.) *Injuries by Elevators*, 145
- (VI.) *Answer or Plea*, 146
- (VII.) *Issues*, 146
- (VIII.) *Variance and Proof*, 147
- (IX.) *Questions of Law and Fact*, 149
 - (A.) *Generally*, 149
 - (B.) *Negligence*, 149
 - (C.) *Contributory Negligence*, 150
 - (1.) *In General*, 150
 - (2.) *In Boarding or Alighting From Moving Car*, 150
 - (3.) *In Exposing Body Beyond Side of Car*, 152
- c. *Actions for Ejection of Passengers and Trespassers*, 153
 - (I.) *Form of Action*, 153
 - (II.) *Venue*, 154
 - (III.) *Parties*, 154
 - (IV.) *Declaration or Complaint*, 154
 - (A.) *In General*, 154
 - (B.) *Particular Allegations*, 155
 - (1.) *Plaintiff's Right To Be on Train or Car*, 155
 - (a.) *In General*, 155
 - (b.) *Tendering Ticket or Fare*, 155
 - (c.) *That Train Scheduled To Stop at Plaintiff's Destination*, 156
 - (d.) *Compliance With Rules and Conditions in Ticket*, 156
 - (2.) *Allegations as to Ejection*, 156
 - (a.) *In General*, 156
 - (b.) *Negligence and Contributory Negligence*, 158
 - (3.) *Allegations of Damage*, 158
 - (4.) *Joinder of Causes of Action*, 158

- (5.) *Amendment*, 158
- (V.) *Answer or Plea*, 158
- (VI.) *Replication*, 159
- (VII.) *Issues, Proof and Variance*, 159
- (VIII.) *Questions of Law and Fact*, 160
- 3. *Actions Relating to Transportation in Sleeping Cars*, 161
- 4. *Actions for Damage, Loss or Delay of Baggage and Personal Effects*, 162
 - a. *Form and Right of Action*, 162
 - (I.) *In General*, 162
 - (II.) *As Affected by Character and Ownership of Baggage*, 162
 - b. *Venue*, 163
 - c. *Parties*, 164
 - d. *Pleadings*, 164
 - (I.) *Declaration and Complaint*, 164
 - (II.) *Answer or Plea*, 165
 - (III.) *Replication*, 166
 - e. *Variance*, 166
 - f. *Questions of Law and Fact*, 166
- 5. *Suits or Actions Relating to Excessive Fares and Refusal To Issue Transfers*, 168
 - a. *Actions for Penalties*, 168
 - b. *Injunction*, 169

CROSS-REFERENCES:

Freight Carriers;	Railroads;
Injuries to Persons and Property;	Ships and Shipping;
Negligence;	Street Railroads.

For forms, see 9 STANDARD PROC. 940, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. ACTIONS BY CARRIERS. — A. FOR FARES AND RELATING TO NONTRANSFERABLE TICKETS. — A passenger carrier may bring an action on contract to recover the amount of the transportation charges of a passenger.¹ It may sue in equity to cancel a nontransferable ticket sold by the purchaser,² or at law for breach of the contract, if it has been used.³ Likewise the carrier may enjoin a ticket broker from dealing in special nontransferable tickets.⁴

1. *Bush v. Cole*, 128 Ark. 411, 194 S. W. 24; *New York & N. E. R. Co. v. Feely*, 163 Mass. 205, 40 N. E. 20.

2. *Schubach v. McDonald*, 179 Mo. 163, 191, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136.

3. *Schubach v. McDonald*, 179 Mo. 163, 193, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136.

4. See the following: *U. S.—Bitterman v. Louisville & N. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. ed. 171, 12 Ann. Cas. 693; *Missouri, K. & T. R. Co. v. McCrary*, 182 Fed. 401; *Penn-*

B. ENFORCING AND OBTAINING RELIEF FROM RATES FIXED BY LEGISLATIVE POWER.—The manner of enforcing and of obtaining relief from passenger rates fixed by legislative power is treated in a subsequent title.⁵

II. ACTIONS AGAINST CARRIERS.—**A. MATTERS RELATING TO ACTIONS GENERALLY.**—**1. Form of Action.**—Generally a passenger has an election to sue a carrier either in tort or contract for breach of a contract of transportation, or the duties implied therefrom.⁶ If a passenger is injured by the concurring negligence of the

sylvania Co. v. Bay, 150 Fed. 770. Colo.—Kirby v. Union Pac. R. Co., 51 Colo. 509, 119 Pac. 1042, Ann. Cas. 1913B, 461. Mo.—Schubach v. McDonald, 179 Mo. 163, 192, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136. N. Y.—Long Island R. Co. v. Lanice, 136 N. Y. Supp. 138. Compare New York Cent. & H. R. R. Co. v. Reeves, 41 Misc. 490, 85 N. Y. Supp. 28. Ohio.—Kinner v. Lake Shore & M. S. Ry. Co., 69 Ohio St. 339, 69 N. E. 614. Tex.—Lytle v. Galveston, H. & S. A. R. Co., 100 Tex. 292, 99 S. W. 396, 10 L. R. A. (N. S.) 437 (Tex. Civ. App.), 100 S. W. 199.

[a] **Injunction Against Illegal Dealings in Tickets Which May Be Issued in the Future.**—Bitterman v. Louisville & N. R. Co., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. ed. 171, 12 Ann. Cas. 693. See Lytle v. Galveston, H. & S. A. R. Co., 100 Tex. 292, 99 S. W. 396, 10 L. R. A. (N. S.) 437 (Tex. Civ. App.), 100 S. W. 199.

[b] **Action Is Transitory.**—Kirby v. Union Pac. R. Co., 51 Colo. 509, 119 Pac. 1042, Ann. Cas. 1913B, 461.

[c] **How jurisdictional amount of the suit is determined,** see Bitterman v. Louisville & N. R. Co., 207 U. S. 205, 225, 28 Sup. Ct. 91, 52 L. ed. 171, 12 Ann. Cas. 693, (affirming 144 Fed. 34, 75 C. C. A. 192); Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689.

[d] **Several ticket brokers or scalpers may be joined as parties defendant.** Bitterman v. Louisville & N. R. Co., 207 U. S. 205, 28 Sup. Ct. 91, 52 L. ed. 171, 12 Ann. Cas. 693; Pennsylvania Co. v. Bay, 150 Fed. 770. But see New York Cent. & H. R. R. Co. v. Reeves, 41 Misc. 490, 85 N. Y. Supp. 28.

5. See the title "Public Service Corporations."

As to criminal prosecutions for fraudulently obtaining illegal rate, see 14 STANDARD PROC. 279.

6. See the following: Ky.—Louisville & N. R. Co. v. Storms, 15 Ky. L. Rep. 333, where passenger is not carried or payment of fare a second time is compelled. Miss.—Alabama & V. R. Co. v. Hanes, 69 Miss. 160, 13 So. 246; New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 660, 74 Am. Dec. 785, where carrier failed to stop at station. S. C. Cave v. Seaboard A. L. Ry., 94 S. C. 282, 77 S. E. 1017, Ann. Cas. 1915A, 1065, L. R. A. 1915B, 915 (where carrier failed to provide seat); Pickens v. South Carolina & G. R. Co., 54 S. C. 498, 32 S. E. 567. W. Va.—Jenkins v. Chesapeake & O. R. Co., 61 W. Va. 597, 57 S. E. 48, 49 L. R. A. (N. S.) 1166.

[a] **Failure to stop a train at plaintiff's destination as agreed.** Evansville & T. H. R. Co. v. Wilson, 20 Ind. App. 5, 50 N. E. 90; Evansville & R. R. Co. v. Kyte, 6 Ind. App. 52, 32 N. E. 1134; Owens v. Atlantic C. L. R. Co., 147 N. C. 357, 61 S. E. 198.

[b] **Postal clerks cannot (1) base their right to recovery upon the contract between the railroad company and the government (Southern R. Co. v. Harrington, 166 Ala. 630, 52 So. 57, 139 Am. St. Rep. 59), although (2) they may sue in court for breach of duty owing from a carrier to its passengers. Southern R. Co. v. Harrington, 166 Ala. 630, 52 So. 57, 139 Am. St. Rep. 59; Lindsey v. Pennsylvania R. Co., 26 App. Cas. (D. C.) 503, 3 L. R. A. (N. S.) 218; Chesapeake & O. R. Co. v. Patton, 23 App. Cas. (D. C.) 113, 121.**

As to actions *ex contractu*, see *infra*, II, B, 1.

As to actions for injuries, see *infra*, II, B, 2, b, (I).

As to actions arising out of breach of contract of transportation, see *infra*, II, B, 2, a, (I).

As to actions for wrongful ejection, see *infra*, II, B, 2, c, (I).

carrier and another, he may bring an action in tort against either or both,⁷ or an action based on the contract against his carrier.⁸

Whether an action is *ex contractu* or *ex delicto* must be determined by the pleadings,⁹ considering, under the reformed procedure, the substance of the whole statement of the cause of action, rather than the mere formal language in which it is expressed.¹⁰ The inclination of the courts is toward treating actions against carriers as sounding in tort.¹¹

2. Process.—Carriers must be served with process in accordance with the general rules relating thereto.¹²

3. Declaration or Complaint.—a. *Alleging Corporate Capacity of Defendant.*¹³—If the carrier of passengers is a corporation, the complaint should set out its corporate capacity.¹⁴

b. *Showing Relation of Carrier and Passenger.*—(I.) **Necessity for.**¹⁵ In tort actions against carriers of passengers, based upon the relationship of carrier and passenger, the complaint or declaration must show the existence of such relationship.¹⁶

(II.) **Manner of.**—Ultimate facts¹⁷ showing the existence of such

As to actions relating to baggage, see *infra*, II, B, 4.

As to actions for penalties, see *infra*, II, B, 2, a, (I).

7. See *infra*, II, B, 2.

8. *Wabash, St. L. & P. Ry. Co. v. Shacklet*, 105 Ill. 364, 379, 44 Am. Rep. 791, he cannot sue the other person or carrier *ex contractu*.

9. *Union Pac. R. Co. v. Shook*, 3 Kan. App. 710, 44 Pac. 685.

10. *Ark.*—*Fordyce v. Nix*, 58 Ark. 136, 23 S. W. 967. *Ky.*—*McMurtry v. Kentucky Cent. R. Co.*, 84 Ky. 462, 1 S. W. 815. *Miss.*—*New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 665, 74 Am. Dec. 785. *Tex.*—*Galveston, H. & S. A. R. Co. v. Roemer*, 1 Tex. Civ. App. 191, 20 S. W. 843.

See 4 STANDARD PROC. 625; 10 STANDARD PROC. 222.

[a] **Allegation that plaintiff purchased a ticket** is insufficient to show that action is upon contract. *Fremont E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254.

11. See the following: *Ind.*—*Pittsburgh, C. C. & St. L. Ry. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081. *Miss.*—*New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 665, 74 Am. Dec. 785. *Wis.*—*Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Walsh v. Chicago, M. & St. P. Ry. Co.*, 42 Wis. 23, 24 Am. Rep.

376, holding action to be on special contract.

12. See generally the title "Process."

Persons on whom service must be made, see 5 STANDARD PROC. 624.

13. Generally, see 5 STANDARD PROC. 652.

14. *Galveston, H. & S. A. R. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133.

15. **Presumptions as to relationship**, see 2 ENCY. OF EV. 904.

16. *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41.

In personal injury cases, see *infra*, II, B, 2 b, (V), (A), (2).

In ejection cases, see *infra*, II, B, 2, c, (IV), (B).

17. See the following. *Ala.*—*Birmingham Ry. & E. Co. v. Mason*, 137 Ala. 342, 34 So. 207. *Fla.*—*Barnwell v. Seaboard A. L. Ry.*, 74 So. 497. *Ill.*—*Chicago Union T. Co. v. O'Brien*, 117 Ill. App. 183. *Mo.*—*Nolan v. Metropolitan S. R. Co.*, 250 Mo. 602, 614, 157 S. W. 637. *Wash.*—*Boyle v. Great Northern Ry. Co.*, 13 Wash. 383, 43 Pac. 344.

[a] **Sufficient Averments.**—(1) That plaintiff was rightfully on defendant's premises at or near a station where he had gone for the purpose of entraining (*Louisville & N. R. Co. v. Glasgow*, 179 Ala. 251, 60 So. 103); (2) that plaintiff took passage upon a car in one of the defendant's trains and was admitted in one of de-

relationship, and showing either an express contract of carriage,¹⁸ or circumstances from which such a contract may be implied in law,¹⁹ must be alleged; an allegation that a person is a passenger is a mere conclusion of law,²⁰ as is an allegation that the plaintiff was lawfully in a certain car.²¹ The plaintiff need not allege the purchase of a ticket or payment of fare,²² or show whether he has a ticket,²³ although he may and often does do so.²⁴ The relationship of carrier and passenger may be shown without setting up definitely the termini of the journey.²⁵ A person boarding a car must allege an attempt to do so at a proper time and place,²⁶ or show that he was invited, in

fendant's said cars to be carried from the point of entry to the point of destination. *Ohio & M. Ry. Co. v. Croucher*, 132 Ind. 275, 31 N. E. 941; *Indiana Union Tract. Co. v. McKinney*, 39 Ind. App. 86, 78 N. E. 203. To same effect, see: *Ala.*—*Birmingham Ry. & Elec. Co. v. Mason*, 137 Ala. 342, 34 So. 207. *Ia.*—*Warfield v. Hepburn*, 62 Fla. 409, 57 So. 618. *Ill.*—*Walsh v. Cullen*, 235 Ill. 91, 85 N. E. 223, 18 L. R. A. (N. S.) 911; *Steiskal v. Marshall Field & Co.*, 142 Ill. App. 154, passenger on elevator. But (3) an averment that the plaintiff "was on" the defendant's street car does not show a relation of carrier and passenger. *Breese v. Trenton Horse R. Co.*, 52 N. J. L. 250, 19 Atl. 204.

[b] **Alleging undertaking to carry for hire** is sufficient. *Roberts v. Johnson*, 58 N. Y. 613.

[c] **That the plaintiff boarded the defendant's car (1) with the intention of becoming a passenger** is not equivalent to an allegation that the plaintiff did become a passenger. *Raming v. Metropolitan St. Ry. Co.*, 157 Mo. 477, 505, 57 S. W. 268. (2) But it is sufficient on appeal. *Nolan v. Metropolitan St. Ry. Co.*, 250 Mo. 602, 614, 157 S. W. 637.

[d] **If a passenger is on a car by invitation**, he must show that the person inviting him to board the car was acting within the scope of his employment. *Thompson v. Nashville, C. & St. L. Ry.*, 160 Ala. 590, 49 So. 340. See *Lammert v. Chicago & A. R. Co.*, 9 Ill. App. 388.

[e] **One riding on a pass need not allege** that he is a person entitled to a pass. *Louisville & N. R. Co. v. Dawson*, 11 Ala. App. 621, 66 So. 905.

18. *North Birmingham Ry. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18.

19. *North Birmingham Ry. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18; *Evansville & C. R. Co. v. Duncan*, 28 Ind.

441, 92 Am. Dec. 322, nature of contract need not be averred.

20. See 5 STANDARD PROC. 219.

[a] **But an allegation that one ejected is a passenger** sufficiently negatives any suggestion that he is a trespasser and is sufficient. *Ark.*—*St. Louis & S. F. R. Co. v. Coy*, 113 Ark. 265, 168 S. W. 1106. *Fla.*—*Seaboard Air Line R. Co. v. Scarborough*, 52 Fla. 425, 42 So. 706. *Ga.*—*Macon, D. & S. R. Co. v. Moore*, 125 Ga. 810, 54 S. E. 700.

21. See 5 STANDARD PROC. 219.

22. *U. S.*—*Chicago, R. I. & P. R. Co. v. Lee*, 92 Fed. 318, 34 C. C. A. 365. *Ill.*—*Cleveland, C. C. & St. L. R. Co. v. Scott*, 111 Ill. App. 234. *Mo.*—*Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799.

But see *Powell v. East Tennessee, V. & G. R. Co. (Miss.)*, 8 So. 738, where plaintiff was passenger on a freight train.

23. *Seaboard Air Line R. Co. v. Scarborough*, 52 Fla. 425, 432, 42 So. 706.

24. *Southern R. Co. v. Melton*, 158 Ala. 404, 47 So. 1008; *Pittsburgh, C. C. & St. L. R. Co. v. Haislup*, 39 Ind. App. 394, 79 N. E. 1035.

[a] **By special objection**, he may be required to state where he purchased his ticket. *Riley v. Wrightsville & T. R. Co.*, 133 Ga. 413, 65 S. E. 890, 24 L. R. A. (N. S.) 379, 18 Ann. Cas. 208 (wherein plaintiff purchased a ticket over several connecting roads), *Charleston & W. C. R. Co. v. Boyd*, 5 Ga. App. 137, 62 S. E. 714.

25. *Wabash W. Ry. v. Friedman*, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111, but if set forth, they must be truly stated.

Effect of variance where termini set up, see *infra*, II, A, 5.

26. *North Birmingham R. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18.

the legal sense, to board the car.²⁷

If plaintiff was a passenger on a freight train, he must show the authority, express or implied, of the employees in charge thereof to carry passengers,²⁸ an express contract to be carried on such train,²⁹ or that by established usage or by rules or regulations, passengers are allowed on such trains.³⁰

That the defendant is a common carrier need not be alleged if the defendant is a railroad company.³¹

c. *Alleging Contract*.—Where the action against a carrier of passengers is based on contract, the contract being the gravamen of the suit must be alleged;³² but if the action is based on tort, the contract is pleaded merely as an inducement and the breach of duty is solely counted on.³³

4. *Plea or Answer*.—The general rules relating to pleas and answers obtain in actions against carriers of passengers.³⁴

Allegations in "sudden jerk" cases, see *infra*, II, B, 2, b, (V), (B), (4).

27. *North Birmingham R. Co. v. Liddicoat*, 99 Ala. 545, 13 So. 18; *Hess v. Public Service R. Co.*, 84 N. J. L. 329, 86 Atl. 951.

[a] **Allegations showing an implied invitation to board a car** by reducing its speed and stating that plaintiff was "in the act of getting upon and alighting on said car" shows that plaintiff is a passenger. *Chicago Union T. Co. v. O'Brien*, 117 Ill. App. 183. See also *Citizens' St. R. Co. v. Jolly*, 161 Ind. 80, 88, 67 N. E. 935; *Hess v. Public Service R. Co.*, 84 N. J. L. 329, 86 Atl. 951; *Kennedy v. North Jersey St. R. Co.*, 72 N. J. L. 19, 60 Atl. 40.

28. *Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 22 Mo. App. 60.

29. *International & G. N. R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 190, where plaintiff rode by virtue of live stock contract.

30. *Smith v. Louisville, E. & St. L. R. Co.*, 124 Ind. 394, 24 N. E. 753.

31. **U. S.**—*Atlantic & P. R. Co. v. Laird*, 58 Fed. 760, 7 C. C. A. 489. **Ala.** *Birmingham Ry., L. & P. Co. v. Adams*, 146 Ala. 267, 40 So. 385, 119 Am. St. Rep. 27. See *Birmingham Ry., L. & P. Co. v. Selhorst*, 165 Ala. 475, 51 So. 568. **Conn.**—*Fuller v. Naugatuck R. Co.*, 21 Conn. 557.

Judicial notice that railway company is a common carrier, see 7 ENCY. OF EV. 941.

32. See *infra*, II, B, 1.

Variance between contract as alleged and proved, see *infra*, II, A, 5.

33. **Ga.**—*King v. Southern R. Co.*, 128 Ga. 285, 57 S. E. 507. **Ill.**—*Frink*

v. Potter, 17 Ill. 406. **Ind.**—*Pittsburgh, C. C. & St. L. Ry. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081. **Neb.**—*Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254. **S. C.**—*Pickens v. South Carolina R. & G. R. Co.*, 54 S. C., 498, 502, 32 S. E. 567; *Hammond v. North Eastern R. Co.*, 6 S. C. 130, 24 Am. Rep. 467.

34. See *infra* this note, and the titles "**Answers**," "**Denials**," "**Pleas**."

[a] **Defendant must plead affirmatively** (1) the defense that the plaintiff has forfeited his right to be carried as a passenger. *Ohio & M. Ry. Co. v. Croucher*, 132 Ind. 275, 31 N. E. 941; *Indiana Union Tract. Co. v. McKinney*, 39 Ind. App. 86, 78 N. E. 203. (2) And if he relies on rules or regulations he must in general specially plead them (*Birmingham R., L. & P. Co. v. Yielding*, 155 Ala. 359, 46 So. 747; *Birmingham R. L. & P. Co. v. McDonough*, 153 Ala. 122, 44 So. 960, 127 Am. St. Rep. 18, 13 L. R. A. [N. S.] 445; *Lane v. Choctaw, O. & G. R. R. Co.*, 19 Okla. 324, 91 Pac. 883), (3) negating their disuse or waiver (*Louisville & N. R. Co. v. Bizzell*, 131 Ala. 429, 30 So. 777), (4) and showing plaintiff's knowledge thereof. *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 233, 247, 26 So. 349; *Birmingham Ry., L. & P. Co. v. Smith*, 14 Ala. App. 264, 69 So. 910, rule as to place and time of transfer must be presented.

[b] **Exception Where Rule Is Proved Under Denial**.—*Logan v. Hannibal & St. J. R. Co.*, 77 Mo. 663.

Form of answer that defendant is

5. Issues, Proof, and Variance.³⁵—While it has been held that the allegation of the relationship of carrier and passenger is a material allegation which must be proved as alleged,³⁶ it has also been held that the general issue does not put in issue an allegation that the plaintiff is a passenger.³⁷ A recovery on the theory that plaintiff is a trespasser cannot be had under an allegation that he is a passenger.³⁸ A variation between the pleadings and proof as to the termini of the journey,³⁹ or as to the consideration of the contract,⁴⁰ has been held fatal. The plaintiff may prove the disregard of rules set up in the answer without additional pleading on his part.⁴¹

6. Questions of Law and Fact.⁴²—The construction of contracts of transportation is a matter of law for the court,⁴³ as is the question of what facts will create the relation of carrier and passenger.⁴⁴ But the existence of the relationship of carrier and passenger is a mixed question of fact and law.⁴⁵ Generally, the reasonableness of

not a common carrier, see 9 STANDARD PROC. 69.

35. As to variance, see generally the title "**Variance and Failure of Proof.**"

36. Birmingham Ry., L. & P. Co. v. McCurdy, 172 Ala. 488, 55 So. 616 (although there is no suggestion during the trial of a denial of the fact); **Birmingham Ry., L. & P. Co. v. Sawyer**, 156 Ala. 199, 47 So. 67, 19 L. R. A. (N. S.) 717.

37. Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 434, 43 So. 318.

38. Fitzgibbon v. Chicago & N. W. R. Co., 108 Iowa 614, 79 N. W. 477. [a] **Where Gross Negligence Is Charged.**—**Way v. Chicago, R. I. & P. R. Co.**, 73 Iowa 463, 35 N. W. 525.

39. Ala.—**Southern R. Co. v. Lollar**, 135 Ala. 375, 33 So. 32, holding there was no variance. **Ill.**—**Wabash W. Ry. v. Friedman**, 146 Ill. 583, 590, 30 N. E. 353, 34 N. E. 1111. **Mass.** **Harris v. Rayner**, 8 Pick. 541.

[a] **Where different names for same place** there is no variance. **Illinois Cent. R. Co. v. Sutton**, 53 Ill. 397.

40. Harris v. Rayner, 8 Pick. (Mass.) 541.

41. Missouri, K. & T. R. Co. v. Herring, 61 Tex. Civ. App. 543, 127 S. W. 1155, 130 S. W. 1039.

42. See generally the title "**Province of Judge and Jury.**"

43. Simms v. Pullman S. Car Co., 22 Fed. Cas. No. 12,869a. See generally 11 STANDARD PROC. 1057.

44. Chicago & E. I. R. R. Co. v. Jennings, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827; **O'Donnell v. Chicago & N. W. Ry. Co.**, 106 Ill. App. 287.

45. U. S.—**Chesapeake & O. R. Co. v. King**, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102. **Ala.**—**Widener v. Alabama G. S. R. Co.**, 194 Ala. 115, 69 So. 558; **Louisville & N. R. Co. v. Glascow**, 179 Ala. 251, 60 So. 103. **Ark.**—**St. Louis & S. F. R. Co. v. Coy**, 113 Ark. 265, 168 S. W. 1106. **Ill.** **Chicago U. T. Co. v. Rosenthal**, 217 Ill. 458, 75 N. E. 578; **Chicago T. T. R. Co. v. Gruss**, 200 Ill. 195, 65 N. E. 693. **Ind.**—**Citizens' St. R. Co. v. Jolly**, 161 Ind. 80, 67 N. E. 935. **Mass.** **Hogner v. Boston Elevated R. Co.**, 198 Mass. 260, 84 N. E. 464, 15 L. R. A. (N. S.) 960. **Mo.**—**Anderson v. Missouri Pac. R. Co.**, 196 Mo. 442, 93 S. W. 394, 113 Am. St. Rep. 748; **Lindsay v. St. Louis & H. R. Co.** (Mo. App.), 178 S. W. 276. **Neb.**—**Fremont, E. & M. V. R. Co. v. Root**, 49 Neb. 900, 69 N. W. 397. **N. J.**—**Atlantic City R. Co. v. Kiefer**, 75 N. J. L. 54, 66 Atl. 930. **Pa.**—**Goehring v. Beaver Val. Tract. Co.**, 222 Pa. 600, 72 Atl. 259. **S. C.**—**Martin v. Southern Ry. Co.**, 51 S. C. 150, 28 S. E. 303. **Tex.** **Missouri, K. & T. R. Co. v. Huff**, 98 Tex. 110, 81 S. W. 525; **Missouri, K. & T. R. Co. v. Brown** (Tex. Civ. App.), 156 S. W. 519. **Wash.**—**Dunn v. Puget Sound T., L. & P. Co.**, 89 Wash. 36, 153 Pac. 1059.

[a] **Commencement and Termination of Relation.**—(1) Whether plaintiff went to station a reasonable time before train time (**Northern P. R. Co. v. Marinovich**, 189 Fed. 328, 111 C. C. A. 60), and (2) whether passenger failed to leave carrier's premises within a reasonable time (**Layne v. Chesapeake & O. R. Co.**, 68 W. Va. 213,

the rules and regulations of the carrier is a question of law for the court.⁴⁶ But it is a question of fact whether the enforcement of a rule in a particular instance is reasonable.⁴⁷

7. **Costs.**⁴⁸—Special statutes exist relating to costs in actions against carriers of passengers.⁴⁹

B. PARTICULAR ACTIONS.—1. **Actions Ex Contractu.**⁵⁰—a. *Jurisdiction and Venue.*—The rules of jurisdiction and venue as to actions upon contracts generally apply to an action against a passenger founded on contract.⁵¹

b. *Parties.*⁵²—Passengers may sue in their own names for breach of contract of transportation.⁵³

69 S. E. 700, 31 L. R. A. [N. S.] 414) are questions for the jury, (3) as well as the question whether a passenger by his conduct forfeits his rights as such. **Ia.**—*Ramm v. Minneapolis & St. L. Ry. Co.*, 94 Iowa 296, 62 N. W. 751. **Neb.**—*Fremont, E. & M. V. R. Co. v. Root*, 49 Neb. 900, 69 N. W. 397. **Va.**—*Southern R. Co. v. Grubbs*, 115 Va. 876, 80 S. E. 749.

46. See the following: **Ala.**—*Birmingham R., L. & P. Co. v. McDonough*, 153 Ala. 122, 44 So. 960, 127 Am. St. Rep. 18, 13 L. R. A. (N. S.) 445; *Pullman Car Co. v. Krauss*, 145 Ala. 395, 40 So. 398; *Bowie v. Birmingham Ry. & Elec. Co.*, 125 Ala. 397, 27 So. 1016, 82 Am. St. Rep. 247, 50 L. R. A. 632. **Ark.**—*Railway Co. v. Hardy*, 55 Ark. 134, 17 S. W. 711, regulation as to extra charge for chair car. **Fla.**—*South Florida R. Co. v. Rhoads*, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733. **Mont.**—*Doherty v. Northern Pac. R. Co.*, 43 Mont. 294, 115 Pac. 401, 36 L. R. A. (N. S.) 1139. **N. J.**—*Daniel v. North Jersey St. Ry. Co.*, 64 N. J. L. 603, 46 Atl. 625. **N. Y.**—*Hibbard v. New York & E. R. Co.*, 15 N. Y. 455; *Hanley v. Brooklyn Heights R. Co.*, 110 App. Div. 429, 96 N. Y. Supp. 249; *Mannion v. International R. Co.*, 121 N. Y. Supp. 263. **Pa.**—*Pittsburgh, C. & St. L. R. Co. v. Lyon*, 123 Pa. 140, 16 Atl. 607, 10 Am. St. Rep. 517, 2 L. R. A. 489. **Tenn.**—*Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea 128, 145. **Wis.**—*Goldberg v. Ahnapee & W. R. Co.*, 105 Wis. 1, 80 N. W. 920, 76 Am. St. Rep. 899, 47 L. R. A. 221.

Contra, *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62 (the reasonableness of a rule or regulation is a mixed question of law and fact to be found by the jury under proper instruc-

tions); *Compton v. Van Volkenburgh*, 34 N. J. L. 134.

47. *Montgomery v. Buffalo Ry. Co.*, 165 N. Y. 139, 58 N. E. 770; *Pittsburgh, C. & St. L. R. Co. v. Lyon*, 123 Pa. 140, 16 Atl. 607, 10 Am. St. Rep. 517, 2 L. R. A. 489.

48. See generally the title "Costs."

49. See generally the statutes, and *St. Louis & S. F. R. Co. v. Neal*, 66 Ark. 543, 51 S. W. 1060, under statute requiring freight trains to carry passengers from and to stations.

[a] For the violation of any law regulating transportation of passengers a successful plaintiff may recover a reasonable attorney's fee to be taxed as costs in Arkansas. *St. Louis S. W. R. Co. v. Knight*, 81 Ark. 429, 99 S. W. 684; *Kansas City S. Ry. Co. v. Marx*, 72 Ark. 357, 80 S. W. 579.

50. See generally the title "Implied and Express Agreements."

51. See *Hines v. Dry Dock, E. B. & B. R. Co.*, 75 App. Div. 391, 78 N. Y. Supp. 170, and generally the titles "Jurisdiction;" "Venue."

[a] Justice's court has exclusive jurisdiction if the consideration of the ticket is within the jurisdictional limits of such court. *Hannah v. Richmond & D. R. Co.*, 87 N. C. 351. Amount in controversy or value of property as test of jurisdiction generally, see 17 STANDARD PROC. 831, et seq.

[b] **Venue.**—(1) County where contract is made (*Southern R. Co. v. Cassell*, 122 Ky. 317, 92 S. W. 281), or (2) county in which the final destination named in his ticket is located (*Sutton v. Southern Ry. Co.*, 101 Ga. 776, 29 S. E. 53) is a proper one for commencement of suit.

52. See generally the title "Parties."

53. *Weed v. Saratoga & S. R. Co.*,

c. *Declaration or Complaint*.—In actions ex contractu against carriers of passengers the plaintiff, in accordance with the general rules in such actions,⁵⁴ must set out the promise to carry the purchaser between the points named in the ticket,⁵⁵ in consideration of the sum paid,⁵⁶ a faithful performance by him, or a readiness and willingness to do so,⁵⁷ and a breach of the contract.⁵⁸ It is not necessary to set out a copy of the ticket.⁵⁹ Allegations of tortious acts of the carrier's servants may be treated as surplusage.⁶⁰

d. *Answer or Plea*.—The general rules relating to answers and pleas in contract cases obtain in actions for breach of contract of carriage.⁶¹

e. *Issues, Proof and Variance*.—If the railroad company does not plead non est factum, the plaintiff need not prove execution and issuance of the ticket by the defendant.⁶² But a very slight variance in the proof of the contract to transport from that described in the petition has been held fatal.⁶³

2. **Actions Ex Delicto**.—a. *Actions Arising Out of Breach of Contract or Duty To Transport*.—(I.) **Generally**.—(A.) **FOR REFUSAL TO CARRY**.⁶⁴—If a common carrier of passengers wrongfully refuses to carry one properly presenting himself for transportation, he may bring an action on the case;⁶⁵ or under proper circumstances, ask injunctive relief.⁶⁶ If he had a ticket, he may sue upon contract or in

19 Wend. (N. Y.) 534 (where passenger is an agent); *Jenkins v. Chesapeake & O. R. Co.*, 61 W. Va. 597, 57 S. E. 48, 49 L. R. A. (N. S.) 1166.

Right of postal clerks to sue as for breach of contract, see *supra*, II, A, 1, a.

54. See 11 STANDARD PROC. 981.

55. *Frink v. Potter*, 17 Ill. 406; *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537.

[a] **Contract Must Be Correctly Stated**.—*Cleveland, C. C. & St. L. R. Co. v. Scott*, 111 Ill. App. 234.

[b] **If the ticket is sold by another company**, there must be an allegation that the issuing company is a joint contractor or has authority to bind defendant by issuing tickets. *Matthews v. Charleston & S. Ry. Co.*, 38 S. C. 429, 17 S. E. 225, 37 Am. St. Rep. 773.

56. *Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254; *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537.

57. *Norfolk & W. R. Co. v. Wysor*, 82 Va. 250.

58. *Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A.

(N. S.) 254; *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537.

59. *Evansville & R. R. Co. v. Kyte*, 6 Ind. App. 52, 32 N. E. 1134.

60. *Chase v. Atchison, T. & S. F. R. Co.*, 70 Kan. 546, 79 Pac. 153.

61. See *Taxicab Co. v. Grant*, 3 Ala. App. 393, 57 So. 141; and generally the titles "Answers;" "Denials;" "Implied and Express Agreements;" "Pleas."

62. *International & G. N. R. Co. v. Ing*, 29 Tex. Civ. App. 398, 68 S. W. 722.

63. *Jenkins v. Chesapeake & O. R. Co.*, 61 W. Va. 597, 57 S. E. 48, 49 L. R. A. (N. S.) 1166, citing *Kline v. McLain*, 33 W. Va. 32, 10 S. E. 11, 5 L. R. A. 400; *Baltimore & O. R. Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664.

As to variance generally, see 11 STANDARD PROC. 1036, and the title "Variance and Failure of Proof."

64. **Actions for wrongful ejection**, see *infra*, II, B, 2, c.

65. *Ballard v. Cincinnati R. Co.*, 15 Ky. L. Rep. 703; *Wallen v. McHenry*, 3 Humph. (Tenn.) 245, public ferry. See generally the title "Case (The Action of Trespass On The)."

66. *Hogan v. Nashville Interurban R. Co.*, 131 Tenn. 244, 174 S. W. 1118,

tort at his election.⁶⁷ An action to recover a statutory penalty for refusal to carry should be in debt.⁶⁸

(B.) WHERE PASSENGER PRESENTS IMPROPER TICKET OR TRANSFER.

A passenger ejected because given an improper ticket or transfer may sue either for a breach of the contract,⁶⁹ or in tort.⁷⁰ If the ticket is regarded as conclusive as between conductor and passenger, and no unnecessary force is used in the ejection, the action cannot be based on wrongful ejection,⁷¹ especially where the invalidity of the ticket is apparent.⁷² If able to do so, the plaintiff should pay

Ann. Cas. 1916C, 1162, L. R. A. 1915E, 788.

67. *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052; *Purell v. Richmond & D. R. Co.*, 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113.

68. *Wallen v. McHenry*, 3 Humph. (Tenn.) 245, not for trespass and damages. See generally the titles "Debt;" "Penalties, Forfeitures and Fines."

69. *U. S.—Poulin v. Canadian Pac. R. Co.*, 47 Fed. 858. *Ala.—Montgomery Traction Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136, 9 L. R. A. (N. S.) 851; *Louisville & N. R. Co. v. Hine*, 121 Ala. 234, 25 So. 857. *Ark.—Little Rock R. & Elec. Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97. *Ga.—Head v. Georgia Pac. Ry. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434. *Ill.—Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499. *Kan.—Chase v. Atchison, T. & S. F. R. Co.*, 70 Kan. 546, 79 Pac. 153; *Union Pac. R. Co. v. Shook*, 3 Kan. App. 710, 44 Pac. 685. *Ky.—Southern R. Co. v. Hawkins*, 121 Ky. 415, 89 S. W. 258; *Lexington & E. Ry. Co. v. Lyons*, 104 Ky. 23, 46 S. W. 209, holding action to be ex contractu although the ejection is characterized as wrongful and malicious. *Mich.—Van Dusan v. Grand Trunk Ry. Co.*, 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354; *Frederick v. Marquette, H. & O. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531, followed in *Brown v. Rapid R. Co.*, 134 Mich. 591, 96 N. W. 925. But see *Hufford v. Grand Rapids & I. R. Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859, 53 Mich. 118, 18 N. W. 580, 8 Am. Neg. Cas. 430. *W. Va.—McKay v. Ohio River Ry. Co.*, 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 913, 9 L. R. A. 132, 8 Am. Neg. Cas. 662.

Actions for ejection generally, see *infra*, II, B, 2, c.

70. *U. S.—Poulin v. Canadian Pac. R. Co.*, 47 Fed. 858. *Ala.—Louisville*

& N. R. Co. *v. Hine*, 121 Ala. 234, 25 So. 857. *Ga.—Head v. Georgia Pac. Ry. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434. *Kan.—Union Pac. R. Co. v. Shook*, 3 Kan. App. 710, 44 Pac. 685.

71. *Ala.—Montgomery Traction Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136, 9 L. R. A. (N. S.) 851. *Compare Pullman Co. v. Riley*, 5 Ala. App. 561, 59 So. 761. *Ky.—Spink v. Louisville & N. R. Co.*, 21 Ky. L. Rep. 778, 52 S. W. 1067. *Md.—Western M. R. Co. v. Schaub*, 97 Md. 563, 55 Atl. 701; *Western M. R. Co. v. Stocksdales*, 83 Md. 245, 34 Atl. 880. *N. Y.—Townsend v. New York Cent. & H. R. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419. *Ohio.—Shelton v. Lake Shore & M. S. R. Co.*, 29 Ohio St. 214. *Va.—Virginia & S. W. R. Co. v. Hill*, 105 Va. 729, 739, 54 S. E. 872, 6 L. R. A. (N. S.) 899. *W. Va.—McKay v. Ohio River Ry. Co.*, 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 913, 9 L. R. A. 132, 8 Am. Neg. Cas. 662. *Wis.—Yorton v. Milwaukee, L. S. & W. Ry. Co.*, 62 Wis. 367, 21 N. W. 516, 23 N. W. 401, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23, 8 Am. Neg. Cas. 678.

As to actions for ejection, see *infra*, II, B, 2, c.

72. *Western M. R. Co. v. Stocksdales*, 83 Md. 245, 34 Atl. 880; *Murdock v. Boston & A. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307; *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481.

[a] If a passenger fails to see that he is given a proper ticket, he must sue on the contract. *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481.

[b] If the ticket is not plainly insufficient and the ticket agent assures him the ticket is good, an action in tort for wrongful expulsion lies. *Murdock v. Boston & A. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307.

the fare demanded and seek recovery as for breach of contract,⁷³ and it has been held this is his only remedy,⁷⁴ although many courts allow an action for negligence in giving a wrong ticket, especially where the ticket is apparently valid.⁷⁵ Of course, if undue force is used, an action for wrongful ejection lies.⁷⁶ If the conductor is bound to accept an explanation from the passenger, an action for damages for wrongful expulsion lies.⁷⁷

(C.) WHERE PASSENGER IS GIVEN INCORRECT INFORMATION AS TO TRAINS. As in cases where the ticket is conclusive as between conductor and

73. U. S.—*Poulin v. Canadian Pac. R. Co.*, 47 Fed. 858. **Ky.**—*Spink v. Louisville & N. R. Co.*, 21 Ky. L. Rep. 778, 52 S. W. 1067. **Md.**—*Western M. R. Co. v. Schaun*, 97 Md. 563, 55 Atl. 701; *Western M. R. Co. v. Stocksdales*, 83 Md. 245, 34 Atl. 880; *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63, 21 Atl. 97. **Vt.**—*Holden v. Rutland R. Co.*, 72 Vt. 156, 47 Atl. 403, 82 Am. St. Rep. 926. **W. Va.**—*McKay v. Ohio River Ry. Co.*, 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 913, 9 L. R. A. 132, 8 Am. Neg. Cas. 662.

74. U. S.—See *Northern Pac. R. Co. v. Pauson*, 70 Fed. 585, 17 C. C. A. 287, 30 L. R. A. 730, which so states the rule although it follows the contrary rule that the conductor is bound to accept the passenger's explanation. **Ark.**—*Little Rock R. & Elec. Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97. *Compare* *Hot Springs R. Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913, 4 Am. Neg. Rep. 1. **Mass.**—*Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481, where the invalidity is apparent. **Va.**—*Virginia & S. W. R. Co. v. Hill*, 105 Va. 729, 739, 54 S. E. 872, 6 L. R. A. (N. S.) 899.

75. Ala.—*Montgomery Traction Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136, 9 L. R. A. (N. S.) 851. **Ind.**—*Scott v. Cleveland, C., C. & St. L. Ry. Co.*, 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154. **Md.**—*Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63, 21 Atl. 97, an action will lie against the company for a breach of contract, or for negligence of the conductor. **N. Y.**—*Townsend v. New York Cent. & H. R. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419, for the wrongful act of the conductor in taking plaintiff's ticket without giving him a transfer he has a remedy against the company. **Ohio.**—*Shelton v. Lake Shore & M. S. R. Co.*,

29 Ohio St. 214. **Vt.**—*Holden v. Rutland R. Co.*, 72 Vt. 156, 47 Atl. 403, 82 Am. St. Rep. 926. **W. Va.**—*McKay v. Ohio River Ry. Co.*, 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 913, 9 L. R. A. 132, 8 Am. Neg. Cas. 662, plaintiff "must look to the breach of contract or the act of receiving money for the round trip and giving a wrong ticket." **Wis.**—*Yorton v. Milwaukee, L. S. & W. R. Co.*, 62 Wis. 367, 21 N. W. 516, 23 N. W. 401, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23, 8 Am. Neg. Cas. 678, plaintiff may leave the train and hold the company liable for the fault or mistake of the first conductor.

76. See *infra*, II, B, 2, c.

77. U. S.—*New York, Lake Erie & W. R. Co. v. Winters' Admr.*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. ed. 71; *Northern P. R. Co. v. Pauson*, 70 Fed. 585, 17 C. C. A. 287, 30 L. R. A. 730. See also *Scofield v. Pennsylvania Co.*, 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224, *distinguishing* *Poulin v. Canadian Pac. R. Co.*, 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800. **Ga.**—*Georgia R. Co. v. Olds*, 77 Ga. 673. See *City & S. R. Co. v. Brauss*, 70 Ga. 368, where plaintiff was told that he needed no transfer. **Ind.**—*Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439; *Toledo W. & W. R. Co. v. McDonough*, 53 Ind. 289. **Ia.**—*Ellsworth v. Chicago, B. & Q. R. Co.*, 95 Iowa 98, 63 N. W. 584, 29 L. R. A. 173, 8 Am. Neg. Cas. 252. **Minn.**—*Krueger v. Chicago, St. P., M. & O. Ry. Co.*, 68 Minn. 445, 71 N. W. 683, 64 Am. St. Rep. 487. **Pa.**—*Laird v. Pittsburgh Tract. Co.*, 166 Pa. 4, 31 Atl. 51, 8 Am. Neg. Cas. 617. **Tenn.**—*O'Rourke v. Street Ry. Co.*, 103 Tenn. 124, 132, 52 S. W. 872, 76 Am. St. Rep. 639, 46 L. R. A. 614. **Wash.**—*Lawshe v. Tacoma Ry. & Power Co.*, 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350.

passenger,⁷⁸ an action arising out of incorrect information should not be based on a breach of duty to transport,⁷⁹ but on the misdirection.⁸⁰

(II.) **Jurisdiction and Venue.** — The general rules governing jurisdiction and venue apply to this class of actions.⁸¹

(III.) **Parties.** — The general rules as to parties apply to this class of actions.⁸²

(IV.) **Declaration or Complaint.** — (A.) **GENERALLY.** — The declaration or complaint in actions for damages sustained by reason of the carrier's breach of contract or his common law duty to transport must state a cause of action in accord with the general rules, relating to such pleadings.⁸³

(B.) **FOR REFUSAL OF CARRIAGE.** — The complaint in a tort action for refusal to carry a passenger must show a duty⁸⁴ to carry the plaintiff

As to actions for ejection, see *infra*, II, B, 2, c.

78. See *supra*, II, B, 2, a, (I), (C).

79. *Louisville & N. R. Co. v. Maxwell*, 190 Ala. 47, 66 So. 669; *Marshall v. St. Louis, K. C. & N. Ry. Co.*, 78 Mo. 610, where passenger was carried by station.

80. *Marshall v. St. Louis, K. C. & N. Ry. Co.*, 78 Mo. 610; *Drew v. Wabash R. Co.*, 129 Mo. App. 459, 107 S. W. 478. See also *St. Louis & S. W. Ry. Co. v. White*, 99 Tex. 359, 89 S. W. 746, 122 Am. St. Rep. 631, 2 L. R. A. (N. S.) 110; *International & G. N. R. Co. v. Kilgo* (Tex. Civ. App.), 71 S. W. 556.

81. See *Gulf, C. & S. F. R. Co. v. Ward*, 58 Tex. Civ. App. 210, 124 S. W. 130 (where passenger is carried by station, the action may be brought in the county in which the injury occurred or in which the plaintiff resided "at the time of the injury"), and the titles "Jurisdiction;" "Venue."

82. See *infra*, this note, and generally the title "Parties."

[a] **A ticket agent in a union station** is the agent of the particular company for whom he purports to act in issuing a ticket, and an action for his negligence must be brought against such company. *Scott v. Cleveland, C., C. & St. L. Ry. Co.*, 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154.

[b] **Dismissal of Joint Defendant.** If the purchaser of a ticket over several lines sues all as joint contractors, and it turns out that the contract was made by a less number, the others may be dismissed. *Bonsteel v. Vanderbilt*, 21 Barb. (N. Y.) 26.

Actions by postal clerks, see *supra*, II, A, 1, a.

83. See *infra*, this note, and generally the title "Declaration and Complaint."

[a] **For complaints in particular actions held sufficient**, see the following: **Ala.**—*Southern R. Co. v. Farquhar*, 192 Ala. 415, 68 So. 289 (failure of conductor to inform passenger he is on wrong train); *Birmingham Ry., L. & P. Co. v. Scisson*, 186 Ala. 70, 65 So. 332, refusal of conductor to issue transfer. **Miss.**—*St. Clair v. Kansas City, M. & B. R. Co.*, 76 Miss. 473, 24 So. 904, 71 Am. St. Rep. 534, declaration for damages for selling ticket over route knowing of quarantine regulations. **S. C.**—*Kibler v. Southern R.*, 64 S. C. 242, 41 S. E. 977.

[b] **Alleging Duty To Accept Ticket.**—*Pittsburgh, C., C. & St. L. Ry. Co. v. Lightcap*, 7 Ind. App. 249, 34 N. E. 243.

[c] **In alleging that he was prevented from concluding a business transaction**, the plaintiff must state the name of the parties thereto. *Townsend v. Texas & N. O. R. Co.*, 40 Tex. Civ. App. 71, 88 S. W. 302. As to alleging damages generally, see 13 STANDARD PROC. 360, et seq.

84. *Birmingham Ry., L. & P. Co. v. Anderson*, 3 Ala. App. 424, 57 So. 103.

[a] **Duty to stop** must be alleged. *Battle v. Georgia Ry. & Elec. Co.*, 120 Ga. 992, 994, 48 S. E. 337, 338.

[b] **Manner in which the plaintiff flagged the train** need not be alleged. *Southern R. Co. v. Wallis*, 133 Ga. 553, 66 S. E. 370, 30 L. R. A. (N. S.) 401.

as a passenger, an offer or readiness to pay the fare,⁸⁵ and a breach of the duty to transport.⁸⁶

(C.) FOR FAILURE TO GIVE PASSENGER TIME TO BOARD OR ALIGHT.—A duty of the carrier to stop the train or car at the place in question long enough to enable the plaintiff to board or alight,⁸⁷ and a breach of that duty,⁸⁸ must be shown, where the action is based on this theory.

(D.) FOR SETTING PASSENGER DOWN AT WRONG DESTINATION.—Where a party is set down at the wrong place, the complaint must allege a rule,⁸⁹ custom,⁹⁰ or special agreement,⁹¹ requiring the train to stop at plaintiff's destination; and a breach of such duty,⁹² but the plaintiff's knowledge that the train was scheduled to stop,⁹³ or the conductor's knowledge of his ignorance of a safe route to the station,⁹⁴

85. *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62; *St. Louis S. W. R. Co. v. Thomas* (Tex. Civ. App.), 27 S. W. 419.

Similar allegations in cases of wrongful ejection, see *infra*, II, B, 2, c, (IV), (B), (1), (b).

[a] The price of the ticket, the price of a substituted conveyance or special damages as in an action ex contractu need not be alleged. *Purcell v. Richmond & D. R. Co.*, 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113.

86. *Ga.*—*Brown v. Georgia, C. & N. R. Co.*, 119 Ga. 88, 46 S. E. 71. *Ky.* *Dierig v. South Covington & C. S. R. Co.*, 24 Ky. L. Rep. 1825, 72 S. W. 355. *Tex.*—*San Antonio & A. P. R. Co. v. Safford* (Tex. Civ. App.), 48 S. W. 1105.

87. *Louisville & N. R. R. Co. v. Cornelius*, 183 Ala. 203, 62 So. 710; *Birmingham Ry., L. & P. Co. v. McLeod*, 9 Ala. App. 637, 64 So. 193; *Birmingham Ry., L. & P. Co. v. Elmit*, 6 Ala. App. 653, 60 So. 981, he must show it to be a regular or customary stopping place, or that the defendant agreed to give him an opportunity to get off there.

[a] An allegation that the place was plaintiff's destination is insufficient. *Birmingham Ry., L. & P. Co. v. Elmit*, 6 Ala. App. 653, 60 So. 981.

88. *Southern R. Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68, petition sufficient.

89. *Cook v. Southern R. Co.*, 153 Ala. 118, 45 So. 156; *Ohio & M. Ry. Co. v. Swarthout*, 67 Ind. 567, 33 Am. Rep. 104; *Ohio & M. Ry. Co. v. Hatton*, 60 Ind. 12; *Evansville & T. H. R. Co. v. Wilson*, 20 Ind. App. 5, 50 N. E. 90.

90. *Cook v. Southern R. Co.*, 153

Ala. 118, 45 So. 156; *Matthews v. Charleston & S. Ry. Co.*, 38 S. C. 429, 17 S. E. 225, 37 Am. St. Rep. 773.

91. *Ala.*—*Birmingham, E. & B. R. Co. v. Wilson*, 14 Ala. App. 235, 69 So. 312 (holding complaint sufficient where plaintiff asked the conductor to stop car "at or near" a certain street); *Birmingham Ry., L. & P. Co. v. Elmit*, 6 Ala. App. 657, 60 So. 982, complaint sufficient. *Ind.*—*Ohio & M. Ry. Co. v. Hatton*, 60 Ind. 12; *Evansville & T. H. R. Co. v. Wilson*, 20 Ind. App. 5, 50 N. E. 90. *Miss.*—See *Wells v. Alabama G. S. R. Co.*, 67 Miss. 24, 6 So. 737, in order to prove declarations of the ticket agent that plaintiff may board train without a ticket as tending to show a special contract, such declarations must be alleged.

[a] It is sufficient in this respect to allege payment on the car to plaintiff's destination. *Birmingham Ry., L. & P. Co. v. Arnold*, 7 Ala. App. 521, 60 So. 988.

92. *North Alabama T. Co. v. Daniel*, 158 Ala. 414, 48 So. 50; *Birmingham Ry., L. & P. Co. v. McDaniel*, 6 Ala. App. 322, 59 So. 334. See *Southern R. Co. v. Melton*, 158 Ala. 404, 47 So. 1008.

[a] That the servant's act is wrongful must be shown. *Birmingham Ry., L. & P. Co. v. McDaniel*, 6 Ala. App. 322, 59 So. 334.

93. *Louisville & N. R. R. Co. v. Cayce*, 17 Ky. L. Rep. 1389, 34 S. W. 896.

94. *Alabama City G. & A. R. Co. v. Cox*, 173 Ala. 629, 55 So. 909.

[a] That the conductor was cognizant of the plaintiff's ignorance of a safe route to the station, that the servants had reason to believe he would encounter danger, or that there

need not be alleged.

(E.) FOR NEGLIGENT GIVING OF WRONG TICKETS OR INFORMATION.⁹⁵ — Where the gravamen of the action is the giving of an improper ticket or transfer,⁹⁶ or the giving of incorrect information,⁹⁷ negligence must be alleged, as must facts relied on entitling the plaintiff to go behind the contract shown by the ticket.⁹⁸

(F.) FOR DENIAL OF ACCOMMODATIONS⁹⁹ to which a passenger is entitled by the rules and regulations of the carrier, it is sufficient to state the rule or regulation,¹ its reasonableness,² that the plaintiff comes within it,³ and a breach thereof.⁴

(V.) **Demurrer and Answer.** — The carrier must demur or answer to the complaint or declaration in accordance with the general rules.⁵

(VI.) **Variance.** — The general rules as to variance are applicable in this class of actions.⁶

(VII.) **Questions of Law and Fact.** — The general rules as to the province of judge and jury apply in this class of actions.⁷

was no open or safe way he could have walked back on need not be alleged. *Alabama City G. & A. R. Co. v. Cox*, 173 Ala. 629, 55 So. 909.

95. Where gravamen of action is tortious expulsion from train, see *infra*, II, B, 2, c.

96. See *infra*, this note.

[a] An allegation of ejection because of negligence in incorrectly punching a transfer is sufficient. *Birmingham R., L. & P. Co. v. Turner*, 154 Ala. 542, 45 So. 671.

97. See *infra*, this note.

[a] That the informant represents the railroad company must be alleged when alleging negligence in giving incorrect information as to trains. *Riley v. Wrightsville & T. R. Co.*, 133 Ga. 413, 65 S. E. 890, 24 L. R. A. (N. S.) 379, 18 Ann. Cas. 208.

98. *Mexican Cent. Ry. Co. v. Goodman* (Tex. Civ. App.), 43 S. W. 580, where the agent told a husband he could sign his name to his wife's ticket.

99. Actions for failure to reserve sleeping car accommodations, see *infra*, II, B, 3.

1. *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62.

2. *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62, facts relied upon to show reasonableness need not be stated.

3. *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62.

[a] Where a white person is compelled to ride with negroes, the petition must allege that the plaintiff is a white person. *Wolfe v. Georgia R.*

& Elec. Co., 124 Ga. 693, 53 S. E. 239.

4. See *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62.

5. See *infra*, this note, and the titles "Answers;" "Demurrer."

[a] Defense that the demand for facilities was so sudden the carrier could not provide seats must be pleaded. *Cave v. Seaboard A. L. Ry.*, 94 S. C. 282, 77 S. E. 1017, Ann. Cas. 1915A, 1065, L. R. A. 1915B, 915.

6. See *infra*, this note, and generally the title "Variance and Failure of Proof."

[a] Allegation (1) that the conductor wilfully failed to stop his train is not supported by proof of a mere neglect to do so. *Louisville & N. R. Co. v. Johnston*, 79 Ala. 436. (2) But in an allegation of negligent and wilful breach of contract of transportation, the allegation as to wilfulness may be treated as surplusage and the plaintiff will recover on proof of simple negligence. *Alabama & V. R. Co. v. Hanes*, 69 Miss. 160, 13 So. 246.

[b] Where a passenger was carried by his destination, an allegation that he was carried to a particular place does not require proof that he was carried to that place as this allegation is not descriptive of the negligence. *Henderson v. Metropolitan St. R. Co.*, 123 Mo. App. 666, 100 S. W. 1111.

7. See *infra*, this note and generally the title "Province of Judge and Jury."

[a] Thus, it is a question for the

b. *Actions for Personal Injuries.*⁸ — (I.) *Form of Action.* — A passenger sustaining personal injuries at the hands of a carrier or its servants may sue for breach of the contract for safe carriage, where there is one, or in tort for breach of duty.⁹

(II.) *Conditions Precedent.*¹⁰ — The giving of notice of injury is not a condition precedent to an action against the carrier for personal injuries,¹¹ unless it is required by express statute,¹² or by the con-

jury (1) whether misinformation given to a passenger is inadvertently, recklessly or wantonly, given (*Wilcox v. Southern Ry.*, 91 S. C. 71, 74 S. E. 122); (2) whether failure to stop a train at a station is wilful or capricious (*Burns v. Alabama & V. R. Co.*, 93 Miss. 816, 47 So. 640); (3) whether signals are sufficient to attract the attention of the engineer (*Louisville & N. R. Co. v. Moore* [Ky.], 121 S. W. 666); (4) whether passenger is compelled to walk on refusal of carrier to stop car for him (*Northern T. T. Co. v. Hooper* [Tex. Civ. App.], 80 S. W. 113); (5) whether passenger is guilty of negligence in walking when carried beyond destination (*St. Louis S. W. R. Co. v. Knight*, 81 Ark. 429, 99 S. W. 684; *Chesapeake & O. R. Co. v. Lynch*, 28 Ky. L. Rep. 467, 89 S. W. 517), and (6) whether party has reasonable time and opportunity to board or alight. *Lamson v. Great Northern R. Co.*, 114 Minn. 182, 130 N. W. 945, Ann. Cas. 1914A, 15. (7) Question of negligent delay is for the jury (*Green v. Missouri, K. & T. R. Co.*, 121 Mo. App. 720, 97 S. W. 646), (8) as is question of reasonableness of refusal of carrier's agent to sell a ticket to party apparently unable to travel alone after an explanation by him of his competency. *Illinois Cent. R. Co. v. Smith*, 85 Miss. 349, 37 So. 643, 107 Am. St. Rep. 293, 70 L. R. A. 642.

8. *Physical examination of injured passenger*, see 9 ENCY. OF EV. 783; and also the title "*Physical Examination.*"

9. See the following: **U. S.**—*Atlantic & P. R. Co. v. Laird*, 58 Fed. 760, 7 C. C. A. 489. **Ala.**—*Central of Georgia R. Co. v. Carleton*, 163 Ala. 62, 51 So. 27; *Malcolm v. Louisville & N. R. Co.*, 155 Ala. 337, 46 So. 768, 130 Am. St. Rep. 52, 18 L. R. A. (N. S.) 489. **Cal.**—*Sheldon v. The Uncle Sam*, 18 Cal. 526, 79 Am. Dec. 193. **Ga.**—*Patterson v. Augusta & S. R. Co.*, 94 Ga. 119, 21 S. E. 233, 111

Frink v. Potter, 17 Ill. 406. **Ind.**—*Pittsburgh, C., C. & St. L. R. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Rooker v. Bruce*, 45 Ind. App. 57, 90 N. E. 86. **Ky.**—*McMurtry v. Kentucky Cent. R. Co.*, 84 Ky. 462, 1 S. W. 815. **Md.**—*Baltimore C. P. R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134. **Mass.**—*McElroy v. Nashua & L. R. Corp.*, 4 Cush. 400, 50 Am. Dec. 794. **N. Y.**—*Gillespie v. Brooklyn H. R. Co.*, 178 N. Y. 347, 70 N. E. 857, 102 Am. St. Rep. 503, 66 L. R. A. 618; *Weed v. Saratoga & S. R. Co.*, 19 Wend. 534. **N. C.**—*Purcell v. Richmond & D. R. Co.*, 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113. **Ohio.**—*Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537. **Okl.**—*Martin v. Chicago, R. I. & P. R. Co.*, 46 Okla. 169, 148 Pac. 711. **Pa.**—*McCall v. Forsyth*, 4 Watts & S. 179. **Tex.**—*Sawyer v. El Paso & N. E. R. Co.*, 49 Tex. Civ. App. 106, 108 S. W. 718. **Wis.**—*Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41.

[a] *Passenger assaulted* may bring an action *ex contractu* or *ex delicto*. **Ky.**—*Winnegar's Admr. v. Central Pass. Ry. Co.*, 85 Ky. 547, 4 S. W. 237. **Me.**—*Goddard v. Grand Trunk Ry.*, 57 Me. 202, 218, 2 Am. Rep. 39. **Mass.**—*Bryant v. Rich.*, 106 Mass. 180, 8 Am. Rep. 311. **N. Y.**—*Busch v. Interborough Rapid Transit Co.*, 187 N. Y. 388, 80 N. E. 197, 10 Am. & Eng. Ann. Cas. 460; *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185. **Tenn.**—*Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549.

10. See generally the title "*Suits and Actions.*"

11. *Birmingham Ry. & Elec. Co. v. Wildman*, 119 Ala. 547, 24 So. 548.

12. **Conn.**—*Thorson v. Groton & S. St. R. Co.*, 85 Conn. 11, 81 Atl. 1024. **Mass.**—*Joslyn v. Milford H. & F. St. R. Co.*, 184 Mass. 65, 67 N. E. 866, statute does not apply where accident is not on a highway. **S. D.**—*Smith*

tract for transportation.¹³

(III.) Jurisdiction and Venue. — (A.) GENERALLY. — Such an action is transitory in character.¹⁴ In the absence of a statute localizing the action, it may be brought in any county in which process can be served.¹⁵ Statutes generally provide in what county the action shall be brought.¹⁶

(B.) CHANGE OF VENUE. — The venue of the action may be changed

v. Chicago, M. & St. P. R. Co., 26 S. D. 555, 128 N. W. 815. **Tex.**—*Sawyer v. El Paso & N. E. R. Co.*, 49 Tex. Civ. App. 106, 108 S. W. 718.

[a] Where the injury occurs in one state and the action is brought in another, which requires notice of injury, notice must be given if the action is in tort. But it is otherwise if the action is on contract and the *lex loci contractus* does not require notice of injury. *Sawyer v. El Paso & N. E. R. Co.*, 49 Tex. Civ. App. 106, 108 S. W. 718.

13. *Barber v. Chicago, R. I. & P. R. Co.*, 86 Kan. 277, 120 Pac. 359. See also *Pittsburgh, C. & St. L. R. Co. v. Brown*, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625.

[a] Application to Injuries in Boarding Train.—*Barber v. Chicago, R. I. & P. R. Co.*, 86 Kan. 277, 120 Pac. 359.

14. *Chesapeake & O. R. Co. v. Cowherd*, 15 Ky. L. Rep. 160.

[a] It may be brought in a state (1) other than that in which the injury is inflicted (**U. S.**—*Denver & R. G. R. Co. v. Roller*, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77. **Ga.**—*Mason v. Nashville, C. & St. L. R. Co.*, 135 Ga. 741, 70 S. E. 225, 33 L. R. A. (N. S.) 280. **Ky.**—*Chesapeake & O. R. Co. v. Cowherd*, 15 Ky. L. Rep. 160. **Miss.**—*New Orleans, J. & G. N. R. Co. v. Wallace*, 50 Miss. 244. **S. C.**—*Crosby v. Seaboard A. L. R. Co.*, 81 S. C. 24, 61 S. E. 1064. **Tenn.**—*Railroad Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202; *Mississippi & T. R. Co. v. Ayres*, 16 Lea 725. **Tex.**—*Mexican Cent. Ry. Co. v. Goodman*, 20 Tex. Civ. App. 109, 48 S. W. 778 (where plaintiff was injured in Mexico); *Mexican Cent. Ry. Co. v. Mitton*, 13 Tex. Civ. App. 653, 36 S. W. 282. **Wis.**—*Curtis v. Bradford*, 33 Wis. 190, or (2) in which the contract of carriage is made. *Indiana, I. & I. R. Co. v. Masterson*, 16 Ind. App. 323, 44 N. E. 1004.

15. *Chesapeake & O. R. Co. v. Cowherd*, 15 Ky. L. Rep. 160.

16. See generally the statutes, and *infra*, this note.

[a] It is generally required (1) that such actions shall be brought in the county in which the defendant resides (*Virginia & S. W. Ry. Co. v. Hollingsworth*, 107 Va. 359, 58 S. E. 572), or (2) in which the plaintiff is injured (*Virginia & S. W. Ry. Co. v. Hollingsworth*, 107 Va. 359, 58 S. E. 572), or (3) in which he resides, if he resides in a county into which the carrier passes (*Louisville & N. R. Co. v. Mitchell*, 162 Ky. 253, 172 S. W. 527; *N. N. & M. V. Co. v. Boles*, 13 Ky. L. Rep. 208 [ownership of tracks immaterial]), or (4) in any county into or through which the railroad passes. *Baltimore & O. R. Co. v. Reed*, 223 Fed. 689, 139 C. C. A. 192.

[b] Statute applies to actions brought in the forum for injuries received in another state from a non-resident carrier. *Chesapeake & O. R. Co. v. Cowherd*, 15 Ky. L. Rep. 160.

[c] Where the plaintiff is transported by two or more railroads, see *Blanks v. Missouri, K. & T. R. Co.* (Tex. Civ. App.), 116 S. W. 377, construing the Texas statute.

[d] Continuing Act.—*Parris v. Atlanta, K. & N. R. Co.*, 128 Ga. 434, 57 S. E. 692; *Atlantic Coast L. R. Co. v. Powell*, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769, 9 Ann. Cas. 553. See also *Southern R. Co. v. Harrington*, 166 Ala. 630, 52 So. 57, 139 Am. St. Rep. 59.

[e] The county in which the personal representative resides is a proper county although his intestate was killed in another county. *Illinois Cent. R. Co. v. Stith's Admx.*, 120 Ky. 237, 85 S. W. 1173, 1 L. R. A. (N. S.) 1014. See *Louisville & N. R. Co. v. Cooley's Admr.*, 20 Ky. L. Rep. 1372, 49 S. W. 339, holding the county of the residence of the intestate where the representative qualified, to be the

in accordance with the general rules relating to changing venue.¹⁷

(IV.) Parties. — The general rules relating to parties apply in this class of actions.¹⁸ The carrier and its negligent servant may be joined;¹⁹ and if a person not a servant of the carrier is also a joint trespasser with the servant of the company, he may be joined.²⁰ If an injury results from the concurrent negligence of two or more carriers, the plaintiff may sue either separately or both in one action.²¹ And as the lessor of a railroad is liable for the torts of the lessee, the plaintiff may sue each separately or both in one action.²² If the railroad company is in the hands of a receiver, the action must be brought against him in accordance with the general rules regulating receiverships.²³

proper county. The residence of the personal representative is not disclosed by the case.

[f] In an action against the carrier and another as joint trespassers, the action may be brought in the county of the residence of the latter under a statute so providing in the case of joint trespassers generally. Central of Georgia R. Co. v. Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250.

[g] Where Case Is Not Within Statute.—Chesapeake & O. R. Co. v. Cowherd, 15 Ky. L. Rep. 160.

17. See *infra*, this note, and generally the title "Change of Venue."

[a] Convenience of Witnesses. Neeley v. Erie R. Co., 134 App. Div. 781, 119 N. Y. Supp. 953.

18. See Citizens' St. R. Co. v. Shepherd, 30 Ind. App. 193, 65 N. E. 765 (as to right to join company to which franchise of railroad company is transferred); also the titles "Corporations;" "Parties."

[a] A shipper of live stock who agrees to hold a carrier harmless for any damages sustained by the person accompanying the stock, is not a necessary party to an action by the caretaker against the carrier. Missouri, K. & T. R. Co. v. Lynn (Okla.), 161 Pac. 1058.

19. U. S.—Bryce v. Southern R. Co., 125 Fed. 958. Ga.—Central of Georgia R. Co. v. Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250. Ill.—Wabash, St. L. & P. Ry. Co. v. Shacklet, 105 Ill. 364, 379, 44 Am. Rep. 791. Mont.—Emerson v. Butte Elec. R. Co., 46 Mont. 454, 129 Pac. 319; Knuckey v. Butte Elec. R. Co., 41 Mont. 214, 109 Pac. 979. N. J.—Whalen v. Pennsylvania R. Co., 73 N. J. L. 192,

63 Atl. 993. Tex.—Texas & P. Ry. Co. v. Miller, 79 Tex. 78, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395.

See also the title "Master and Servant."

20. Central of Georgia R. Co. v. Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250.

21. U. S.—Atlantic & P. R. Co. v. Laird, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. ed. 485. Cal.—Rankin v. Central Pac. R. Co., 73 Cal. 93, 15 Pac. 57; Tompkins v. Clay St. H. R. Co., 66 Cal. 163, 4 Pac. 1165. D. C.—Washington & G. R. Co. v. Hickey, 5 App. Cas. 436, 470. Ill.—Wabash, St. L. & P. Ry. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791. Ind.—Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309. Mich.—Cuddy v. Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178. Minn.—Flaherty v. Minneapolis & St. L. R. Co., 39 Minn. 328, 40 N. W. 160, 12 Am. St. Rep. 654, 1 L. R. A. 680. Mo.—McFadden v. Metropolitan St. R. Co., 161 Mo. App. 652, 143 S. W. 884. N. Y.—Colegrove v. New York & N. H. R. Co., 20 N. Y. 492, 75 Am. Dec. 418. Pa.—Bunting v. Hogsett, 139 Pa. 363, 21 Atl. 31, 33, 34, 23 Am. St. Rep. 192, 12 L. R. A. 268.

[a] The Pullman company and the railway company may be joined in action for allowing fellow passenger to use indecent language in a Pullman car. Houston, E. & W. T. Ry. Co. v. Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124.

22. Carleton v. Yadkin R. Co., 143 N. C. 43, 55 S. E. 429, 10 Ann. Cas. 348.

23. See *infra*, this note, and generally the title "Receivers."

(V.) **Declaration or Complaint.**—(A.) **MATTERS RELATING TO COMPLAINTS GENERALLY.**—(1.) *Generally.*²⁴—It is generally sufficient in an action against a carrier for injuries to a passenger to aver the relation of carrier and passenger, a breach of the duty owing from the former to the latter, and an injury in consequence thereof.²⁵

(2.) *Alleging Relation of Carrier and Passenger.*—Plaintiff must allege

[a] Where a passenger is killed after foreclosure sale while the road is still being operated by a receiver, and the decree provides that the purchasers shall pay all obligations of the receiver, and the receiver shall be discharged except that he may defend any suits pending, or that may be brought, an action for damages for such death is properly brought against both the receiver and the purchaser. *Denver & R. G. R. Co. v. Gunning*, 33 Colo. 280, 80 Pac. 727.

24. **Presumptions of negligence from fact of accident**, see 2 *ENCY. OF EV.* 908.

25. *Birmingham Ry., L. & P. Co. v. Yates*, 169 Ala. 381, 53 So. 915; *Birmingham Ry., L. & P. Co. v. Barrett*, 4 Ala. App. 347, 58 So. 760; *Florida E. C. Ry. v. Hayes*, 66 Fla. 589, 64 So. 274. See generally the titles "*Injuries to Persons and Property*," "*Negligence*."

[a] The kind of train on which he was a passenger should be averred. *St. Louis, I. M. & S. R. Co. v. Wright*, 105 Ark. 269, 150 S. W. 706.

[b] Where a passenger on a freight train claims the right to alight at intermediate stations for certain purposes he must, as against special demurrer, set out the provisions of the contract entitling him to do so. *International & G. N. R. Co. v. Downing*, 16 Tex. Civ. App. 643, 41 S. W. 190, a general demurrer will not reach the omission.

Forms of complaint, see 9 *STANDARD PROC.* 940.

[c] **Complaints in Particular Cases Held Sufficient.**—*U. S.*—*Chicago, R. I. & P. Co. v. Stephens*, 218 Fed. 535, 134 C. C. A. 263, injuries sustained by discontinuance of trains. *Ala.* *Alabama G. S. R. Co. v. Robinson*, 183 Ala. 265, 62 So. 813 (imprisonment in toilet because of defects in the lock); *Birmingham Ry., L. & P. Co. v. Jordan*, 170 Ala. 530, 54 So. 280 (injury by explosion on car); *Central of Georgia R. Co. v. Carleton*, 163 Ala. 62,

51 So. 27 (passenger thrown from train when going from one coach to another); *Louisville & N. R. Co. v. Weathers*, 163 Ala. 48, 50 So. 268 (injury from smoke to blind passenger put in smoking car); *Alabama G. S. R. Co. v. Collier*, 112 Ala. 681, 14 So. 327 (injuries from breaking of bottle of fire extinguisher); *Birmingham Ry., L. & P. Co. v. Hunnicutt*, 3 Ala. App. 448, 57 So. 262, injuries by being thrown from crowded street car run at high rate of speed. *Ga.*—*Georgia R. & B. Co. v. Adams*, 127 Ga. 408, 56 S. E. 409 (injury to passenger on station platform by passing train); *Primus v. Macon R. & L. Co.*, 126 Ga. 667, 55 S. E. 924, wanton pushing child from moving car. *Ind.*—*Curtis v. Mauger*, 114 N. E. 408 (passenger killed by being struck by coach while walking down track to board a train); *Pittsburgh, C., C. & St. L. R. Co. v. Schepman*, 171 Ind. 71, 84 N. E. 988; *Citizens' St. R. Co. v. Shepherd* (Ind. App.), 59 N. E. 349, where conductor stood on passenger's skirt while car moved away. *Mich.*—*Hopkins v. Michigan Traction Co.*, 144 Mich. 359, 107 N. W. 909, where plaintiff touched live wire hanging from car thinking it a rope. *N. J.*—*Miller v. West Jersey & S. R. Co.* (N. J. L.), 71 Atl. 1113, action for injuries received on platform of a station by use of trucks by agents of another company. *Tex.* *Foreman v. Missouri Pac. R. Co.*, 4 Tex. Civ. App. 54, 23 S. W. 422, boarding train in motion where conductor told passenger the train would stop five minutes but it did not do so. *Wash.*—*Elliott v. Seattle, R. & S. R. Co.*, 68 Wash. 129, 122 Pac. 614, 39 L. R. A. (N. S.) 608, where passenger alighting on wrong side of street car is injured by street car on adjoining track.

[d] **Banana Peel on Floor of Car.** *Pittsburgh, C., C. & St. L. Ry. Co. v. Rose*, 40 Ind. App. 240, 79 N. E. 1094; *Dallas C. E. S. R. Co. v. Black*, 40 Tex. Civ. App. 415, 89 S. W. 1087.

[e] **Defects in Car Step.**—*Wilbur*

the existence between him and the defendant of the relation of carrier and passenger.²⁶

(3.) *Alleging Duties of Carrier.*—The relationship of carrier and passenger being alleged,²⁷ it is not necessary to specifically allege the duties of the carrier as the law fixes them.²⁸

(4.) *Alleging Negligence.*—A passenger who has alleged the relationship of carrier and passenger may allege the negligence of the carrier generally,²⁹ or he may, if he desires to do so, set up the par-

v. Rhode Island Co., 27 R. I. 205, 61 Atl. 601.

26. *Ala.*—*Knight v. Tombigbee V. R. Co.*, 190 Ala. 140, 67 So. 238; *Louisville & N. R. Co. v. Glasgow*, 179 Ala. 251, 60 So. 103; *Broyles v. Central of Georgia R. Co.*, 166 Ala. 616, 52 So. 81, 139 Am. St. Rep. 50. *Ill.*—*Wabash W. Ry. v. Friedman*, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111; *Barger v. North Chicago St. R. Co.*, 54 Ill. App. 284. *Ind.*—*Smith v. Louisville, E. & St. L. R. Co.*, 124 Ind. 394, 24 N. E. 753. *La.*—*Mills v. St. Tammany & N. O. R. & F. Co.*, 139 La. 285, 71 So. 511. *Miss.*—*Powell v. East Tennessee, V. & G. R. Co.*, 8 So. 738. *Mo.*—*Scott v. Metropolitan S. R. Co.*, 138 Mo. App. 196, 120 S. W. 131; *Whitehead v. St. Louis, I. M. & S. R. Co.*, 22 Mo. App. 60. *Neb.*—*Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773, 789, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254. *N. C.*—*Conley v. Richmond & D. R. Co.*, 109 N. C. 692, 14 S. E. 303. *S. C.*—*Crech v. Charleston & W. C. R. Co.*, 66 S. C. 528, 45 S. E. 86. *Tex.*—*Gulf, C. & S. F. R. Co. v. Gorman*, 6 Tex. Civ. App. 230, 25 S. W. 992. *Va.*—*Washington-Va. R. Co. v. Bouknight*, 113 Va. 696, 75 S. E. 1032, Ann. Cas. 1913E, 546; *Richmond City Ry. Co. v. Scott*, 86 Va. 902, 11 S. E. 404. *Wis.*—*Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41.

Manner of averring relationship of carrier and passenger, see *supra*, II, A, 2, b, (II).

27. See *supra*, II, B, 2, b, (V), (A), (2).

28. *U. S.*—*Atlantic & P. R. Co. v. Laird*, 58 Fed. 760, 7 C. C. A. 489. *Ala.*—*Birmingham R., L. & P. Co. v. Garrett*, 73 So. 818; *Atkinson v. Dean*, 73 So. 479; *Birmingham Ry., L. & P. Co. v. Adams*, 146 Ala. 267, 40 So. 385, 119 Am. St. Rep. 27; *Birmingham Ry., L. & P. Co. v. Anderson*, 3 Ala. App. 424, 57 So. 103. *Ill.*—*Ruch*

v. Aurora, E. & C. R. Co., 150 Ill. App. 329. *Ind.*—*Evansville & C. R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322; *Winona & W. R. Co. v. Rousseau*, 48 Ind. App. 248, 93 N. E. 34, 1028. *N. J.*—*Breese v. Trenton Horse R. Co.*, 52 N. J. L. 250, 19 Atl. 204.

[a] An allegation setting up a higher degree of care than the law exacts will be treated as surplusage. *Ruch v. Aurora, E. & C. R. Co.*, 150 Ill. App. 329; *Brogan v. Union T. Co.*, 76 W. Va. 698, 86 S. E. 753.

29. *Ala.*—*Seaboard A. L. R. Co. v. Mobley*, 194 Ala. 211, 69 So. 614; *Birmingham Ry., L. & P. Co. v. O'Brien*, 185 Ala. 617, 64 So. 343; *Birmingham Ry., L. & P. Co. v. Harris*, 165 Ala. 482, 51 So. 607. *Ill.*—*Lavis v. Wisconsin Cent. R. Co.*, 54 Ill. App. 636, where plaintiff was thrown off train by a lurch. *Ind.*—*Indiana Union Tract. Co. v. Jacobs*, 167 Ind. 85, 78 N. E. 325; *Terre Haute & I. R. Co. v. Sheeks*, 155 Ind. 74, 94, 56 N. E. 434. *Ky.*—*Paducah T. Co. v. Baker*, 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N. S.) 1185. *Mass.*—*Ware v. Gay*, 11 Pick. 106, where stage coach broke down. *Mo.*—*Roscoe v. Metropolitan S. R. Co.*, 202 Mo. 576, 101 S. W. 32; *Hamilton v. Metropolitan St. R. Co.*, 114 Mo. App. 504, 89 S. W. 893; *Jacquin v. Grand Ave. Cable Co.*, 57 Mo. App. 320. *Neb.*—*Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254. *S. C.*—*Madden v. Port Royal & W. C. Ry. Co.*, 35 S. C. 381, 14 S. E. 713, 28 Am. St. Rep. 855. *Tex.*—*San Antonio Tract. Co. v. Williams*, 34 Tex. Civ. App. 372, 78 S. W. 977.

See generally the title "Negligence."

[a] It is in general sufficient to allege that the defendant carrier negligently did or omitted the act or acts that proximately caused or contributed to causing the injury as stated,

ticular acts or omission constituting it.³⁰ An allegation of the negligence of the servant is a sufficient charge of negligence of the carrier.³¹

If the servant of the carrier is joined as a defendant with the carrier, it is necessary, in order to charge the servant personally, to do more than allege negligence or joint negligence with the carrier. Facts on which this charge is made must be stated.³²

(5.) *Allegations as to Employes.*—(a.) *Generally.*—A passenger need not allege the name of the employe whose negligence or acts were the cause of his injury,³³ or show his ignorance thereof.³⁴ Nor need he state the character of the service the employe was engaged in,³⁵

duly alleging the specific act that actually caused the injury. **Ala.**—Alabama G. S. R. Co. v. Gilbert, 6 Ala. App. 372, 60 So. 542. **Cal.**—Cary v. Los Angeles R. Co., 157 Cal. 599, 108 Pac. 682, 27 L. R. A. (N. S.) 764. **Fla.**—Barnwell v. Seaboard A. L. Ry., 74 So. 497; Warfield v. Hepburn, 62 Fla. 409, 57 So. 618. **Ind.**—Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935. See generally the title "**Negligence.**"

[b] It is sufficient to allege that the said injury was proximately caused by the negligence of the defendant's servants in and about the carriage of the plaintiff as a passenger. **Atkinson v. Dean** (Ala.), 73 So. 479; **Western Ry. of Alabama v. Foshee**, 183 Ala. 182, 62 So. 500; **Birmingham R., L. & P. Co. v. Weathers**, 164 Ala. 23, 51 So. 303. See **Philadelphia, B. & W. R. Co. v. Allen**, 102 Md. 110, 62 Atl. 245; also **Brien v. Bennett**, 8 Car. & P. 724, 34 E. C. L. 984. *Contra:* **Del.**—**Riedel v. Wilmington City R. Co.**, 5 Penne. 572, 64 Atl. 257; **King v. Wilmington & N. C. Elec. Ry. Co.**, 1 Penne. 452, 41 Atl. 975. **Fla.**—**Warfield v. Hepburn**, 62 Fla. 409, 57 So. 618. **Vt.**—**Devino v. Central Vt. R. Co.**, 63 Vt. 98, 20 Atl. 953.

[c] **Great generality** permitted. **Birmingham Ry., L. & P. Co. v. McCurdy**, 172 Ala. 488, 55 So. 616.

[d] **An omission of the word "negligence"** renders the allegation insufficient, no attempt being made to state the facts. **Birmingham R., L. & P. Co. v. Garrett** (Ala.), 73 Ala. 818.

[e] **The particular act or acts** alleged to have been negligently done must be specified. **Cary v. Los Angeles R. Co.**, 157 Cal. 599, 108 Pac. 682, 27 L. R. A. (N. S.) 764.

30. **Indiana Union Tract. Co. v. Mc-**

Kinney, 39 Ind. App. 86, 78 N. E. 203; **Hamilton v. Metropolitan St. R. Co.**, 114 Mo. App. 504, 89 S. W. 893.

[a] **By making specific allegations of negligence the passenger abandons the presumption of negligence arising from the fact of the accident, and the sufficiency of his pleading will be determined by the rules applicable to cases where the relation of carrier and passenger is not present.** **Ala.**—**Birmingham Ry., L. & P. Co. v. O'Brien**, 185 Ala. 617, 64 So. 343; **Birmingham Ry., L. & P. Co. v. Weathers**, 164 Ala. 23, 51 So. 303. **Ind.**—**Ft. Wayne & N. I. T. Co. v. Kumb** (Ind. App.), 116 N. E. 309. **Mo.**—**Kennedy v. Metropolitan St. R. Co.**, 128 Mo. App. 297, 107 S. W. 16; **Hamilton v. Metropolitan St. R. Co.**, 114 Mo. App. 504, 89 S. W. 893. *Contra*, **Washington-Va. R. Co. v. Bouknight**, 113 Va. 696, 75 S. E. 1032, Ann. Cas. 1913E, 546; **Walters v. Seattle, R. & S. R. Co.**, 48 Wash. 233, 93 Pac. 419, 24 L. R. A. (N. S.) 788.

[b] **If the specific facts show there is no duty within the meaning of the general allegations as to duty and negligence, the declaration is bad.** **Barnwell v. Seaboard A. L. Ry.** (Fla.), 74 So. 497.

31. **Columbus, C. & I. C. R. Co. v. Powell**, 40 Ind. 37. **Converse**, **Birmingham R., L. & P. Co. v. Moore**, 148 Ala. 115, 42 So. 1024.

32. **Bryce v. Southern R. Co.**, 125 Fed. 958.

33. **Birmingham Ry., L. & P. Co. v. Goldstein**, 181 Ala. 517, 61 So. 281; **Armstrong v. Montgomery St. Ry. Co.**, 123 Ala. 233, 26 So. 349.

34. **Armstrong v. Montgomery St. Ry. Co.**, 123 Ala. 233, 245, 26 So. 349.

35. **Birmingham Ry., L. & P. Co.**

although it has been held that a complaint by a trespasser for assault by defendant's servants should do so.³⁶

(b.) *Alleging Acts To Be in Scope of Employment.*³⁷ — Under the doctrine that carriers are not responsible to their passengers for tortious or negligent acts of their servants without the scope of their employment, it is necessary to show that the wrongful act of the servant was within the line of his duties.³⁸ But under the doctrine that carriers owe the duty to passengers to protect them from personal violence or insult from its employes or servants, it is not necessary to allege that an assault by a servant of the defendant upon a passenger was committed within the scope of his duties, the relation of carrier and passenger being shown.³⁹ If this relationship is not shown, however, it must be alleged that the assault was within the scope of the servant's duties,⁴⁰ or was done by authority of the defendant company.⁴¹ This fact need not be alleged in terms;⁴² and a direct

v. Goldstein, 181 Ala. 517, 61 So. 281, action for wanton collision.

36. *Smith v. Louisville, E. & St. L. R. Co.*, 124 Ind. 394, 24 N. E. 753, whether brakeman, baggageman and the like.

37. See generally the title "Master and Servant."

In ejection cases, see *infra*, II, B, 2, c, (IV), (B), (2), (a).

38. *Ga.*—*Savannah F. & W. Ry. Co. v. Wall*, 96 Ga. 328, 23 S. E. 197; *Peeples v. Brunswick & A. R. Co.*, 60 Ga. 281. *Ind.*—*Smith v. Louisville, E. & St. L. R. Co.*, 124 Ind. 394, 24 N. E. 753; *Pittsburgh, C. & St. L. R. Co. v. Theobald*, 51 Ind. 246. *Md.*—*Philadelphia, B. & W. R. Co. v. Green*, 110 Md. 32, 71 Atl. 986. *Mo.*—*McPeak v. Missouri Pac. Ry. Co.*, 128 Mo. 617, 30 S. W. 170.

39. *Birmingham Ry., L. & P. Co. v. Harden*, 156 Ala. 244, 47 So. 327; *Birmingham Ry. & Elec. Co. v. Mason*, 137 Ala. 342, 34 So. 207. But see *Alabama G. S. R. Co. v. Pouncey*, 7 Ala. App. 548, 61 So. 601, which was an action for use of abusive language by a servant.

40. *Ala.*—*Birmingham Ry. & Elec. Co. v. Mason*, 137 Ala. 342, 34 So. 207. *Ind.*—*Smith v. Louisville, E. & St. L. R. Co.*, 124 Ind. 394, 24 N. E. 753. *Mo.*—*McDonald v. St. Louis & S. F. R. Co.*, 165 Mo. App. 75, 146 S. W. 83.

41. *Birmingham Ry. & Elec. Co. v. Mason*, 137 Ala. 342, 34 So. 207.

42. *Ala.*—*Kansas City, M. & B. R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207. *Ind.*—*Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E.

572, 16 N. E. 197. *Mo.*—*Austin v. St. Louis & S. F. R. Co.*, 149 Mo. App. 397, 130 S. W. 385.

[a] It is sufficiently shown by an averment (1) that the act was done by an employe or servant in charge of a train or waiting room (*Ind.*—*Indianapolis St. Ry. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201; *Indianapolis Traction & T. Co. v. Formes*, 40 Ind. App. 202, 80 N. E. 872. *Md.*—*Philadelphia, B. & W. R. v. Green*, 110 Md. 32, 71 Atl. 986. *Tex.*—*Texas & P. Ry. Co. v. Boyd* [Tex. Civ. App.], 141 S. W. 1076), or (2) an averment that said injuries were caused by the negligence of the defendant (*Louisville, N. A. & C. R. Co. v. Kendall*, 138 Ind. 313, 36 N. E. 415), or (3) by the act of the defendant by its employes, servants and agents. *Southern R. Co. v. Crone*, 51 Ind. App. 300, 99 N. E. 762.

[b] An averment that it is a duty of a brakeman to look after the safe debarkation of passengers, and a statement of the acts of the brakeman in assisting the passenger to alight show his acts to be connected with the service. *Pittsburgh, C. & St. L. Ry. Co. v. Gray* (Ind. App.), 59 N. E. 1000. See also *St. Louis S. W. R. Co. v. Kennedy* (Tex. Civ. App.), 96 S. W. 653.

[c] **Apparent Authority.**—Where an agent makes representations as to other routes in order to induce persons to take passage on his road, the acts are within the scope of his apparent authority, and in an action for injuries, it is unnecessary to allege a custom of the defendant or authority

allegation is not necessary where the scope of servant's duties is within the judicial knowledge of the court.⁴³

(6.) *Negating Contributory Negligence.* — Generally the plaintiff need not negative contributory negligence, unless this defense appears on the face of his pleading.⁴⁴

(7.) *Injury and Damage.* — The plaintiff must plead his damage in accordance with the general rules,⁴⁵ showing a causal connection between the negligent act complained of and the injury suffered,⁴⁶ and stating the time,⁴⁷ and place⁴⁸ of the injury.

(8.) *Joinder of Actions and Duplicity.* — The general rules as to joinder of actions and duplicity apply to this class of actions.⁴⁹

of the agent to bind it in such matters. *St. Louis S. W. R. Co. v. White* (Tex. Civ. App.), 86 S. W. 71.

Where passenger is ejected, see *infra*, II, B, 2, c, (IV), (B), (2), (a).

43. *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 367, 49 Am. Rep. 752 (conductor); *Indianapolis & E. R. Co. v. Barnes*, 35 Ind. App. 485, 74 N. E. 583, conductor.

Judicial notice as to duties of conductors, see 7 ENCY. OF EV. 939, 940.

44. *Citizens' St. R. Co. v. Jolly*, 161 Ind. 80, 89, 67 N. E. 935; *Kansas City, M. & O. Ry. Co. v. Young*, 50 Tex. Civ. App. 610, 111 S. W. 764. See generally the title "Negligence."

[a] Rule is otherwise (1) in some states (*Burger v. Omaha & C. B. S. R. Co.*, 139 Iowa 645, 117 N. W. 35, 130 Am. St. Rep. 343), except (2) in those cases where the facts show that the injury was the result solely of the negligence of the carrier as in derailment cases for example. *Burke v. Chicago & N. W. R. Co.*, 108 Ill. App. 565 (where plaintiff was helpless); *Bedford S. O. & B. R. R. Co. v. Rainbolt* 99 Ind. 551 (where bridge gave way); *Michigan S. & N. I. R. Co. v. Lantz*, 29 Ind. 528. For present Indiana rule see *supra*, this note. See generally the title "Negligence."

45. *Denver & R. G. R. Co. v. Roller*, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; *Pittsburgh, C. & St. L. R. Co. v. Brown*, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625, holding allegation sufficient. See 13 STANDARD PROC. 360.

46. As to necessity for showing causal connection between injury and damage, see 13 STANDARD PROC. 353.

[a] In derailment cases, the petition need not allege that the injury was the result of a wrongful act or omission of the defendant, as that will

be presumed. *Chicago, R. I. & P. R. Co. v. Young*, 58 Neb. 678, 79 N. W. 556.

47. *St. Louis, I. M. & S. R. Co. v. Wright*, 105 Ark. 269, 150 S. W. 706.

48. *Birmingham R., L. & P. Co. v. Moore*, 148 Ala. 115, 42 So. 1024 (holding allegation sufficient as the court judicially knows in what county a city is situated); *St. Louis, I. M. & S. R. Co. v. Wright*, 105 Ark. 269, 150 S. W. 706.

[a] That the place where the accident occurred is between the place of departure and the destination need not be specifically alleged. *International & G. N. R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216.

49. See *infra*, this note, and generally the titles "Duplicity;" "Joinder of Actions."

[a] Accordingly (1) the plaintiff may state separate and distinct concurring acts that produce the accident and injury (*New York, C. & St. L. R. Co. v. Callahan*, 40 Ind. App. 223, 81 N. E. 670; *Paducah T. Co. v. Baker*, 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N. S.) 1185. See generally the title "Negligence"), or (2) he may in separate counts charge the acts of negligence in different ways to meet the proof. *Froeming v. Stockton Elec. R. Co.*, 171 Cal. 401, 153 Pac. 712.

[b] **Thrown From Car and Injured While Alighting.**—A petition is not duplicitous which states in separate counts that plaintiff was thrown from a train without fault on his part and that he was injured by voluntarily attempting to leave the train. *Gulf, C. & S. F. Ry. Co. v. Buford*, 2 Tex. Civ. App. 115, 21 S. W. 272.

[c] **Refusal To Stop and Ejection.** A count alleging a failure and refusal to stop at plaintiff's destination and an expulsion a short distance beyond

(9.) *Amendment.* — The plaintiff may amend his pleading in accordance with the general rules regulating amendments,⁵⁰ if he does not thereby introduce a new and different cause of action.⁵¹

(B.) *ALLEGATIONS IN PARTICULAR CASES.* — (1.) *Defective Condition of Premises and Insufficient Accommodations at Stations.* — A declaration or complaint for injuries received from a defective condition of the premises at or about a station,⁵² or from insufficient accommodations at stations⁵³ must allege negligence or a breach of duty in accord with the general rules. If statutory regulations are relied on, facts bringing the case within the statute must be alleged.⁵⁴

(2.) *Failure To Assist Passengers To Board or Alight and From Alighting at Unsafe Places.* — If the negligence claimed is the omission to assist a passenger to board or alight from a train, the complaint must allege facts showing a duty to render assistance, as by showing sickness,

joins case and trespass in one count. *Louisville & N. R. R. Co. v. Dancy*, 97 Ala. 338, 11 So. 796.

50. See *infra*, this section, and generally the title "**Amendments and Joinders.**"

[a] **Charging Wilfulness.**—*Southern R. Co. v. Jordan*, 129 Ga. 665, 59 S. E. 802.

51. **U. S.**—*Atlantic & P. R. Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. 120, 41 L. ed. 485, amendment dropping joint tortfeasor. **Ala.**—*Alabama G. S. R. Co. v. Arnold*, 80 Ala. 600, 2 So. 337, amendment particularly describing the platform so as to show the necessity for lights does not add cause of action. **Ga.**—*Georgia R. & E. Co. v. Reeves*, 127 Ga. 697, 51 S. E. 610, adding new ground of negligence. **Ill.** *Steiskal v. Marshall Field & Co.*, 142 Ill. App. 154; *Chicago, T. T. R. Co. v. Young*, 118 Ill. App. 226; *Chicago & E. I. R. Co. v. Wallace*, 104 Ill. App. 55. **Mo.**—*Dougherty v. Missouri R. Co.*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251; *Patterson v. Springfield T. Co.*, 178 Mo. App. 250, 163 S. W. 955. **Tex.**—*International & G. N. R. Co. v. Irvine*, 64 Tex. 529; *San Antonio Traction Co. v. Williams*, 34 Tex. Civ. App. 372, 78 S. W. 977 (setting up particular negligence, the original allegation being general); *Mexican Cent. Ry. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282.

See generally the title "**New Cause of Action or Defense.**"

Amendment changing misdescription of contract of carriage as changing the cause of action, see the title "New Cause of Action or Defense."

[a] **Amendment changing the place**

where the injury occurred does not introduce a new cause of action. *Chicago City R. Co. v. McMeen*, 206 Ill. 108, 118, 68 N. E. 1093; *Cicero & P. S. R. Co. v. Brown*, 89 Ill. App. 318.

52. *Louisville & N. R. Co. v. Dixon*, 176 Ky. 369, 195 S. W. 1099, holding complaint charging injuries sustained by falling through trap-door in station platform sufficient.

[a] **Insufficient Lights.**—*Stewart v. International & G. N. R. Co.*, 53 Tex. 289, 37 Am. Rep. 753. See also *Alabama G. S. R. Co. v. Godfrey*, 156 Ala. 202, 47 So. 185, 130 Am. St. Rep. 76 (falling into ditch near pathway); *Central of Georgia R. Co. v. Campbell*, 10 Ala. App. 288, 64 So. 540 (complaint sufficient to show negligent failure to light premises); *Cleveland, C., C. & St. L. R. Co. v. Harvey*, 45 Ind. App. 153, 90 N. E. 318.

[b] **Wanton Injury.**—An allegation that the defendant wantonly or intentionally left or permitted a hole or opening in its platform is insufficient to charge wantonness as the inference of wantonness does not necessarily follow from the facts stated. *Western Ry. of Alabama v. Turrentine*, 197 Ala. 603, 73 So. 40.

Injuries from alighting at unsafe place, see *infra*, II, B, 2, b, (V), (B), (2).

53. *Brown v. Georgia, C. & N. R. Co.*, 119 Ga. 88, 46 S. E. 71, failure to heat waiting room.

54. **Ala.**—*Page v. Louisville & N. R. Co.*, 129 Ala. 232, 29 So. 676. **Ind.**—*Draper v. Evansville & T. H. R. Co.*, 165 Ind. 117, 74 N. E. 889. **Ky.** *Ward v. Louisville & N. R. Co.*, 168

infirmity or the other cause known to the carrier,⁵⁵ a breach of such duty,⁵⁶ and injury resulting therefrom.⁵⁷ If an injury results from alighting at an unsafe place, complaints against railroad companies,⁵⁸ or street car companies,⁵⁹ must state facts showing a breach of duty owing from the carrier to the passenger, and show the dangerous condition of the place of discharge of passengers,⁶⁰ and that the plain-

Ky. 826, 183 S. W. 211, under statute requiring stations to be kept open "until the train departs," complaint must allege that when the passenger found the waiting room closed, the train had not departed.

55. **Ind.**—Lake Erie & W. R. Co. v. Beals, 50 Ind. App. 450, 98 N. E. 453. **S. C.**—See *Madden v. Port Royal & W. C. Ry. Co.*, 35 S. C. 381, 14 S. E. 713, 28 Am. St. Rep. 855. **Tex.** St. Louis S. W. R. Co. v. Kennedy (Tex. Civ. App.), 96 S. W. 653.

56. *Georgia R. & B. Co. v. Rives*, 137 Ga. 376, 73 S. E. 645, 38 L. R. A. (N. S.) 564 (failure of conductor to assist blind person to alight); *Lake Erie & W. R. Co. v. Beals*, 50 Ind. App. 450, 98 N. E. 453; *Sellers v. Cleveland, C. C. & St. L. R. Co.*, 40 Ind. App. 319, 81 N. E. 1087, complaint setting up failure to provide platform held insufficient.

57. *Lake Erie & W. R. Co. v. Beals*, 50 Ind. App. 450, 98 N. E. 453.

58. **Ga.**—*Waldrup v. Central of Georgia R. Co.*, 127 Ga. 359, 56 S. E. 439 (complaint indefinite); *Wilkes v. Western & A. R. Co.*, 109 Ga. 794, 35 S. E. 165, where plaintiff was injured by splinter of wood on depot platform. **Ind.**—*Evansville & C. R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322, injuries from jumping from box car without steps before car reached platform. **N. J.**—*Mettler v. Delaware, L. & W. R. Co.*, 77 N. J. L. 97, 71 Atl. 111. **S. C.**—*Madden v. Port Royal & W. C. Ry. Co.*, 35 S. C. 381, 14 S. E. 713, 28 Am. St. Rep. 855, holding allegations sufficient. **Tex.**—*International & G. N. R. Co. v. Clark* (Tex. Civ. App.), 71 S. W. 587 (holding petition good against general demurrer); *Missouri, K. & T. R. Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. 684. **Va.**—*Chesapeake & O. R. Co. v. Tinsley*, 116 Va. 600, 82 S. E. 732, complaint sufficient.

59. **Ala.**—*Montgomery St. R. Co. v. Mason*, 133 Ala. 508, 526, 32 So. 261, complaint sufficient. **Ind.**—*Indiana Union Tract. Co. v. Jacobs*, 167 Ind. 85,

78 N. E. 325 (complaint sufficient); *Ft. Wayne & N. I. T. Co. v. Kumb* (Ind. App.), 116 N. E. 309; *Indianapolis Tract. & T. Co. v. Pressell*, 39 Ind. App. 472, 77 N. E. 357. **Ky.**—*Murnahan v. Cincinnati, N. & C. St. R. Co.*, 27 Ky. L. Rep. 737, 86 S. W. 688. **N. Y.** Page v. United T. Co., 161 App. Div. 383, 146 N. Y. Supp. 530; *Catterson v. Brooklyn Heights R. Co.*, 132 App. Div. 399, 116 N. Y. Supp. 760, complaint sufficient. **Va.**—*Richmond City Ry. Co. v. Scott*, 86 Va. 902, 11 S. E. 404, complaint sufficient.

[a] Knowledge by the street car company of the defective condition of the street at the place the car stopped need not be alleged. *Indiana Union Tract. Co. v. Jacobs*, 167 Ind. 85, 78 N. E. 325. *Contra*, *Murnahan v. Cincinnati N. & C. St. R. Co.*, 27 Ky. L. Rep. 737, 86 S. W. 688, holding that an averment that the conductor failed to warn the passenger of the danger is not equivalent to an averment of knowledge of the danger.

[b] Ignorance by the passenger of the dangerous condition of the street at the place the car stopped because of blindness and the like must be shown. *Indianapolis Tract. & T. Co. v. Pressell*, 39 Ind. App. 472, 77 N. E. 357; *Murnahan v. Cincinnati N. & C. St. R. Co.*, 27 Ky. L. Rep. 737, 86 S. W. 688. But compare the cases cited above holding complaint sufficient, and see *supra*, II, B, 2, b, (V), (6), as to necessity of negating contributory negligence.

60. **Ga.**—*Seaboard Air Line R. Co. v. Olsen*, 123 Ga. 612, 51 S. E. 591. **Ind.** *Indianapolis Tract. & T. Co. v. Pressell*, 39 Ind. App. 472, 77 N. E. 357. **Ky.**—*Durham v. Louisville & N. R. Co.*, 16 Ky. L. Rep. 757, 29 S. W. 737, averment that servant knew place was unsafe is insufficient to show place was in fact unsafe. **Mo.**—*Fillingham v. St. Louis T. Co.*, 102 Mo. App. 573, 77 S. W. 314.

[a] A minute description of the place at which the stop was made need not be averred. *Montgomery St. R.*

tiff sustained injuries because thereof.⁶¹

(3.) *Alighting From Crowded Cars.* — One injured by alighting from crowded cars must aver negligence in accordance with the general rules.⁶²

(4.) *Sudden Starting, Jerking, or Lurching of Train or Car.*⁶³ — A passenger injured by the sudden jerking or starting of a car or train while he is in the act of boarding or alighting, should allege that the car stopped,⁶⁴ or slowed down,⁶⁵ at a regular stopping place,⁶⁶ or that it stopped for the purpose of taking on or letting off passengers.⁶⁷ That the jerk, sudden starting, or acceleration was done,⁶⁸ through the agency of the defendant's servants,⁶⁹ must be alleged, unless the facts disclosed themselves amount to negligence.⁷⁰ It is generally sufficient,

Co. v. Mason, 133 Ala. 508, 526, 32 So. 261; Catterson v. Brooklyn Heights R. Co., 132 App. Div. 399, 116 N. Y. Supp. 760.

[b] What would constitute a safe place to alight need not be stated. Montgomery St. R. Co. v. Mason, 133 Ala. 508, 526, 32 So. 261.

61. Indianapolis Tract. & T. Co. v. Pressell, 39 Ind. App. 472, 77 N. E. 357.

Necessity for showing causal connection between injury and damage, see generally, 13 STANDARD PROC. 353.

62. See *infra*, this note.

[a] A declaration is sufficient which alleges that a street car company carelessly and negligently suffered and permitted its car exits and running board to be greatly crowded with passengers, whereby plaintiff while attempting to alight, was thrown and injured. Dunham v. Public Service Corp., 76 N. J. L. 452, 69 Atl. 1012. See also Worthington v. Georgia R. & E. Co., 131 Ga. 450, 62 S. E. 525; Houston & T. C. R. Co. v. Hubbard (Tex. Civ. App.), 37 S. W. 25, where plaintiff was not given reasonable time to alight, the car being crowded.

63. **Form of complaint,** see 9 STANDARD PROC. 646.

64. Gorza v. Peoria R. Co., 175 Ill. App. 117 (holding it will be implied from an allegation that the car started, that the car stopped before the passenger attempted to alight); Shareman v. St. Louis Transit Co., 103 Mo. App. 515, 78 S. W. 846. But see Louisville & S. I. Tract. Co. v. Leaf, 40 Ind. App. 214, 79 N. E. 1066.

65. See Rome R. & L. Co. v. Keel, 3 Ga. App. 769, 60 S. E. 468; Shareman v. St. Louis Transit Co., 103 Mo. App. 515, 78 S. W. 846.

66. Louisville & S. I. Tract. Co. v. Korbe, 175 Ind. 450, 93 N. E. 5, 94 N. E. 768; Terre Haute T. & L. Co. v. Payne, 45 Ind. App. 132, 89 N. E. 413; Hays v. Metropolitan St. R. Co., 182 Mo. App. 393, 170 S. W. 414. Compare Knuckey v. Butte Elec. R. Co., 41 Mont. 314, 109 Pac. 979, where plaintiff alleged the car stopped at his destination.

[a] That the car stopped to allow passengers to board or alight need not be alleged where the car is stopped at a regular stopping place. Indianapolis & M. Rapid Transit Co. v. Walsh, 45 Ind. App. 42, 90 N. E. 138. See Peterson v. Metropolitan St. R. Co., 211 Mo. 498, 515, 111 S. W. 37.

67. Hays v. Metropolitan St. R. Co., 182 Mo. App. 393, 170 S. W. 414.

[a] That the car stopped in response to a signal shows that the car stopped to let off passengers. Winona & W. R. Co. v. Rousseau, 48 Ind. App. 248, 93 N. E. 34, 1028; Hays v. Metropolitan St. R. Co., 182 Mo. App. 393, 170 S. W. 414.

68. Birmingham R. L. & P. Co. v. Weathers, 164 Ala. 23, 51 So. 303; Birmingham Ry. L. & P. Co. v. Parker, 156 Ala. 251, 47 So. 138; Seeley v. Central Vermont R. Co., 88 Vt. 178, 92 Atl. 28.

69. Nilson v. Oakland Traction Co., 10 Cal. App. 103, 108, 101 Pac. 413, 21 Am. Neg. Rep. 566, holding allegation to be implied from an allegation that the car was under the control of the defendant's servants.

70. Ala.—Birmingham Ry. L. & P. Co. v. Parker, 156 Ala. 251, 47 So. 138. Ind.—Cincinnati, H. & I. R. Co. v. Worthington, 30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478, 96 Am. St. Rep. 355. Mo.—Keeton v. St. Louis & M. R. R. Co., 116 Mo. App. 281, 92 S. W. 512,

whether the passenger is injured while aboard a train or car,⁷¹ or while boarding or alighting therefrom,⁷² to allege that the defendant negligently started or stopped the car with a sudden jerk and in such a manner as to throw plaintiff down,⁷³ although it has been held necessary to show that the jerk or lurch was unusually violent, where the injury was received by a passenger aboard a train.⁷⁴ It is not necessary to allege the particular methods by which the defendant's servants produced the jerk, lurch, stop or acceleration.⁷⁵ Notice of

even in such case, better practice requires breach of duty to be characterized as negligence.

71. *Brady v. Springfield T. Co.*, 140 Mo. App. 421, 124 S. W. 1070.

72. *Birmingham Ry. L. & P. Co. v. Weathers*, 164 Ala. 23, 51 So. 303; *Birmingham Ry. L. & P. Co. v. Parker*, 156 Ala. 251, 47 So. 138; *Bobbitt v. United Rys. Co.*, 169 Mo. App. 424, 153 S. W. 70.

[a] *Compare Saxton v. Missouri Pac. R. Co.*, 98 Mo. App. 494, 72 S. W. 717, holding it should be stated that the jerk was extraordinary or more than a usual incident to the acceleration of the speed of the train under the circumstances.

73. For complaints held to be sufficient, see the following. Ala.—*Birmingham Ry. L. & P. Co. v. Gonzalez*, 183 Ala. 273, 61 So. 80, Ann. Cas. 1916 A, 543 (action for starting or jerking car or train while passenger boarding or alighting); *Birmingham Ry. L. & P. Co. v. McGinty*, 158 Ala. 410, 48 So. 491; *Southern R. Co. v. Hundley*, 151 Ala. 378, 44 So. 195, where lurch threw passenger about to alight from platform. Cal.—*Nilson v. Oakland Traction Co.*, 10 Cal. App. 103, 101 Pac. 413, 21 Am. Neg. Rep. 566. Colo.—*Fox v. Denver City Tramway Co.*, 57 Colo. 511, 143 Pac. 278. Fla.—*Florida E. C. R. Co. v. Carter*, 67 Fla. 335, 65 So. 254, Ann. Cas. 1916E, 1299 (starting train before passenger got off); *Florida E. C. R. Co. v. Hayes*, 66 Fla. 589, 64 So. 274, where plaintiff was thrown off crowded car by sudden stop. Ga.—*Western & A. R. Co. v. Roberts*, 144 Ga. 250, 86 S. E. 933; *Mack v. Savannah & S. R. Co.*, 118 Ga. 629, 45 S. E. 509; *James v. Atlanta St. R. Co.*, 90 Ga. 695, 16 S. E. 642; *Douglas, A. & G. R. Co. v. Swindle*, 2 Ga. App. 550, 59 S. E. 600. Ill.—*Chicago & A. R. Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680; *Wayne v. St. Louis & N. E. R. Co.*, 165 Ill. App. 353; *Ruch v. Aurora, E. & C.*

R. Co., 150 Ill. App. 329, where plaintiff was thrown from car taking switch at high rate of speed. Ind.—*Baltimore & O. S. W. Ry. Co. v. Harbin*, 160 Ind. 441, 67 N. E. 109 (where passenger is thrown against seat by sudden stop); *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197 (where conductor jerked passenger from train after it started); *Public Utilities Co. v. Cosby*, 60 Ind. App. 252, 110 N. E. 576; *Kokomo M. & W. Tract. Co. v. Walsh*, 58 Ind. App. 182, 108 N. E. 19; *Indiana Union Tract. Co. v. Bales*, 58 Ind. App. 92, 107 N. E. 682; *Lake Erie & W. R. Co. v. Cotton*, 45 Ind. App. 580, 91 N. E. 253; *Indianapolis Tract. & T. Co. v. Miller*, 40 Ind. App. 403, 82 N. E. 113, complaint sufficient on appeal. Mo.—*Peterson v. Metropolitan S. R. Co.*, 211 Mo. 498, 111 S. W. 37; *Coudy v. St. Louis, I. M. & S. R. Co.*, 85 Mo. 79; *Keeton v. St. Louis & M. R. Co.*, 116 Mo. App. 281, 92 S. W. 512, starting car while plaintiff was boarding it. Tex.—*Missouri, K. & T. R. Co. v. Moody*, 35 Tex. Civ. App. 46, 79 S. W. 856. Vt.—*Seeley v. Central Vermont R. Co.*, 88 Vt. 178, 92 Atl. 28. Wash.—*Mueller v. Washington Water Power Co.*, 56 Wash. 556, 106 Pac. 476. W. Va.—*Duty v. Chesapeake & O. R. Co.*, 70 W. Va. 14, 73 S. E. 331.

74. *Connor v. Washington R. & E. Co.*, 43 App. Cas. (D. C.) 329; *Missouri, K. & T. R. Co. v. Cobb*, 60 Tex. Civ. App. 562, 128 S. W. 910, where plaintiff was a passenger in a box car.

75. Ga.—*Georgia R. & E. Co. v. Reeves*, 123 Ga. 697, 51 S. E. 610, Mich.—*Schultz v. Michigan U. R. Co.*, 158 Mich. 665, 123 N. W. 594, 27 L. R. A. (N. S.) 503. R. I.—*McCauley v. Rhode Island Co.*, 25 R. I. 558, 57 Atl. 376.

[a] But a description of a curve as "sharp and dangerous" is insufficient as against special demurrer. *Central of Ga. R. Co. v. Staacer*, 20 Ga. App. 195, 92 S. E. 962.

plaintiff's intention to board or alight must be alleged in actions against railroads, if the place was not a regular stopping place for discharge of passengers,⁷⁶ and in actions against street car companies where the car had not stopped;⁷⁷ but it is otherwise where the car stopped at the passenger's destination.⁷⁸ A trespasser injured by a sudden acceleration in speed while alighting must show knowledge of his position by defendant's servants.⁷⁹

Starting Before Passenger Has Time To Board or Alight. — If the train is started before a passenger has a reasonable time to board or alight, that fact must be shown.⁸⁰ That the passenger was in danger, which was known to the defendant, need not be alleged, when facts from which such conclusion may be drawn are alleged.⁸¹

Wilful and Wanton Injury. — If the jerk was wilful or wanton, the complaint must show that the servant or employe who caused the jerk was a servant of the railroad company,⁸² that he was conscious of the danger,⁸³ and wilfully or wantonly inflicted the injury.⁸⁴

(5.) *Alighting From Moving Train or Car.* — A passenger injured while boarding or alighting from a moving train must negative contributory negligence;⁸⁵ and show that the speed of the train was not such as

[b] **Impossible cause set up** will be disregarded. *Rome R. & L. Co. v. Keel*, 3 Ga. App. 769, 60 S. E. 468, where it was alleged the jerk was caused by throwing off the brakes, nothing being said about the power which the court assumed to be off under the allegations.

76. *Barnwell v. Seaboard A. L. Ry. (Fla.)*, 74 So. 497 (where train stopped); *Creech v. Charleston & N. C. R. Co.*, 66 S. C. 528, 45 S. E. 86, where train slowed down.

77. *Birmingham Ry. L. & P. Co. v. Selhorst*, 165 Ala. 475, 51 So. 568 (avertment of a negligent jerking or lurching of a car implies notice of plaintiff's position); *Public Utilities Co. v. Cosby*, 60 Ind. App. 252, 110 N. E. 576, sufficient allegation.

78. *Knuckey v. Butte Elec. R. Co.*, 41 Mont. 314, 109 Pac. 979.

79. *McElvane v. Central of Georgia R. Co.*, 170 Ala. 525, 54 So. 489, 34 L. R. A. (N. S.) 715.

80. *Mich.*—*McCaslin v. Lake Shore & M. S. Ry. Co.*, 93 Mich. 553, 53 N. W. 724. *Mo.*—*McKinstry v. St. Louis T. Co.*, 108 Mo. App. 12, 82 S. W. 1108, petition sufficient as against objection after verdict. *Tex.*—*Houston & T. C. R. Co. v. Hubbard (Tex. Civ. App.)*, 37 S. W. 25; *San Antonio & A. P. R. Co. v. Jackson*, 38 Tex. Civ. App. 201, 85 S. W. 445, complaint sufficient.

[a] Unless he is in the act of alighting in view of the conductor or under

circumstances making it his duty to see the passenger. *Cobb v. Lindell R. Co.*, 149 Mo. 135, 50 S. W. 310.

[b] **That the train failed to stop for a sufficient length of time** to enable the plaintiff to alight is sufficient. *Louisville & N. R. Co. v. Cornelius*, 183 Ala. 203, 62 So. 710; *Western & A. R. Co. v. Roberts*, 144 Ga. 250, 86 S. E. 933.

[c] **That the train was started while plaintiff was alighting** is sufficient to admit proof that the train did not stop a reasonable time. *Indianapolis S. R. Co. v. Wall*, 54 Ind. App. 43, 101 N. E. 680. See also *Knuckey v. Butte Elec. R. Co.*, 41 Mont. 314, 109 Pac. 979.

81. *Galveston, H. & S. A. R. Co. v. Thornsberry (Tex.)*, 17 S. W. 521, nor need he allege his age.

82. *Birmingham Ry. L. & P. Co. v. Barrett*, 4 Ala. App. 347, 58 So. 760. See *Birmingham Ry. L. & P. Co. v. Selhorst*, 165 Ala. 475, 51 So. 568.

83. *Birmingham Ry. L. & P. Co. v. Selhorst*, 165 Ala. 475, 51 So. 568; *Birmingham R. L. & P. Co. v. Bennett*, 144 Ala. 369, 39 So. 565; *Birmingham Ry. L. & P. Co. v. Barrett*, 4 Ala. App. 347, 58 So. 760.

84. *Western Ry. of Alabama v. Foshee*, 183 Ala. 182, 62 So. 500; *Birmingham Ry. L. & P. Co. v. Barrett*, 4 Ala. App. 347, 58 So. 760.

85. *Badovinac v. Northern Pac. R. Co.*, 39 Mont. 454, 104 Pac. 543.

to render the danger imminent and obvious.⁸⁶ That an employe inviting him to alight was acting within the scope of his employment must be shown.⁸⁷ If the plaintiff thought that the car had stopped, the servant's knowledge thereof must be alleged.⁸⁸ If a person assisting another on the train is not given sufficient time or warning to alight, he must allege defendant's knowledge of his presence on the train,⁸⁹ and a custom to give warning signals of the departure of trains.⁹⁰

(6.) *Collision*. — In alleging a collision, it is sufficient to state that plaintiff was a passenger and was injured through a collision with the train, car or other obstruction on the track.⁹¹

86. *Dailey v. South Covington & C. S. R. Co.*, 158 Ky. 64, 164 S. W. 361; *Durham v. Louisville & N. R. R. Co.*, 16 Ky. L. Rep. 757, 29 S. W. 737; *Owens v. Atlantic C. L. R. Co.*, 147 N. C. 357, 61 S. E. 198. See *Pittsburgh, C. C. & St. L. Ry. Co. v. Gray* (Ind. App.), 59 N. E. 1000, holding complaint did not show contributory negligence.

[a] That passenger believes it to be safe to alight is insufficient to show that the danger of attempting it is not obvious or apparent. *Dailey v. South Covington & C. S. R. Co.*, 158 Ky. 64, 164 S. W. 361.

[b] **Sufficient Allegations**. — See *Lake Erie & W. R. Co. v. Huffman*, 177 Ind. 126, 97 N. E. 434, Ann. Cas. 1914 C, 1272; *Crosby v. Seaboard A. L. R. Co.*, 81 S. C. 24, 61 S. E. 1064, holding complaint charges wilfulness.

87. *Savannah, F. & W. Ry. Co. v. Wall*, 96 Ga. 328, 23 S. E. 197, where flagman told plaintiff he could get off. *Pittsburgh, C. C. & St. L. Ry. Co. v. Gray*, 28 Ind. App. 588, 64 N. E. 39, holding it to be sufficiently shown that a brakeman acted within the scope of his duties.

[a] *Compare Wilburn v. St. Louis, I. M. & S. Ry. Co.*, 36 Mo. App. 203, holding a complaint, alleging that the conductor "or some other employe of the defendant" ordered the passenger to jump, is not objectionable for failure to show the "other employe" was authorized to give such direction.

Allegations as to scope of employment, see *supra*, II, B, 2, b, (V), (A), (5), (b).

88. *Indiana Union Tract. Co. v. Swafford*, 179 Ind. 279, 100 N. E. 840, unless the facts alleged disclose a duty to warn the passenger of the car's motion.

89. *Coleman v. Georgia R. Co.*, 84 Ga. 1, 10 S. E. 498.

90. *Coleman v. Georgia R. Co.*, 84 Ga. 1, 10 S. E. 498.

91. *Greinke v. Chicago City R. Co.*, 234 Ill. 564, 568, 85 N. E. 327; *Rice v. Chicago, B. & Q. R. Co.*, 153 Mo. App. 35, 53, 131 S. W. 374. See also *Ala. Highland Ave. & B. R. Co. v. Swope*, 115 Ala. 287, 22 So. 174, complaint sufficient. **D. C.**—*Washington & G. R. Co. v. Hickey*, 5 App. Cas. 436, collision between railroad and street car at crossing. **Ga.**—*Atlantic Coast Line R. Co. v. Adeeb*, 15 Ga. App. 842, 84 S. E. 316, complaint sufficient. **Ill.**—*Chicago C. R. Co. v. Pural*, 224 Ill. 324, 79 N. E. 686; *O'Hern v. Illinois C. E. Ry.*, 190 Ill. App. 502; *West Chicago St. R. Co. v. Mileham*, 138 Ill. App. 569; *Chicago U. T. Co. v. Mee*, 136 Ill. App. 98, street car and wagon collision. **Ind.**—*New York, C. & St. L. R. Co. v. Callahan*, 40 Ind. App. 223, 81 N. E. 670. *Compare South Chicago City Ry. Co. v. Moltrum*, 26 Ind. App. 550, 60 N. E. 361. And see *Hammond, W. & E. C. E. Ry. Co. v. Spyzchalski*, 17 Ind. App. 7, 46 N. E. 47. **Mo.**—*Anderson v. Missouri Pac. R. Co.*, 196 Mo. 442, 93 S. W. 394, 113 Am. St. Rep. 748; *Malloy v. St. Louis, etc., R. Co.*, 173 Mo. 75, 73 S. W. 159; *McFadden v. Metropolitan St. T. R. Co.*, 161 Mo. App. 652, 143 S. W. 884, where both carriers are sued. **Tex.**—*Gulf, C. & S. F. Ry. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608; *Fort Worth S. R. Co. v. Ferguson*, 9 Tex. Civ. App. 610, 29 S. W. 61. **Va.**—*Bireckhead v. Chesapeake & O. R. Co.*, 95 Va. 648, 29 S. E. 678; *Baltimore & O. R. Co. v. Sherman's Admx.*, 30 Gratt. (71 Va.) 602.

[a] **Need not specify in particular acts of negligence causing collision**. *Greinke v. Chicago City R. Co.*, 234 Ill. 564, 85 N. E. 327; *Roscoe v. Metropolitan S. R. Co.*, 202 Mo. 576, 101 S. W. 32; *Hamilton v. Metropolitan St. R.*

(7.) *Derailment*.—In derailment cases, the particular cause of the derailment may,⁹² but need not be,⁹³ alleged, even though known to the passenger,⁹⁴ unless the servant of the carrier is joined as a party

Co., 114 Mo. App. 504, 89 S. W. 893.

Form of complaint for injuries in collision, see 9 STANDARD PROC. 942, 642.

[b] That injury was not due to negligence of company on whose train plaintiff was a passenger need not be negatived where the action is brought against the other railroad. *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 98 Ind. 186.

[c] Which of the two intersecting railroads were first built need not be stated to show which has the right of way over the crossing. *Atlantic Coast Line R. Co. v. Adeeb*, 15 Ga. App. 842, 84 S. E. 316.

[d] Where the gates of the railroad company were negligently operated, it is not necessary to make a specific averment that the gate keeper was the servant of the railroad company or that it was bound to maintain gates, negligence being alleged generally. *Washington & G. R. Co. v. Hickey*, 5 App. Cas. (D. C.) 436.

92. *Southern R. Co. v. Adams*, 52 Ind. App. 322, 100 N. E. 773; *Missouri, O. & G. R. Co. v. Vandivere*, 42 Okla. 427, 141 Pac. 799.

[a] **Particularity Required**.—*Galveston, H. & S. A. R. Co. v. Waldo*, (Tex. Civ. App.), 26 S. W. 1004.

[b] **Repugnant Averments**.—*St. Louis & S. F. R. Co. v. Pearce*, 159 Ala. 141, 49 So. 247.

[c] **Sufficient allegations**, see *Galveston, H. & S. A. R. Co. v. Contreras*, 31 Tex. Civ. App. 489, 72 S. W. 1051. Also *Ala.*—*Louisville & N. R. Co. v. Jones*, 83 Ala. 376, 3 So. 902. *Del.* *King v. Wilmington & N. C. Elec. R. Co.*, 1 Penne. 452, 41 Atl. 975. *Ind.* *Indiana Union Tract. Co. v. McKinney*, 39 Ind. App. 86, 78 N. E. 203. *Mont.*—*Emerson v. Butte Elec. R. Co.*, 46 Mont. 454, 129 Pac. 319.

[d] **Effect of Alleging Specific Causes**.—(1) If the particular acts causing the derailment are set up, the complaint will be insufficient unless they as a matter of law constitute negligence, even though the complaint alleges negligence generally (*Knight v. Tombigbee V. R. Co.*, 190 Ala. 140, 67 So. 238), (2) although it has been held

that the allegations of specific causes should be treated as surplusage, so as to admit proof of other causes. *Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 102 Pac. 988, *overruling Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867, so far as it conflicts with this rule. See also II, B, 2, b, (V), (A), (4).

93. **U. S.**—*Bryce v. Southern R. Co.*, 129 Fed. 966, 125 Fed. 958; *Clark v. Chicago, B. & Q. R. Co.*, 15 Fed. 588. *Ala.*—*Western Ry. of Alabama v. McGraw*, 183 Ala. 220, 62 So. 772. *Ariz.* *Southern Pac. Co. v. Hogan*, 13 Ariz. 34, 108 Pac. 240, 29 L. R. A. (N. S.) 813. *Del.*—*King v. Wilmington & N. C. Elec. Ry. Co.*, 1 Penne. 452, 41 Atl. 975. *Fla.*—*Warfield v. Hepburn*, 62 Fla. 409, 57 So. 618. *Ind.*—*Indianapolis St. Ry. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201; *Indiana Union Tract. Co. v. McKinney*, 39 Ind. App. 86, 78 N. E. 203. *Ky.*—*Kentucky Cent. R. Co. v. McMurtry*, 3 Ky. L. Rep. 625. *Me.* *Hebert v. Portland R. Co.*, 103 Me. 315, 69 Atl. 266, 125 Am. St. Rep. 297. *Minn.*—*Smith v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 169, 14 N. W. 797. *Mo.* *Patterson v. Springfield T. Co.*, 178 Mo. App. 250, 163 S. W. 955. See *Ellet v. St. Louis, K. C. & N. R. Co.*, 76 Mo. 518, holding petition sufficient as against objection after trial. *Mont.* *Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 102 Pac. 988; *Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867. *Nev.*—*Sherman v. Southern Pac. Co.*, 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, Ann. Cas. 1914 A. 287. *Tenn.*—*Railroad Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. 202. *Tex.*—*Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 23 Am. St. Rep. 345, 11 L. R. A. 486; *Gulf, C. & S. F. R. Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104. *Va.* *Washington-Va. R. Co. v. Bouknight*, 113 Va. 696, 75 S. E. 1032, Ann. Cas. 1913 E, 546.

Form of complaint, see 9 STANDARD PROC. 942; for injury where train falls through bridge, see 9 STANDARD PROC. 645.

94. *San Antonio Tract. Co. v. Williams*, 34 Tex. Civ. App. 372, 78 S. W. 977.

defendant, in which event it must be stated.⁹⁵

(8.) *Jostling of Passengers.*⁹⁶ — A passenger pushed from a car or otherwise injured by the jostling of passengers on an overcrowded car need only allege the negligence of the company.⁹⁷

(9.) *Failure To Properly Heat Cars.* — In an action for injuries resulting from a failure of a railroad company to heat its cars, the complaint must show whether the plaintiff was a passenger on a freight or passenger train,⁹⁸ as well as such other facts as may be necessary to state a cause of action.⁹⁹

(10.) *Jumping From Cars on Appearance of Danger.* — A passenger who jumped from a train or car on an appearance of imminent danger need not state all the circumstances producing the peril to which he was exposed.¹

(11.) *Assault by Employes and Servants.* — A passenger assaulted by the carrier's servants must allege an assault in accordance with the general rules.²

95. *Bryce v. Southern R. Co.*, 125 Fed. 958.

96. *Injuries while alighting from crowded car*, see *supra*, II, B, 2, b, (V), (B), (3).

97. *International & G. N. R. Co. v. Williams*, 20 Tex. Civ. App. 587, 50 S. W. 732, need not allege acts of passengers, although he may do so.

[a] A count states a cause of action which alleges that plaintiff was a passenger, that he was exercising due care, that his position on the rear platform was insecure by reason of the crowd of passengers, that defendant ran its car upon a switch in such a way that the passengers were thrown against the plaintiff, whereby he was thrown from the platform and injured. *Ruch v. Aurora, E. & C. R. Co.*, 150 Ill. App. 329. See also *Florida E. C. R. Co. v. Hayes*, 66 Fla. 589, 64 So. 274, where plaintiff was thrown from crowded car by sudden stop.

[b] *Due Care of Passenger.* — After verdict, the declaration will not be held insufficient for a failure to allege the exercise of due care for his safety in boarding a crowded car from which he is later pushed or thrown. *Kordick v. Chicago Rys. Co.*, 187 Ill. App. 74, probably the declaration would be insufficient as against demurrer.

98. *Atlantic Coast L. R. Co. v. Powell*, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769, 9 Ann. Cas. 553.

99. *Southern R. Co. v. Harrington*, 166 Ala. 630, 52 So. 57, 139 Am. St. Rep. 59. See *Atlantic Coast L. R. Co. v. Powell*, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769, 9 Ann. Cas.

553, holding a cause of action to be stated.

[a] That the person whose attention was called to the lack of heat was connected with the operation of the train must be shown. *Atlantic Coast L. R. Co. v. Powell*, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769, 9 Ann. Cas. 553.

1. *Eldridge v. Long Island R. Co.*, 1 Sandf. (N. Y.) 89.

[a] But he must show that the appearance was such as to impress a reasonably prudent person of the existence of the peril and such as to cause him to jump. *Birmingham Ry. & Elec. Co. v. Butler*, 135 Ala. 388, 33 So. 33. See *Selma St. & S. Ry. Co. v. Owen*, 132 Ala. 420, 31 So. 598; *Moore v. Metropolitan S. R. Co.*, 189 Mo. App. 555, 176 S. W. 1120.

[b] It is sufficient for him to show that he had reasonable cause to apprehend an accident and that the danger was, and that he believed it was imminent and impending, and that in consequence thereof he jumped and was injured. *Chitty v. St. Louis, I. M. & S. R. Co.*, 148 Mo. 64, 49 S. W. 868.

[c] *Defective Appliances.* — If plaintiff alleges that control over the car is lost by reason of defective appliances, the particular appliance must be specified. *Newton v. Peoples R. Co.*, 4 Penn. (Del.) 350, 55 Atl. 2, holding that an allegation of "insufficient brakes or other appliances" to stop the car is too general.

Form of complaint, see 9 STANDARD PROC. 942, 646.

2. See the following: Ala.—Bir-

(12.) *Assault and Disorderly Conduct of Fellow Passengers.* — A complaint for damages for failure to protect a passenger from the assaults of his fellow passengers must allege that the carrier knew or from the attendant circumstances should have known of the threatened injury in time to have averted it.³ It need not allege that the assault was not in self defense.⁴ Nor need vulgar language used by fellow passengers be set out.⁵

(13.) *Injuries by Elevators.* — Complaints for injuries received from passenger elevators must state a cause of action in accordance with the general rules.⁶

If the elevator drops, negligence may be alleged in general terms,⁷

mingham Ry. L. & P. Co. v. Parker, 161 Ala. 248, 50 So. 55 (assault on female passenger); Lampkin v. Louisville & N. R. Co., 106 Ala. 287, 17 So. 448 (holding complaint sufficient); Birmingham Ry. L. & P. Co. v. Tate, 7 Ala. App. 517, 61 So. 32. Ind.—Citizens' St. R. Co. v. Willoebey, 134 Ind. 563, 33 N. E. 627 (holding complaint sufficient when first attacked on error. N. Y.—Ray v. United Traction Co., 96 App. Div. 48, 89 N. Y. Supp. 49, complaint alleging assault but no ejection is a complaint for assault and battery only. Wash.—Casey v. Oakes, 17 Wash. 409, 50 Pac. 53 (complaint states a cause of action), and generally the title, "Assault and Battery."

[a] He need not show (1) that he was on the car at the time of the assault (Alabama City G. & A. R. Co. v. Sampley, 169 Ala. 372, 53 So. 142); or, (2) according to some authorities, that the servant was acting in the course of his employment. See *supra*, II, B, 2, b, (V), (A), (5), (b), Nor (3) need the insulting language of the servant be pleaded. Houston & T. C. R. Co. v. Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902.

3. Southern R. Co. v. Haynes, 186 Ala. 60, 65 So. 339; Nashville, C. & St. L. Ry. v. Crosby, 183 Ala. 237, 62 So. 889; Southern R. Co. v. Hanby, 183 Ala. 255, 62 So. 871; Baltimore & O. R. Co. v. Rudy, 118 Md. 42, 57, 84 Atl. 241.

[a] *Cure of Omission.* — A general allegation that the defendant negligently failed to perform its duty to the plaintiff does not cure the omission of the allegation in the text. Southern R. Co. v. Hanby, 183 Ala. 255, 62 So. 871. Compare Holly v. Atlanta St. R. R., 61 Ga. 215, 34 Am. Rep. 97.

4. Culberson v. Empire Coal Co.,

156 Ala. 416, 47 So. 237, matter of defense.

5. St. Louis S. W. R. Co. v. Wright, 33 Tex. Civ. App. 80, 75 S. W. 565. See the titles, "Obscenity;" "Profanity."

[a] *Sufficient Complaint.* — Seaboard Air Line R. Co. v. Mobley, 194 Ala. 211, 69 So. 614. See also Houston, E. & W. T. Ry. Co. v. Perkins, 21 Tex. Civ. App. 508, 52 S. W. 124.

6. See the title, "Negligence" and *supra*, II, B, 2, b, (V), (A).

[a] That the elevator had stopped before plaintiff's decedent attempted to board it must be shown. Ohio Valley Tr. Co. v. Wernke, 42 Ind. App. 326, 84 N. E. 999.

[b] An allegation of opening of the door thereby inviting the passenger to alight is a conclusion of law. Bullock v. Butler Exchange Co., 22 R. I. 105, 46 Atl. 273. See the title, "Conclusions of Law."

[c] A complaint by a person injured by falling into an elevator shaft must not show the plaintiff to be guilty of contributory negligence. Kauffman v. Machin Shirt Co., 167 Cal. 506, 140 Pac. 15 (holding complaint demurrable); Tippecanoe L. & T. Co. v. Jester, 180 Ind. 357, 101 N. E. 915, L. R. A. 1915 E, 721.

[d] *Sudden Starting.* — Bullock v. Butler Exchange Co., 22 R. I. 105, 46 Atl. 273.

7. Champagne v. A. Hamburger & Sons, 169 Cal. 683, 147 Pac. 954.

[a] An allegation of negligence is sufficient which states that the fall of the elevator was occasioned through the negligence of the defendant in failing to properly operate it. Champagne v. A. Hamburger & Sons, 169 Cal. 683, 147 Pac. 954.

without alleging the nature of the defects causing the accident.*

(VI.) Answer or Plea. — The general rules relating to answers and pleas generally apply to answers in this action.⁹ Thus, if defendant relies on the defense of contributory negligence, he must generally set it up in his answer.¹⁰

(VII.) Issues. — In accordance with the general rules,¹¹ a plea of general issue does not put in issue allegations that the defendant company is a corporation,¹² that it owns and controls¹³ the tracks and

8. *Winheim v. Field*, 107 Ill. App. 145. See also *Steiskal v. Marshall Field & Co.*, 142 Ill. App. 154.

[a] Knowledge by the defendant of the defect need not be alleged. *Winheim v. Field*, 107 Ill. App. 145.

9. See *infra*, this note; and generally the titles "Answers;" "Denials;" "Pleas."

[a] That plaintiff was not a passenger must be specially pleaded. *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 434, 435, 43 So. 318.

[b] That plaintiff rode on a free pass is bad as amounting to a general issue. *Kimball v. Boston C. & M. R. Co.*, 55 Vt. 95.

[c] That plaintiff boarded the train without invitation includes both express and implied invitations. *Lawrence v. Kaul Lumb. Co.*, 171 Ala. 300, 55 So. 111.

[d] Defense as to lack of ownership or control over the railroad or cars must be specially pleaded. *Pell v. Joliet, P. & A. R. Co.*, 238 Ill. 510, 87 N. E. 542.

[e] Defense that plaintiff agreed to assume the risk must be set up in the answer if the plaintiff's allegations do not show it. *Pittsburgh, C. C. & St. L. Ry. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Citizens' St. R. Co. v. Twiname*, 111 Ind. 587, 13 N. E. 55; *Yazoo & M. V. R. Co. v. Grant*, 86 Miss. 565, 38 So. 502, 109 Am. St. Rep. 723.

[f] If defendant desires to rely upon the contract relating to immunities from liability for personal injuries, it should be plainly alleged. *Fish v. Delaware, L. & W. R. Co.*, 211 N. Y. 374, 105 N. E. 661.

[g] Plea setting up negligence of a third party without negating the defendant's negligence and without showing it to be the sole proximate cause of the injury is insufficient. *Western Ry. of Alabama v. McGraw*, 183 Ala. 220, 62 So. 772.

10. See *infra*, this note.

Vol. XXI

[a] Where a person on the platform is killed by a projection from a train, the plea must negative that he was standing on the platform for reception and discharge of passengers or charge him with knowledge of the projection. *Metcalf v. St. Louis & S. F. R. Co.*, 156 Ala. 240, 47 So. 158.

[b] Negligent Alighting. — *Dallas Consol. E. St. R. Co. v. Barnes* (Tex. Civ. App.), 119 S. W. 122

[c] A plea that plaintiff jumped from a moving car is defective if it does not allege the speed of the car, even if it alleges that he jumped in a direction opposite from that in which the car was moving. *Birmingham R. L. & P. Co. v. Dickerson*, 154 Ala. 523, 45 So. 659. Compare *Galveston, H. & S. A. R. Co. v. Castillo* (Tex. Civ. App.), 83 S. W. 25.

[d] Where a passenger falls over obstructions in the aisles, the plea must state facts showing a duty to look out for such obstructions. *Atkinson v. Dean* (Ala.), 73 So. 479.

[e] As to necessity for pleading the defense of contributory negligence and the manner thereof generally, see the title "Negligence."

Negating defense in complaint, see *supra*, II, B, 2, b, (V), (A), (6).

11. See generally the titles "Denials;" "Issues in Pleading and Practice."

[a] An admission that the defendant is a street railroad corporation is an admission that it is a common carrier of passengers. *Burbridge v. Kansas City Cable R. Co.*, 36 Mo. App. 669, 680.

12. *Chicago & E. I. R. R. Co. v. Schmitz*, 211 Ill. 446, 459, 71 N. E. 1050.

As to issues raised by general issue generally, see 7 STANDARD PROC. 66.

13. *Patterson v. Jacksonville T. Co.*, 213 Fed. 289, 130 C. C. A. 13; *Pell v. Joliet, P. & A. R. Co.*, 238 Ill. 510, 87 N. E. 542; *Chicago & E. I. R. Co. v.*

cars, or that the operatives in charge of the train were its servants and employees.¹⁴

(VIII.) **Variance and Proof.** — The general rules as to variance and proof are applicable to actions for damages for injuries to passengers.¹⁵ So where the plaintiff particularizes the acts of negligence, the proof must sustain the averments; recovery cannot be had on the proof of a negligent act or breach of duty not alleged as causing the injury complained of,¹⁶ even where the law raises a presumption of

Schmitz, 211 Ill. 446, 459, 71 N. E. 1050.

14. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; *Hill v. Chicago City R. Co.*, 126 Ill. App. 152.

15. See the following: **U. S.**—*Washington & G. R. Co. v. Hickey*, 166 U. S. 521, 531, 17 Sup. Ct. 661, 41 L. ed. 1101. **Ala.**—*Birmingham Ry. L. & P. Co. v. Glenn*, 179 Ala. 263, 60 So. 111; *Southern R. Co. v. Melton*, 158 Ala. 404, 47 So. 1008; *Louisville & N. R. Co. v. Quinn*, 146 Ala. 330, 39 So. 756; *Kansas City, M. & B. R. Co. v. Matthews*, 142 Ala. 298, 312, 39 So. 207. **D. C.**—*Washington & G. R. Co. v. Hickey*, 5 App. Cas. 436, 468, immaterial variance as to whether passenger jumped or was pushed from car in the excitement. **Ga.** *Gosnell v. Central of Ga. R. Co.*, 17 Ga. App. 67, 86 S. E. 90 (where plaintiff was not thrown off by the jerk as alleged, but jumped after the train was in motion, the variance is fatal); *Findley v. Central of Ga. R. Co.*, 7 Ga. App. 180, 66 S. E. 485, holding variance immaterial where plaintiff alleged she was jerked off the car and proof shows she jumped to save herself from falling. **Ind.**—*Evansville & T. H. R. Co. v. Mills*, 37 Ind. App. 598, 77 N. E. 608; *Louisville, N. A. & C. R. Co. v. Renicker*, 8 Ind. App. 404, 35 N. E. 1047. **Ky.**—*Chicago, St. L. & N. O. R. Co. v. Rowell*, 151 Ky. 313, 151 S. W. 950. **Mo.**—*Wright v. Kansas City T. R. Co.*, 195 Mo. App. 480, 193 S. W. 963 (immaterial variance as to whether luggage was pushed off rack); *Johnson v. St. Louis & S. F. R. Co.*, (Mo. App.), 190 S. W. 352 (as to sudden jerk); *Cornell v. Chicago, R. I. & P. R. Co.*, 143 Mo. App. 598, 128 S. W. 1021, variance as to whether the plaintiff paid his fare to a ticket agent or conductor immaterial. **N. Y.**—*Willis v. Metropolitan St. R. Co.*, 76 App. Div. 340, 78 N. Y. Supp. 478, 33 Civ. Proc. 199, *overruling* *Block v. Third Ave. R. Co.*, 60 App. Div. 191, 69 N. Y. Supp. 1107. **Tex.**—*Missouri, K. & T. R. Co.*

v. Ball, 25 Tex. Civ. App. 500, 61 S. W. 327 (variance as to refusal of permission to ride in coach provided for white people); *Houston & T. C. R. Co. v. Moss* (Tex. Civ. App.), 63 S. W. 894. **Wash.**—*Henry v. Navy Yard Route*, 94 Wash. 526, 162 Pac. 584.

See generally the title, "**Variance and Failure of Proof.**"

[a] **Acts of Servants.**—*Powers v. Chicago, C. R. Co.*, 185 Ill. App. 158; *Chicago T. T. R. Co. v. Young*, 118 Ill. App. 226; *Hamilton v. Metropolitan St. R. Co.*, 114 Mo. App. 504, 89 S. W. 893.

[b] **Defective Appliances.**—*Brod v. St. Louis Transit Co.*, 115 Mo. App. 202, 91 S. W. 993.

[c] **Failure (1) to prove an allegation that the defendants are joint owners of the conveyance does not amount to a failure of proof** (*Frink v. Potter*, 17 Ill. 406; *McCall v. Forsyth*, 4 Watts & S. [Pa.] 179), unless (2) the action is based on the contract. *Frink v. Potter, supra*.

16. See the following: **Ala.**—*Southern R. Co. v. Hundley*, 151 Ala. 378, 44 So. 195, injury in alighting. **Del.** *McAllister v. People's R. Co.*, 4 Penne. 272, 54 Atl. 743. **Ill.**—*Lake St. El. R. Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374; *Chicago, B. & N. R. Co. v. Hawk*, 36 Ill. App. 327. **Mich.**—*Flint & P. M. R. Co. v. Stark*, 38 Mich. 714. **Mo.** *Roscoe v. Metropolitan S. R. Co.*, 202 Mo. 576, 101 S. W. 32; *McGrath v. St. Louis T. Co.*, 197 Mo. 97, 105, 94 S. W. 872; *Gunn v. United Rys. Co.*, 177 Mo. App. 512, 160 S. W. 540. **Mont.** *Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867. **Tex.**—*Norton v. Galveston, H. & S. A. R. Co.* (Tex. Civ. App.), 108 S. W. 1044. **Eng.**—*Mayor v. Humphries*, 1 Carr. & P. 251, 12 E. C. L. 151.

[a] **Proof of the substance of the negligent acts set forth will be sufficient.** *Terre Haute & I. R. Co. v. Sheeks*, 155 Ind. 74, 93, 56 N. E. 434.

[b] **Under a general allegation (1) of negligence in starting a train while**

negligence against the carrier,¹⁷ although some cases hold that the allegation of particular acts of negligence do not deprive the passenger of the right to rely on the doctrine of *res ipsa loquitur*.¹⁸ If the action is based solely upon a wilful or wanton tort, a recovery cannot be had for simple negligence,¹⁹ or vice versa.²⁰ And it has been held that an averment that the defendant while acting through its servants wantonly and wilfully injures a passenger is not sustained by proof of the wanton act of the servant alone.²¹

plaintiff is boarding or alighting, proof is admissible to show that the carrier did not stop its train a reasonable time to allow passengers to board or alight (*Indianapolis S. R. Co. v. Wall*, 54 Ind. App. 43, 101 N. E. 680; *Lake Erie & W. R. Co. v. Beals*, 50 Ind. App. 450, 98 N. E. 453), or (2) that it started the train knowing a passenger was boarding or alighting. *Indianapolis S. R. Co. v. Wall*, 54 Ind. App. 43, 101 N. E. 680; *Lake Erie & W. R. Co. v. Beals*, 50 Ind. App. 450, 98 N. E. 453.

[c] Where it is alleged that a car stopped and was jerked (1) while the plaintiff was attempting to board or alight, recovery cannot be had on proof that the car was moving at an appreciable, though slow, rate of speed. *Chicago City R. Co. v. Gates*, 135 Ill. App. 180; *Saeger v. Wabash R. Co.*, 131 Mo. App. 282, 110 S. W. 686; *Green v. Metropolitan S. R. Co.*, 122 Mo. App. 647, 99 S. W. 28. (2) Proof that the speed had been reduced to an imperceptible or perfectly harmless forward motion constitutes an immaterial variance. *Kinyoun v. Metropolitan S. R. Co.*, 153 Mo. App. 477, 134 S. W. 15; *Saeger v. Wabash R. Co.*, 131 Mo. App. 282, 110 S. W. 686; *Feagin v. Gulf, C. & S. F. R. Co.*, 45 Tex. Civ. App. 251, 100 S. W. 346. *Contra*, *Walsh v. Nassau Elec. R. Co.*, 133 App. Div. 144, 117 N. Y. Supp. 358; *Goldstein v. Metropolitan St. R. Co.*, 49 Misc. 647, 98 N. Y. Supp. 862; *Wiener v. Fifth Ave. C. Co.*, 164 N. Y. Supp. 667.

[d] Under an allegation that the train was jerked after coming to a standstill, a recovery may be had whether the proof shows that the starting and jerking was immediately before or after the stop. *Hopkins v. Chicago, M. & St. P. R. Co.*, 128 Wis. 403, 107 N. W. 330, the negligence is the jerking, the allegation as to the stopping is not an indispensable element to the cause of action. *Converse*, *Cincinnati, H. & I. R. Co. v. Revalee*, 17 Ind. App. 657, 46 N. E. 352.

[e] An averment that injuries were caused by a collision, derailment or the like is not supported by proof that the passenger jumped to escape injury and was injured. *McAllister v. People's R. Co.*, 4 Penne. (Del.) 272, 54 Atl. 743; *Chitty v. St. Louis, I. M. & S. R. Co.*, 148 Mo. 64, 72, 49 S. W. 868. But see *Smith v. St. Paul, M. & M. R. Co.*, 30 Minn. 169, 14 N. W. 797.

[f] Proof of being thrown on the platform of a car will not support an allegation of being thrown on the ground and dragged. *Chicago City R. Co. v. Carrick*, 133 Ill. App. 332.

17. Fla.—*Warfield v. Hepburn*, 62 Fla. 409, 57 So. 618. Ind.—*Terre Haute & I. R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434; *Southern R. Co. v. Adams*, 52 Ind. App. 322, 100 N. E. 773. Mo.—*Hamilton v. Metropolitan St. R. Co.*, 114 Mo. App. 504, 89 S. W. 893. Tex.—*Missouri, K. & T. R. Co. v. Vance* (Tex. Civ. App.), 41 S. W. 167; *Johnson v. Galveston, H. & N. R. Co.*, 27 Tex. Civ. App. 616, 66 S. W. 906.

Effect of alleging particular acts of negligence, see *supra*, II, B, 2, b, (V), (A), (4).

18. *Hoskins v. Northern Pac. R. Co.*, 39 Mont. 394, 402, 102 Pac. 988, *overruling* *Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867 (holding the allegations as to specific causes are to be considered surplusage); *Walters v. Seattle, R. & S. R. Co.*, 48 Wash. 233, 93 Pac. 419, 24 L. R. A. (N. S.) 788, plaintiff need not prove the particular cause of the accident even though alleged.

19. Ala.—*Highland Ave. & B. R. Co. v. Winn*, 93 Ala. 306, 9 So. 509; *Louisville & N. R. Co. v. Johnston*, 79 Ala. 436. Ind.—*Indiana, B. & W. Ry. Co. v. Burdge*, 94 Ind. 46. S. C.—*Crosby v. Seaboard A. L. R. Co.*, 81 S. C. 24, 61 S. E. 1064.

20. *Newberry v. Atkinson*, 184 Ala. 567, 64 So. 46.

21. *Newberry v. Atkinson*, 184 Ala. 567, 64 So. 46, three judges dissenting

Allegations as to the place of injury must be proved as laid.²²

Proof Under General Issue or Denial. — Under a general issue, defendant may prove the injury was due to unavoidable accident,²³ and may justify the conduct of its servant in an action for failure to protect a passenger from the wrongful conduct of its servant.²⁴ Under a general denial, he may prove that the servants operating the train were not his servants, but those of a receiver's.²⁵

(IX.) **Questions of Law and Fact.** — (A.) **GENERALLY.** — Questions of law and fact in such actions are submitted to the court or jury, as the case may be, in accordance with the general rules regulating the province of the court and jury.²⁶

(B.) **NEGLIGENCE.** — The question of the negligence of the carrier is generally one for the jury in accordance with the general rules relating to questions of law and fact.²⁷

—the allegation in effect charges the carrier with directing the act.

22. *Chicago City R. Co. v. McMeen*, 206 Ill. 108, 114, 68 N. E. 1093.

[a] **Immaterial variances** are not fatal. *Ala.*—*Birmingham Ry. L. & P. Co. v. Glenn*, 179 Ala. 263, 60 So. 111, where the venue of the offense was placed at East Lake and the evidence showed it occurred at the loop at E. L. and that the station designated as E. L. was at another place, the variance is immaterial. *Mo.*—*Harriman v. Dunham* (Mo. App.), 196 S. W. 443, holding variance immaterial where it was alleged car jerked at street corner and proof showed the jerk to have been 12 or 15 feet therefrom. *Tex.*—*Paris Transit Co. v. Alexander* (Tex. Civ. App.), 90 S. W. 1119, holding it to be immaterial whether a car stopped on one side of the street or the other in an action for injury by sudden starting while alighting.

23. *Carlisle v. Central of Georgia R. Co.*, 183 Ala. 195, 62 So. 759.

24. *Binder v. Georgia R. & E. Co.*, 13 Ga. App. 381, 79 S. E. 216, but it would be otherwise if the primary liability was based on the tort of the employee.

25. *Kansas & G. S. L. Ry. Co. v. Dorough*, 72 Tex. 108, 10 S. W. 711.

26. See *infra* this note, and the title "**Province of Court and Jury.**"

[a] Thus (1) it is a question for the jury in accordance with the general rules regulating province of the court and jury, whether a person was invited to board a car (*North Chicago St. R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672), whether (2) it is reasonably necessary for a passenger to ride

on the platform of a street car (*Brunnchow v. Rhode Island Co.*, 26 R. I. 211, 58 Atl. 656), whether (3) a conductor has a reasonable time to take up tickets before the next stop (*Louisville & N. R. Co. v. Seale*, 160 Ala. 584, 49 So. 323), and (4) whether a railroad company, by a long continued course of action, induced the public to believe that they are invited to board its trains at a place other than a regular station. *Chicago & W. I. R. Co. v. Doan*, 195 Ill. 168, 62 N. E. 826.

[b] **Place of Passenger on Freight Train.** — Where the bill of lading authorized the shipper of goods to ride on the freight, but was silent as to where he should ride, it was for the jury to say whether he should have ridden in the caboose or the freight car. *Pittsburgh, C. C. & St. L. Ry. Co. v. Brown*, 178 Ind. 11, 97 N. E. 145, 98 N. E. 625.

[c] **Whether a given act** (1) is within the scope of the servant's employment is a question of law (*Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413; *Dwinnelle v. New York C. & H. R. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224; *Barry v. Union Ry. Co.*, 105 App. Div. 520, 94 N. Y. Supp. 449); unless (2) the evidence is such that more than one inference may be drawn with respect thereto. See generally the title "**Master and Servant.**" But (3) the question as to the capacity in which the servant acts at the time of the wrongful act is for the jury. *Philadelphia, B. & W. R. Co. v. Green*, 110 Md. 32, 71 Atl. 986.

27. See the following. *U. S.*—*Chicago, B. & Q. R. Co. v. Schrimpf*, 236

(C.) CONTRIBUTORY NEGLIGENCE. — (1.) *In General.* — Whether a person is guilty of contributory negligence under the circumstances disclosed in a case is a question of fact.²⁸

(2.) *In Boarding or Alighting From Moving Car.* — While it has been held to be contributory negligence as a matter of law to board or leave a moving train or street car,²⁹ the weight of authority is to the effect that such conduct does not necessarily constitute negligence per

Fed. 200, 149 C. C. A. 390, in exposure of sick person. **Ala.**—Southern R. Co. v. Wooley, 158 Ala. 447, 48 So. 369 (in directing plaintiff into wrong car); Alabama G. S. R. Co. v. Gilbert, 6 Ala. App. 372, 60 So. 542, negligence as to speed of train. **Ark.**—Robinson v. Little Rock R. & E. Co., 113 Ark. 227, 168 S. W. 1125, where passenger was thrown from car going round a curve. **Ill.** Pell v. Joliet, P. & A. R. Co., 238 Ill. 510, 87 N. E. 542 (failing to put bars on windows); Ward v. Chicago & N. W. Ry. Co., 165 Ill. 462, 46 N. E. 365. **Ind.**—Pittsburgh, C. & St. L. R. Co. v. Spencer, 98 Ind. 186. **Mo.**—Wright v. Kansas City T. R. Co., 195 Mo. App. 480, 193 S. W. 963 (as to luggage racks); Cramer v. Springfield T. Co., 112 Mo. App. 350, 87 S. W. 24, in starting the car. **S. C.**—Madden v. Port Royal & W. C. Ry. Co., 35 S. C. 381, 14 S. E. 713, 28 Am. St. Rep. 855. **Tex.** Stewart v. International & G. N. R. Co., 53 Tex. 289, 37 Am. Rep. 753, negligence in failure to provide lights at depot. **Wis.**—Pool v. Chicago, M. & St. P. Ry. Co., 56 Wis. 227, 14 N. W. 46. See generally the titles, “Negligence;” “Province of Judge and Jury.”

[a] **Notice of Arrival at Destination.** — Whether it is negligence for the defendant’s servant to omit to keep a promise to give a passenger notice of arrival of a train at his destination is for the jury. Missouri, K. & T. R. Co. v. Miller, 20 Tex. Civ. App. 570, 50 S. W. 168.

28. **U. S.**—Chesapeake & O. R. Co. v. King, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102, in failing to look for trains before crossing track. **Cal.**—Hillebrand v. Standard Biscuit Co., 139 Cal. 233, 73 Pac. 163; Nilson v. Oakland Traction Co., 10 Cal. App. 103, 101 Pac. 413, 21 Am. Neg. Rep. 566. **Ind.**—Indiana Union Tract. Co. v. Jacobs, 167 Ind. 85, 78 N. E. 325 (in alighting at unsafe place in the dark); Citizens’ St. Ry. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935; Lake Erie & W. R. Co. v.

Cotton, 45 Ind. App. 580, 91 N. E. 253. **Ia.**—Burger v. Omaha & C. B. S. R. Co., 139 Iowa 645, 117 N. W. 35, 130 Am. St. Rep. 343. **Mo.**—Allen v. St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142; Leslie v. Wabash, St. L. & P. Ry. Co., 88 Mo. 50; Scott v. Metropolitan S. R. Co., 138 Mo. App. 196, 120 S. W. 131. **Pa.**—Goehring v. Beaver Val. Tract. Co., 222 Pa. 600, 72 Atl. 259, where plaintiff stood on platform of derailed car. **Wash.**—Elliott v. Seattle, R. & S. R. Co., 68 Wash. 129, 122 Pac. 614, 39 L. R. A. (N. S.) 608, alighting on wrong side of car.

See generally the titles, “Negligence;” “Province of Judge and Jury.”

[a] Unless the evidence is such that but one reasonable inference can be drawn therefrom. Pittsburgh, C. C. & St. L. Ry. Co. v. Klitch, 11 Ind. App. 290, 37 N. E. 560.

[b] **Negligence in Moving About Coach.** — Louisville & N. R. Co. v. Ashley, 169 Ky. 330, 183 S. W. 921.

29. **Ore.**—Armstrong v. Portland R. Co., 52 Ore. 437, 97 Pac. 715. **Pa.** Quinn v. Philadelphia Rapid Transit Co., 224 Pa. 162, 73 Atl. 319; Boulfrois v. United Traction Co., 210 Pa. 263, 59 Atl. 1007, 105 Am. St. Rep. 809, 2 Am. & Eng. Ann. Cas. 938; Hunterson v. Union Traction Co., 205 Pa. 568, 55 Atl. 543; Neff v. Harrisburg T. Co., 192 Pa. 501, 43 Atl. 1020, 73 Am. St. Rep. 825; Victor v. Pennsylvania R. Co., 164 Pa. 195, 30 Atl. 381; New York, L. E. & W. R. Co. v. Enches, 127 Pa. 316, 17 Atl. 991. **Tenn.**—Knoxville Traction Co. v. Carroll, 113 Tenn. 514, 82 S. W. 313, to step from a moving car, without invitation from the carrier before it reaches its stopping point is negligence.

[a] There are some rare exceptions to this rule. But an exception does not exist where a motorman heeds a signal to stop, and an intending passenger knowing such fact by the slackened speed boards a car running three or four miles an hour. Hunterson v.

se,³⁰ but that it is a question of mixed law and fact whether the passenger is negligent in a particular case.³¹ Generally the question is for the jury.³² But where there are exceptional circumstances attending the attempt to board or alight which render the attempt ob-

Union Traction Co., 205 Pa. 568, 55 Atl. 543.

30. **U. S.**—Puget Sound E. Ry. v. Felt, 181 Fed. 938, 104 C. C. A. 402. **Ala.**—Birmingham Ry. L. & P. Co. v. Jung, 161 Ala. 461, 49 So. 434; Birmingham R. L. & P. Co. v. Dickerson, 154 Ala. 523, 45 So. 659; Watkins v. Birmingham Ry. & Elec. Co., 120 Ala. 147, 24 So. 392, 43 L. R. A. 297. **D. C.** Brown v. Washington & G. R. Co., 11 App. Cas. 37. **N. Y.**—Lobsenz v. Metropolitan St. Ry. Co., 72 App. Div. 181, 76 N. Y. Supp. 411, street car case. **Va.**—Newport News & O. P. R. & E. Co. v. McCormick, 106 Va. 517, 56 S. E. 281.

Compare Richmond T. Co. v. Williams, 102 Va. 253, 46 S. E. 292.

31. Newport News & O. P. R. & E. Co. v. McCormick, 106 Va. 517, 56 S. E. 281.

32. **Ala.**—Birmingham R. L. & P. Co. v. Lee, 153 Ala. 79, 45 So. 292; Kansas City, M. & B. R. Co. v. Matthews, 142 Ala. 298, 39 So. 207; Sweet v. Birmingham R. & Elec. Co., 136 Ala. 166, 33 So. 886. **Cal.**—Finkeldey v. Omnibus C. Co., 114 Cal. 28, 45 Pac. 996; Nilson v. Oakland Traction Co., 10 Cal. App. 103, 101 Pac. 413, 21 Am. Neg. Rep. 566. **Colo.**—Posten v. Denver Consol. T. Co., 11 Colo. App. 187, 53 Pac. 391. **Del.**—Betts v. Wilmington City R. Co., 3 Penne. 448, 53 Atl. 358. **Ill.**—Chicago U. T. Co. v. Lundahl, 215 Ill. 289, 74 N. E. 155; Cicero & P. S. R. Co. v. Meixner, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331. **Ind.** Indianapolis St. Ry. Co. v. Hockett, 159 Ind. 677, 66 N. E. 39; Crump v. Davis, 33 Ind. App. 88, 70 N. E. 886. **Ia.** Root v. Des Moines City Ry. Co., 113 Iowa 675, 83 N. W. 904. **Ky.**—Ford v. Paducah C. Ry., 29 Ky. L. Rep. 752, 96 S. W. 441. **La.**—Jones v. Canal & C. R. Co., 109 La. 213, 33 So. 200. **Md.** United Rys. & Elec. Co. v. Rosik, 107 Md. 138, 68 Atl. 511; New York P. & N. R. Co. v. Coulbourn, 69 Md. 360, 16 Atl. 208, 9 Am. St. Rep. 430, 1 L. R. A. 541. **Mass.**—Payne v. Springfield St. R. Co., 203 Mass. 425, 89 N. E. 536; Block v. Worcester, 186 Mass. 526, 72 N. E. 77; McDonough v. Metropolitan

R. Co., 137 Mass. 210. **Mich.**—Burke v. Bay City T. & E. Co., 147 Mich. 172, 110 N. W. 524. **Minn.**—Cody v. Duluth S. R. Co., 94 Minn. 74, 102 N. W. 201, 397; Schacherl v. St. Paul City Ry. Co., 42 Minn. 42, 43 N. W. 837, horse car. **Mo.**—Green v. Metropolitan S. R. Co., 122 Mo. App. 647, 99 S. W. 28; Spencer v. St. Louis T. Co., 111 Mo. App. 653, 86 S. W. 593 (speed of a fast walk); O'Mara v. St. Louis T. Co., 102 Mo. App. 202, 76 S. W. 680, where car was going three or four miles per hour. **Neb.**—Omaha St. Ry. Co. v. Craig, 39 Neb. 601, 58 N. W. 209. **N. J.**—Murphy v. North Jersey St. R. Co., 71 N. J. L. 5, 58 Atl. 1018; New Jersey T. Co. v. Gardner, 60 N. J. L. 571, 38 Atl. 669. **N. Y.**—Morrison v. Broadway & S. A. R. Co., 130 N. Y. 166, 29 N. E. 105 (where plaintiff was seventy years of age); Eppendorf v. Brooklyn C. & N. R. Co., 69 N. Y. 195, 25 Am. Rep. 171, street car. **Ohio.**—Ashtabula Rapid Transit Co. v. Holmes, 67 Ohio St. 153, 65 N. E. 877. **R. I.**—Rathbone v. Union R. Co., 13 R. I. 709. **S. C.** Norton v. Columbia S. R. L. & P. Co., 83 S. C. 26, 64 S. E. 962; Creech v. Charleston & W. C. Ry., 66 S. C. 528, 45 S. E. 86. **Tex.**—Dallas R. T. Co. v. Payne, 98 Tex. 211, 82 S. W. 649; Kansas & G. S. L. Ry. Co. v. Brough, 72 Tex. 108, 10 S. W. 711. **Utah.**—Paul v. Salt Lake C. R. Co., 30 Utah 41, 83 Pac. 563. **Wash.**—Brown v. Seattle City Ry. Co., 16 Wash. 465, 47 Pac. 890.

[a] Negligence in boarding a slowly moving train is for the jury. Birmingham R. L. & P. Co. v. Lee, 153 Ala. 79, 45 So. 292; Birmingham Ry., L. & P. Co. v. Willis, 143 Ala. 220, 38 So. 1016.

[b] Where Passenger Is a Woman. **Ia.**—Root v. Des Moines City Ry. Co., 113 Iowa 675, 83 N. W. 904. **Md.**—Central Ry. Co. v. Smith, 74 Md. 212, 21 Atl. 706. **Mo.**—Duncan v. Wyatt Park R. Co., 48 Mo. App. 659; Fortune v. Missouri R. Co., 10 Mo. App. 252. **N. Y.** Conley v. Forty-Second St. M. & St. N. A. R. Co., 24 Jones & S. 607, 2 N. Y. Supp. 229. **R. I.**—Rathbone v. Union R. Co., 13 R. I. 709.

[c] Where Motion Is Sole Cause of

viously dangerous, contributory negligence is a matter of law.³³ Some cases apply different rules to cases of steam railroads and street cars;³⁴ but others do not.³⁵

(3.) *In Exposing Body Beyond Side of Car.*—It has generally been held to be a question for the jury whether a passenger on a street car is guilty of negligence in exposing portions of his body beyond the side of the car, while in motion.³⁶ The same has been held to be

Injury.—*Murphy v. North Jersey St. R. Co.*, 71 N. J. L. 5, 58 Atl. 1018; *Schmidt v. North Jersey St. Ry. Co.*, 66 N. J. L. 424, 49 Atl. 438. See also *Dockham v. North Jersey S. R. Co.* (N. J. L.), 66 Atl. 961.

33. Ala.—*Birmingham R. L. & P. Co. v. Dickerson*, 154 Ala. 523, 45 So. 659; *Hunter v. Louisville & N. R. Co.*, 150 Ala. 594, 43 So. 802, 9 L. R. A. (N. S.) 848; *Watkins v. Birmingham Ry. & Elec. Co.*, 120 Ala. 147, 150, 24 So. 392, 43 L. R. A. 297. **Colo.**—*Posten v. Denver Consol. T. Co.*, 11 Colo. App. 187, 53 Pac. 391. **Del.**—*Betts v. Wilmington City R. Co.*, 3 Penne. 448, 53 Atl. 358. **Mo.**—*Joyce v. Metropolitan St. R. Co.*, 219 Mo. 344, 118 S. W. 21, where there was an obstruction in plain view close to the car. **N. Y.** *Reidy v. Metropolitan St. Ry. Co.*, 27 Misc. 527, 58 N. Y. Supp. 326. **R. I.** *Lee v. Rhode Island Co.*, 68 Atl. 475, where plaintiff pursued street car after it started. **Tex.**—See *Lewis v. Houston Elec. Co.*, 39 Tex. Civ. App. 625, 88 S. W. 489, 112 S. W. 593.

[a] These circumstances may be (1) the great speed of the train (**Ala.**—*Hunter v. Louisville & N. R. Co.*, 150 Ala. 594, 43 So. 802, 9 L. R. A. (N. S.) 848 (train running from 6 to 10 miles per hour); *Birmingham Ry., L. & P. Co. v. Glover*, 142 Ala. 492, 38 So. 836 (getting off backwards, train going five or six miles per hour); *Watkins v. Birmingham R. & E. Co.*, 120 Ala. 147, 152, 24 So. 392, 43 L. R. A. 297. **Colo.** *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. 848, eleven miles per hour. **Ga.**—*Masterson v. Macon City & S. St. R. Co.*, 88 Ga. 436, 14 S. E. 591, twenty miles per hour. **Mo.**—*O'Mara v. St. Louis T. Co.*, 102 Mo. 202, 76 S. W. 680. **W. Va.**—*Hoylman v. Kanawha & M. R. Co.*, 65 W. Va. 264, 64 S. E. 536, 22 L. R. A. (N. S.) 741, eight to ten miles. **Wis.**—*Fosnes v. Duluth S. R. Co.*, 140 Wis. 455, 122 N. W. 1054, 30 L. R. A. (N. S.) 270, where foreigner alighted from car going six miles per hour), (2) the age or infirmity of the passenger

(*Watkins v. Birmingham Ry. & Elec. Co.*, 120 Ala. 147, 24 So. 392, 43 L. R. A. 297; *O'Mara v. St. Louis T. Co.*, 102 Mo. App. 202, 76 S. W. 680), or (3) his being incumbered with bundles or children. *Hunter v. Louisville & N. R. Co.*, 150 Ala. 594, 43 So. 802, 9 L. R. A. (N. S.) 848; *Ricketts v. Birmingham St. Ry. Co.*, 85 Ala. 600, 604, 5 So. 353 (where passenger had keg of lead); *O'Mara v. St. Louis T. Co.*, 102 Mo. App. 202, 76 S. W. 680, where car had passed crossing and the servants were unaware of plaintiff's attempt. See to similar effect, *Ebling v. Second Ave. R. Co.*, 60 App. Div. 616, 69 N. Y. Supp. 1102.

34. Lobsenz v. Metropolitan St. Ry. Co., 72 App. Div. 181, 76 N. Y. Supp. 411, holding an instruction that it is negligent to board a moving public vehicle is applicable to steam railroads but not to street cars.

35. Hunterson v. Union Traction Co., 205 Pa. 568, 55 Atl. 543; *Powelson v. United Traction Co.*, 204 Pa. 474, 54 Atl. 282.

36. U. S.—*New Orleans & C. R. Co. v. Schneider*, 60 Fed. 210, 8 C. C. A. 571; *Schneider v. New Orleans & C. R. R.*, 54 Fed. 466. **D. C.**—*Georgetown & T. R. Co. v. Smith*, 25 App. Cas. 259, 5 L. R. A. (N. S.) 274. **Ill.**—*Pell v. Joliet, P. & A. R. Co.*, 238 Ill. 510, 87 N. E. 542, interurban car. **Kan.**—*Cummings v. Wichita R. & L. Co.*, 68 Kan. 218, 74 Pac. 1104. **La.**—*Summers v. Crescent City R. Co.*, 34 La. Anr. 139, 44 Am. Rep. 419. **Minn.**—*Dahlberg v. Minneapolis St. R. Co.*, 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585. **Mo.** *Miller v. St. Louis R. Co.*, 5 Mo. App. 471. **N. Y.**—*Tucker v. Buffalo Ry. Co.*, 53 App. Div. 571, 65 N. Y. Supp. 989. **Pa.**—*Germantown P. R. Co. v. Brophy*, 105 Pa. 38.

[a] But extending head out of car above screens is contributory negligence as a matter of law. *Christensen v. Metropolitan S. R. Co.*, 137 Fed. 708, 70 C. C. A. 657.

[b] A passenger who puts his head

true of passengers on railroads,³⁷ though there are authorities to the contrary.³⁸ But where the evidence is disputed, it is for the jury to determine how the plaintiff's body came to be exposed.³⁹

c. *Actions for Ejection of Passengers and Trespassers.*—(I.) **Form of Action.**—Where a passenger, having a valid contract of transportation, is wrongfully ejected from the train, he has a remedy either by an action on the contract,⁴⁰ or in tort.⁴¹

Whether Trespass or Case.—If the ejection would be lawful if done in a lawful manner, but becomes unlawful because of the unlawful

eight inches out of a street car window and is injured by striking a pole is guilty of negligence as a matter of law. *Moore v. Edison Elec. I. Co.*, 43 La. Ann. 792, 9 So. 433.

37. **La.**—*Clere v. Morgan's L. & T. R. Co.*, 107 La. 370, 31 So. 886, 90 Am. St. Rep. 319; *Kird v. New Orleans & N. W. R. Co.*, 105 La. 226, 29 So. 729. **N. Y.**—*Francis v. New York Steam Co.*, 114 N. Y. 380, 21 N. E. 988 (a general rule cannot be laid down for all cases); *Holbrook v. Utica & S. R. Co.*, 16 Barb. 113, affirmed, 12 N. Y. 236, 244, 64 Am. Dec. 502. See also *Breen v. New York Cent. & H. R. R. Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450. **S. C.**—*Quinn v. South Carolina R. Co.*, 29 S. C. 381, 7 S. E. 614, 1 L. R. A. 682. **Tex.**—*Gulf, C. & S. F. R. Co. v. Phillips*, 32 Tex. Civ. App. 238, 74 S. W. 793. **Wis.**—*Spencer v. Milwaukee & P. du C. R. Co.*, 17 Wis. 487, 84 Am. Dec. 758.

38. **Ala.**—*Georgia P. R. Co. v. Underwood*, 90 Ala. 49, 8 So. 116, 24 Am. St. Rep. 756. **Ind.**—*Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 336. **Ky.**—*Louisville & N. R. Co. v. Sicklings*, 5 Bush 1, 96 Am. Dec. 320; *Morel v. Mississippi Val. Life Ins. Co.*, 4 Bush 535. **Md.**—*Pittsburgh & C. R. Co. v. Andrews*, 39 Md. 329, 17 Am. Rep. 568. **Mass.**—*Todd v. Old Colony & F. R. R. Co.*, 3 Allen 18, 80 Am. Dec. 49. **Mo.**—*Barton v. St. Louis & I. M. R. Co.*, 52 Mo. 253, 14 Am. Rep. 418. **Pa.**—*Pittsburgh & C. R. Co. v. McClurg*, 56 Pa. 294. **Va.**—*Richmond & D. R. Co. v. Scott*, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91; *Dun v. Seaboard & R. R. Co.*, 78 Va. 645, 49 Am. Rep. 388. 39. *North Baltimore Pass. Ry. Co. v. Kaskell*, 78 Md. 517, 28 Atl. 410; *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329, 353, 17 Am. Rep. 568.

40. **U. S.**—*Pittsburgh, C. C. & St. L. Ry. Co. v. Russ*, 57 Fed. 822, 6 C. C. A. 597. **Cal.**—*Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32

L. R. A. 193; *Delmonte v. Southern Pac. Co.*, 2 Cal. App. 211, 83 Pac. 269. **Ga.**—*Georgia S. & F. R. Co. v. Pearson*, 120 Ga. 284, 47 S. E. 904; *Sutton v. Southern Ry. Co.*, 101 Ga. 776, 29 S. E. 53; *Central R. & Bkg. Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315. **Neb.**—*Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167, 70 N. W. 926. **N. Y.**—*Brown v. Brooklyn, Q. C. & S. R. Co.*, 136 App. Div. 690, 121 N. Y. Supp. 445. **W. Va.**—*Boster v. Chesapeake & O. Ry. Co.*, 36 W. Va. 318, 15 S. E. 158.

Where passenger is given improper ticket, see *supra*, II, B, 2, a, (I).

41. **U. S.**—*Pittsburgh, C. C. & St. L. Ry. Co. v. Russ*, 57 Fed. 822, 6 C. C. A. 597. **Cal.**—*Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157. **Ga.**—*King v. Southern R. Co.*, 128 Ga. 285, 57 S. E. 507; *Georgia S. & F. R. Co. v. Pearson*, 120 Ga. 284, 47 S. E. 904. **Neb.**—*Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167, 70 N. W. 926. **N. J.**—*Perine v. North Jersey St. R. Co.*, 69 N. J. L. 230, 54 Atl. 799. **Wash.**—*Casey v. Oakes*, 17 Wash. 409, 50 Pac. 53, holding action to be founded in tort. **W. Va.**—*Boster v. Chesapeake & O. Ry. Co.*, 36 W. Va. 318, 15 S. E. 158; *McKay v. Ohio River Ry. Co.*, 34 W. Va. 65, 11 S. E. 737, 26 Am. St. Rep. 913, 9 L. R. A. 132, 8 Am. Neg. Cas. 662.

[a] **Until person ejected proves obligation to carry him**, his remedy is confined to an action for battery in using excessive force in ejecting him. *Brown v. Brooklyn, Q. C. & S. R. Co.*, 136 App. Div. 690, 121 N. Y. Supp. 445.

[b] **Where plaintiff fails to have his ticket validated before his return**, there is no contract in force and if the plaintiff is ejected he cannot recover in an action of assumpsit for breach of contract. *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. ed. 290.

way in which it is done, case is the proper remedy;⁴² and if a recovery for remote or consequential damages is sought, case must be brought;⁴³ but if the ejection is unlawful in itself and not from the mode of doing it, trespass will lie.⁴⁴ Many statutes, however, have abolished the distinction between actions of trespass and trespass on the case.⁴⁵

(II.) **Venue.**⁴⁶ — Statutes sometimes require that railroad companies be sued in the county where the cause of action originated.⁴⁷

(III.) **Parties.**⁴⁸ — In an action in tort for wrongful expulsion of a person from a train or station, all persons connected with the wrongful act may be joined as defendants.⁴⁹

(IV.) **Declaration or Complaint.**⁵⁰ — (A.) IN GENERAL. — The declaration or complaint in an action ex delicto for wrongful ejection must state a cause of action in conformity to general rules governing such pleadings.⁵¹

42. **U. S.**—*Emigh v. Pittsburgh, F. W. & C. R. Co.*, 4 Biss. 114, 8 Fed. Cas. No. 4,449. **Ill.**—*St. Louis & C. R. Co. v. Dalby*, 19 Ill. 353, 375; *Chicago & E. I. R. Co. v. Casazza*, 83 Ill. App. 421.

W. Va.—See *Boster v. Chesapeake & O. Ry. Co.*, 36 W. Va. 318, 15 S. E. 158.

43. *Barnum v. Baltimore & O. R. Co.*, 5 W. Va. 10.

44. *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353, 375, followed in *Chicago & N. W. R. Co. v. Peacock*, 48 Ill. 253; *Adams v. Union R. Co.*, 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273. See also 4 STANDARD PROC. 627.

45. See *Chicago Union T. Co. v. Brethauer*, 125 Ill. App. 204, and 4 STANDARD PROC. 616.

46. See generally the title "**Venue.**"

47. See the statutes.

[a] A cause of action in tort for wrongful ejection, is deemed to originate where the wrongful ejection took place, and not in the county where the agent of the carrier issued an imperfect or improper ticket. *Georgia S. & F. R. Co. v. Pearson*, 120 Ga. 284, 47 S. E. 904.

Where action is based on contract, see *supra*, II, B, 1.

48. See generally the title "**Parties.**"

49. *Whiteaker v. Chicago, R. I. & P. R. Co.*, 252 Mo. 438, 160 S. W. 1009 (where railroad company and conductor are joined); *Casey v. Oakes*, 17 Wash. 409, 50 Pac. 53, where servant who committed the assault, receiver and the railroad company were joined.

[a] Where two railroad companies jointly provide and use a waiting room at a junction, an action for wrongful

ejection therefrom may be brought against both companies. *Riley v. Wrightsville & T. R. Co.*, 133 Ga. 413, 65 S. E. 890, 24 L. R. A. (N. S.) 379, 18 Ann. Cas. 208.

50. See generally the title "**Declaration and Complaint.**"

51. See cases cited *infra*, this note.

[a] For cases holding a cause of action to be sufficiently stated, see the following: **Ala.**—*Central of Georgia R. Co. v. Bagley*, 173 Ala. 611, 55 So. 894; *Nashville, C. & St. L. Ry. v. Bates*, 133 Ala. 447, 32 So. 589; *Birmingham R. L. & P. Co. v. Smith*, 14 Ala. App. 264, 69 So. 910, ejection from street railway for transferring at wrong place. **Cal.** *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 684, 44 Pac. 320, 32 L. R. A. 193, where conductor took up plaintiff's ticket without giving him evidence thereof so that plaintiff was ejected after transferring to another train. **Ga.**—*Georgia R. & B. Co. v. Murden*, 83 Ga. 753, 10 S. E. 364, where conductor demanded extra fare, no ticket having been purchased. **Ind.**—*Citizens' St. R. Co. v. Willoby*, 134 Ind. 563, 33 N. E. 627; *Pittsburgh, C. C. & St. L. R. Co. v. Haislip*, 39 Ind. App. 394, 79 N. E. 1035. **Neb.**—*Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167, 70 N. W. 926. **N. C.**—*Knowles v. Norfolk S. R. Co.*, 102 N. C. 59, 9 S. E. 7, where plaintiff was ejected despite tender of fare. **Tex.**—*Galveston, H. & S. A. R. Co. v. Short* (Tex. Civ. App.), 163 S. W. 601. **Wash.**—*Casey v. Oakes*, 17 Wash. 409, 50 Pac. 53. **W. Va.**—*White v. Chesapeake & O. R. Co.*, 26 W. Va. 800, where conductor demanded excessive fare.

(B.) PARTICULAR ALLEGATIONS. — (1.) *Plaintiff's Right To Be on Train or Car.* — (a.) *In General.* — A person wrongfully ejected from a train or car must show the relationship of carrier and passenger,⁵² and that he was rightfully on such train or car,⁵³ unless unnecessary force is relied upon.⁵⁴

(b.) *Tendering Ticket or Fare.* — In showing his right to be on the train or car, plaintiff must allege that he exhibited and tendered his ticket to the conductor,⁵⁵ or that he tendered such a sum as the defendant was entitled to charge.⁵⁶ But such allegations are not required where the gravamen of the action is violent and malicious expulsion from a train.⁵⁷ If the passenger objects to the payment of

Form of complaint, see 9 STANDARD PROC. 943.

52. *Pennsylvania Co. v. Dean*, 92 Ind. 459. See also *Ala.*—*McGhee v. Cashin*, 130 Ala. 561, 30 So. 367. *Fla.* *Seaboard Air Line R. Co. v. Scarborough*, 52 Fla. 425, 42 So. 706, holding allegation sufficient. *Ind.*—*Ohio & M. Ry. Co. v. Croucher*, 132 Ind. 275, 31 N. E. 941, holding allegation sufficient.

As to manner of alleging relationship of carrier and passenger, see *supra*, II, A, 1, a.

53. *White v. Evansville & T. H. R. Co.*, 133 Ind. 480, 33 N. E. 273; *Barnum v. Baltimore & O. R. Co.*, 5 W. Va. 10.

[a] **In an action against a street railway** the plaintiff need not show that he boarded the car at such a time and place as would entitle him to passage on the transfer presented, unless he sets out the transfer in full and it discloses a stipulation as to the time and place of transferring. *Birmingham Ry., L. & P. Co. v. Smith*, 14 Ala. App. 264, 69 So. 910.

[b] **Under a statute authorizing certain persons to ride on trains where such trains stop,** it is sufficient to allege that the train stopped on the day in question without showing that it regularly stops there. *Allen v. Lake Shore & M. S. Ry. Co.*, 57 Ohio St. 79, 47 N. E. 1037.

As to compliance with conditions in tickets, see *infra*, II, B, 3, d, (II), (A), (4).

54. *Adams v. St. Louis & S. F. R. Co.*, 149 Mo. App. 278, 130 S. W. 48. See also *Terre Haute & I. R. Co. v. Fitzgerald*, 47 Ind. 79; *Mykleby v. Chicago, St. P., M. & O. Ry. Co.*, 39 Minn. 54, 38 N. W. 763.

[a] **Need Not Show Whether Passenger or Freight Train.**—*Wabash R.*

Co. v. Savage, 110 Ind. 156, 9 N. E. 85.

[b] **Time train departed from the station,** when plaintiff entered, need not be alleged. *Wabash R. Co. v. Savage*, 110 Ind. 156, 9 N. E. 85.

55. *White v. Evansville & T. H. R. Co.*, 133 Ind. 480, 33 N. E. 273, mere allegation that plaintiff purchased ticket is not sufficient.

56. *Cal.*—*Tarbell v. Central Pac. R. Co.*, 34 Cal. 616. *Ga.*—*Wilson v. Southern R. Co.*, 143 Ga. 189, 84 S. E. 445. *Ind.*—*Scott v. Cleveland, C. C. & St. L. Ry. Co.*, 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154; *White v. Evansville & T. H. R. Co.*, 133 Ind. 480, 33 N. E. 273. *N. C.*—*Knowles v. Norfolk S. R. Co.*, 102 N. C. 59, 9 S. E. 7, holding tender to be sufficiently pleaded. *W. Va.*—*White v. Chesapeake & O. Ry. Co.*, 26 W. Va. 800.

[a] **Illustrations.** — An allegation that plaintiff tendered to defendant's servants payment in full for his passage is sufficient, without alleging the amount, or that the particular servant to whom the offer was made was the conductor in charge of the train. *Tarbell v. Central Pac. R. Co.*, 34 Cal. 616. See also *Avery v. Atchison, T. & S. F. R. Co.*, 11 Kan. 448.

[b] **A complaint charging a demand of more than the regular fare** must show the amount demanded is illegal or that it is not the fare when cash instead of a ticket is tendered. *Allison v. Georgia R. & B. Co.*, 132 Ga. 834, 65 S. E. 85.

[c] **A strictly legal tender** need not be alleged. *Tarbell v. Central P. R. Co.*, 34 Cal. 616, where plaintiff offered fare in legal tender notes.

[d] **Alleging Receipt for Fare.** *Atlantic Coast L. R. Co. v. Thomas*, 14 Ga. App. 619, 82 S. E. 299.

57. *Terre Haute & I. R. Co. v. Fitzgerald*, 47 Ind. 79.

an extra charge for failure to purchase a ticket before boarding train,⁵⁸ or if it is a condition to riding on a particular train that passengers must first secure tickets for such passage, and the plaintiff boards such a train without a ticket,⁵⁹ the complaint must show that the plaintiff used reasonable efforts to purchase a ticket and was unable to do so.

Setting Out Ticket or Transfer. — The relationship of carrier and passenger being alleged, the plaintiff need not set out his ticket or allege its terms.⁶⁰

(c.) *That Train Scheduled To Stop at Plaintiff's Destination.* — A plaintiff claiming that he was rightfully on the train must show that the train was scheduled to stop at his destination.⁶¹

(d.) *Compliance With Rules and Conditions in Ticket.* — That the passenger was complying with all the reasonable rules of the company or that he was not about to violate them need not be alleged.⁶² But a compliance with the stipulations disclosed by a ticket set up in the pleading must be alleged.⁶³

(2.) *Allegations as to Ejection.* — (a.) *In General.* — The complaint must show the place where the ejection occurred,⁶⁴ and allege facts showing that the ejection from the train was wrongful.⁶⁵ If unnecessary force

58. *Georgia R. & B. Co. v. Murden*, 83 Ga. 753, 10 S. E. 364.

Amendment to supply omission of allegation, see *infra*, II, B, 3, d, (D).

Proving reason for inability to purchase a ticket which is not alleged, see *infra*, II, B, 3, g.

59. *Indianapolis & St. L. Ry. Co. v. Kennedy*, 77 Ind. 507, holding complaint insufficient.

60. See *infra*, this note.

[a] **Where Conductor Refused To Accept Ticket.** — *McGhee v. Cashin*, 130 Ala. 561, 30 So. 367; *McGhee v. Reynolds*, 117 Ala. 413, 23 So. 68; *Birmingham Ry., L. & P. Co. v. Smith*, 1 Ala. App. 264, 69 So. 910.

[b] **Where Unnecessary Force Was Used.** — *King v. Southern R. Co.*, 128 Ga. 285, 57 S. E. 507.

[c] **But He May Do So.** — *Birmingham Ry., L. & P. Co. v. Smith*, 14 Ala. App. 264, 69 So. 910.

[d] **Where plaintiff alleges generally the purchase of a ticket**, he may be required by special demurrer to give a description of the ticket showing whether it was good for passage on the day it was presented. *Southern R. Co. v. Dyson*, 109 Ga. 103, 34 S. E. 997, distinguished in *King v. Southern R. Co.*, 128 Ga. 285, 57 S. E. 507.

61. *White v. Evansville & T. H. R. Co.*, 133 Ind. 480, 33 N. E. 273; *Chicago, St. L. & P. R. Co. v. Bills*, 104

Ind. 13, 3 N. E. 611; *Lake Erie & W. R. Co. v. Lucas*, 18 Ind. App. 239, 47 N. E. 842; *Drew v. Wabash R. Co.*, 129 Mo. App. 459, 107 S. W. 478. Compare *Missouri, K. & T. R. Co. v. Herring*, 61 Tex. Civ. App. 543, 127 S. W. 1155, 130 S. W. 1039.

[a] **An allegation that the ticket agent told plaintiff that he could take passage on the train from which he was later ejected does not cure the omission of the allegation in the text.** *White v. Evansville & T. H. R. Co.*, 133 Ind. 480, 33 N. E. 273.

62. *South Florida R. Co. v. Rhoads*, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733.

63. *Birmingham Ry., L. & P. Co. v. Smith*, 14 Ala. App. 264, 69 So. 910; *Illinois Cent. R. Co. v. Williams*, 147 Ky. 52, 143 S. W. 760.

64. *Macon, D. & S. R. Co. v. Moore*, 125 Ga. 810, 54 S. E. 700.

[a] A complaint alleging that while going from A. to B. plaintiff was put off at C. sufficiently shows C. to be an intermediate station. *Louisville & N. R. Co. v. Grimes*, 184 Ala. 413, 63 So. 554.

65. **Ala.** — *Louisville & N. R. Co. v. Mason*, 10 Ala. App. 263, 64 So. 154. **Ind.** — *White v. Evansville & T. H. R. Co.*, 133 Ind. 480, 33 N. E. 273; *Lake Erie & W. R. Co. v. Lucas*, 18 Ind. App. 239, 47 N. E. 842. **W. Va.** — *Barnum*

was used in the expulsion, facts showing the use of such force was unnecessary must be stated,⁶⁶ mere epithets or conclusions being insufficient.⁶⁷

A declaration or complaint sufficiently shows the carrier's liability for its servant's acts which alleges that the defendant, acting through its agents or servants, ejected the plaintiff.⁶⁸ It is not necessary to designate the employe or servant ejecting the plaintiff by name,⁶⁹ or state what servant ejected the plaintiff, whether conductor, or brakeman, etc.⁷⁰

The complaint need not allege the motive of the defendant in ejecting the passenger,⁷¹ or allege a consciousness of the result of the

v. Baltimore & O. R. Co., 5 W. Va. 10.

[a] **On expulsion from a moving train**, whether the train was moving rapidly or slowly must be shown. *Pennsylvania Co. v. Dean*, 92 Ind. 459.

[b] **Ejection Without Sufficient Time To Search for Ticket**—*Louisville & N. R. Co. v. Mason*, 10 Ala. App. 263, 64 So. 154.

[c] **Ejection at Improper Place**. *Central of Georgia R. Co. v. Bagley*, 173 Ala. 611, 55 So. 894.

[d] **An allegation that the plaintiff was ordered and compelled to jump from a train** is an allegation of a conclusion. The pleader should state what was done in ordering and compelling him to jump. *Pennsylvania Co. v. Dean*, 92 Ind. 459.

66. *Ala.*—*McGhee v. Reynolds*, 117 Ala. 413, 23 So. 68. *Ga.*—*Rossman v. Georgia R. & P. Co.*, 146 Ga. 264, 91 S. E. 90, L. R. A. 1917 C, 483. **Ill.** *Churchill v. Chicago & A. R. Co.*, 67 Ill. 390. **Ind.**—*White v. Evansville & T. H. R. Co.*, 133 Ind. 480, 33 N. E. 273; *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611.

[a] *Compare Lindsay v. Wabash R. Co.*, 141 Mich. 204, 104 N. W. 656, holding an ordinary declaration in trespass vi et armis, without allegations showing the plaintiff's effort to ride, his refusal to pay fare, his ejection and persistent effort to board the train, will justify proof of an assault upon the plaintiff while attempting to board the train.

67. *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611; *Mitchell v. Southern Ry. Co.*, 77 Miss. 917, 27 So. 834. *Compare White v. Chesapeake & O. R. Co.*, 26 W. Va. 800.

[a] **An allegation that the conductor "willfully, violently and forcibly" ejected the plaintiff** is a statement of

a conclusion merely as to the wilfulness and violence. *McGhee v. Reynolds*, 117 Ala. 413, 418, 23 So. 68; *Churchill v. Chicago & A. R. Co.*, 67 Ill. 390.

68. *Wabash R. Co. v. Savage*, 110 Ind. 156, 9 N. E. 85.

[a] **An allegation (1) that the conductor, servant, or agent in charge of the train ejected the plaintiff is sufficient.** *Ala.*—*Louisville & N. R. Co. v. Laney*, 14 Ala. App. 287, 69 So. 993; *Pullman Co. v. Riley*, 5 Ala. App. 561, 59 So. 761. *Idaho.*—*Lindsay v. Oregon Short Line R. Co.*, 13 Idaho 477, 90 Pac. 984, 12 L. R. A. (N. S.) 184. **Tex.**—*Texas & P. Ry. Co. v. Casey*, 52 Tex. 112. (2) It is not necessary, in such case, to allege that the servant was acting within the scope of his employment. *Lindsay v. Oregon Short Line R. Co.*, 13 Idaho 477, 90 Pac. 984, 12 L. R. A. (N. S.) 184; *Lake Erie & W. R. Co. v. Matthews*, 13 Ind. App. 355, 41 N. E. 842, where plaintiff boarded a freight train thinking it carried passengers.

Alleging act to be within scope of employment in personal injury cases, see *supra*, II, B, 2, b, (V), (5), (b).

69. *Montgomery Traction Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136, 9 L. R. A. (N. S.) 851.

70. *Wabash R. Co. v. Savage*, 110 Ind. 156, 9 N. E. 85.

[a] **But where the plaintiff is wrongfully ejected from a waiting room maintained by more than one railroad company**, it is necessary to allege which company the person who ejected the plaintiff was employed by. *Riley v. Wrightsville & T. R. Co.*, 133 Ga. 413, 65 S. E. 890, 24 L. R. A. (N. S.) 379, 18 Ann. Cas. 268.

71. *Macon, D. & S. R. Co. v. Moore*, 125 Ga. 810, 54 S. E. 700.

wrongful ejection.⁷² And where the passenger ejected is in a weak or helpless condition, it is unnecessary to allege the cause of such condition.⁷³

(b.) *Negligence and Contributory Negligence.* — Negligence must be alleged where the gravamen of the action is the ejection of a passenger at an improper time or place,⁷⁴ or the giving of an improper ticket or transfer, or of incorrect information regarding trains.⁷⁵ But it is otherwise where unnecessary force was used.⁷⁶

Contributory negligence need not be negatived.⁷⁷

(3.) *Allegations of Damage.* — The plaintiff must show his damage,⁷⁸ as well as a causal connection between the wrong alleged and the injury suffered.⁷⁹

(4.) *Joinder of Causes of Action.* — The plaintiff may join causes of action in accordance with the general rules regulating joinder.⁸⁰

(5.) *Amendment.* — The plaintiff may, in accordance with the general rules, amend his complaint or petition if he does not thereby change his cause of action.⁸¹

(V.) *Answer or Plea.*⁸² — The defendant must allege facts showing justification or discharge of the carrier in ejecting the traveler.⁸³ The existence of facts exonerating the carrier from treating a person as a passenger or forfeiting the right of a person to be carried on

72. *Louisville & N. R. Co. v. Perkins*, 144 Ala. 325, 39 So. 305.

73. *Macon, D. & S. R. Co. v. Moore*, 125 Ga. 810, 54 S. E. 700.

74. *Bragg's Admr. v. Norfolk & W. R. Co.*, 110 Va. 867, 67 S. E. 593.

75. As to actions for negligent giving of wrong tickets or information, see *supra*, II, B, 2, a, (IV), (E).

76. *Lake Erie & W. R. Co. v. Matthews*, 13 Ind. App. 355, 41 N. E. 842.

77. *Louisville, N. A. & C. R. Co. v. Goblen*, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890 (the doctrine is inapplicable); *Lake Erie & W. R. Co. v. Matthews*, 13 Ind. App. 355, 41 N. E. 842, where unnecessary force was used.

78. *Birmingham R. L. & P. Co. v. Yielding*, 155 Ala. 539, 46 So. 747, holding averment sufficient. See generally the title "Injuries to Persons and Property."

[a] *Allegation in Prayer for Relief.* *Galveston, H. & S. A. R. Co. v. Short* (Tex. Civ. App.), 163 S. W. 601.

[b] A general averment that the plaintiff suffered damage in a certain sum is sufficient. *Atlantic Coast L. R. Co. v. Thomas*, 14 Ga. App. 619, 82 S. E. 299.

79. *Birmingham Ry. L. & P. Co. v. Tate*, 7 Ala. App. 517, 61 So. 32; *Kee-shan v. Elgin A. & S. Tract. Co.*, 229

Ill. 533, 82 N. E. 360. See 13 STANDARD PROC. 353.

80. See the title "Joinder of Actions."

[a] *Wrongful Ejection and Refusal To Validate Ticket.*—*McGhee v. Reynolds*, 117 Ala. 413, 23 So. 68.

[b] *Trespass by Company and by Servant.*—*Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163, 21 N. E. 7.

81. See the titles "Amendments and Jeofails;" "New Cause of Action or Defense."

[a] *To Show Inability To Obtain Ticket.*—*Georgia R. & B. Co. v. Murden*, 83 Ga. 753, 10 S. E. 364.

[b] *To Set Up Negligence in Issuing Transfer.*—*Montgomery Traction Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136, 9 L. R. A. (N. S.) 851.

82. See generally the titles "Answers;" "Pleas."

83. *Ala.*—*Nashville, C. & St. L. R. Co. v. Bates*, 133 Ala. 447, 32 So. 589, holding pleas to be bad. *Cal.*—*Eylenfeldt v. United Railroads*, 28 Cal. App. 56, 151 Pac. 293, construing pleas. *Ill.* *Chicago & E. I. R. Co. v. Casazza*, 83 Ill. App. 421. *Mass.*—*Jackson v. Old Colony St. R. Co.*, 206 Mass. 477, 92 N. E. 725, 30 L. R. A. (N. S.) 1046, 19 Ann. Cas. 615. *Tex.*—See *Galveston, H. & S. A. R. Co. v. Short* (Tex. Civ. App.), 163 S. W. 601, holding

a train must be pleaded as a defense.⁸⁴ And if the use of excessive force is charged, a plea in justification must set up circumstances showing that the use of such force was necessary.⁸⁵

(VI.) **Replication.**⁸⁶ — In some jurisdictions, the plaintiff must reply to the answer in accordance with the general rules relating thereto.⁸⁷

(VII.) **Issues, Proof, and Variance.** — The general rules relating to issues, proof, and variance apply to this action.⁸⁸

answer does not admit delivery of ticket to servant of company.

[a] **Inconsistent Defenses.**—That the conductor acted without the scope of his authority and that the conductor was justified in ejecting the plaintiff may be pleaded in defense although they may be inconsistent. *International & G. N. R. Co. v. Kentle*, 2 Wills. Civ. Cas. (Tex.) §303.

Showing facts in justification under general issue, see *infra* II, B, 2, c, (VII).

[b] **Where Plaintiff Rode on a Pass.** *Louisville & N. R. Co. v. Dawson*, 11 Ala. App. 621, 66 So. 905.

84. *Ohio & M. Ry. Co. v. Croucher*, 132 Ind. 275, 31 N. E. 941.

85. *Moore v. Nashville, C. & St. L. R.*, 137 Ala. 495, 34 So. 617; *Wright v. Union R. Co.*, 21 R. I. 554, 45 Atl. 548.

86. See generally the title "**Replication and Reply.**"

87. *Louisville & N. R. Co. v. Dawson*, 11 Ala. App. 621, 630, 66 So. 905; *Louisville & N. R. Co. v. Mason*, 4 Ala. App. 353, 58 So. 963 (holding replication insufficient because it did not show that the plaintiff attempted to produce his ticket or notified the conductor that he had one and requested reasonable time to search for it); *McElroy v. Railroad Co.*, 7 Phila. (Pa.) 206.

[a] **In an action for ejection from a station**, a replication alleging that the plaintiff entered the premises and purchased a ticket is sufficient without an allegation that he entered with such intent. But he must show that he was waiting for a train that was expected to leave within such a short period of time thereafter that he would have a right to remain until its departure. *Harris v. Stevens*, 31 Vt. 79, 93, 73 Am. Dec. 337.

88. See *Chesapeake & O. R. Co. v. Gatewood*, 155 Ky. 102, 159 S. W. 660; *Harding v. Chicago & G. T. Ry. Co.*, 56 Mich. 628, 23 N. W. 445; also the

cases cited *infra*, this note; and generally the title "**Variance and Failure of Proof.**"

[a] **Thus**, (1) where plaintiff alleges one reason for failure to procure a ticket, he cannot prove another. *Everett v. Chicago, R. I. & P. R. Co.*, 69 Iowa 15, 28 N. W. 410, 58 Am. Rep. 207. And (2) under a plea of general issue, the carrier may prove facts in the nature of a traverse (*Louisville & N. R. Co. v. Mason*, 10 Ala. App. 263, 64 So. 154, where disorderliness of passenger was shown), but (3) he cannot prove facts in justification or discharge of the ejection (*Chicago & E. I. R. Co. v. Casazza*, 83 Ill. App. 421), (4) except for the purpose of mitigation of damages. *Chicago & E. I. R. Co. v. Casazza*, 83 Ill. App. 421.

[b] **A plaintiff who bases his action on tort** (1) cannot recover on proof of a breach of a contract relating to a matter not included within the carrier's duties to the public. *Noble v. Atchison, T. & S. F. R. Co.*, 4 Okla. 534, 46 Pac. 483, where plaintiff attempted to prove a contract to stop a through train at his destination. See *Denver Tramway Co. v. Cloud*, 6 Colo. App. 445, 40 Pac. 779. And, (2) under a complaint in tort for malicious ejection, a recovery cannot be had as for misdirection by the railroad company's servants (*Turner v. McCook*, 77 Mo. App. 196. But see *Southern R. Co. v. Hawkins*, 121 Ky. 415, 89 S. W. 258), or (3) on proof of ejection at an improper place (*Norfolk & W. R. Co. v. Warden*, 117 Va. 801, 86 S. E. 103), or (4) on proof of a mistake on the part of the brakemen in assisting the passenger to alight at an intermediate station. *Allyn v. Guff, C. & S. F. R. Co.*, 26 Tex. Civ. App. 43, 62 S. W. 1079. (5) But if the gist of the action is the assault and the use of unnecessary force, the variance is not material or fatal where the plaintiff alleged to be a passen-

(VIII.) **Questions of Law and Fact.**⁸⁹ — The construction of tickets is a question of law for the court in such actions.⁹⁰ But it is a question of fact for the jury under the circumstances of the case to determine whether a passenger boards a car or train in good faith,⁹¹ whether he is afforded a reasonable opportunity to purchase a ticket before boarding,⁹² whether he exercises due care to see that he is on the proper train or car,⁹³ whether or not he is guilty of a want of proper care in failing to examine his ticket and discover mistakes therein,⁹⁴ and whether the conductor waived the expiration of the ticket or transfer.⁹⁵ So also it is for the jury to determine whether or not a conductor gives a passenger reasonable opportunity to pay the fare, or produce a ticket,⁹⁶ whether the explanation given by a passenger to show the validity of his ticket is a reasonable one,⁹⁷ and whether a carrier uses due care in ejecting a passenger under the circumstances of the case in view of the condition of the passenger, the time, and place of ejection.⁹⁸ And the questions, whether in the ejecting the servant of the railroad company used only such force as was reason-

ger is proved a trespasser. *Mykleby v. Chicago, St. P., M. & O. R. Co.*, 39 Minn. 54, 38 N. W. 763; *Randell v. Chicago, R. I. & P. R. Co.*, 102 Mo. App. 342, 352, 76 S. W. 493. See also *Adams v. St. Louis & S. F. R. Co.*, 149 Mo. App. 278, 130 S. W. 48. Nor (6) is it material whether the car or train is proved to be in motion or standing still. *Louisville & N. R. Co. v. Penick*, 8 Ala. App. 558, 62 So. 965.

89. Generally, see *supra*, II, A, 6; and the title "**Province of Judge and Jury.**"

90. *Ligon v. St. Louis & S. F. R. Co.*, 184 Mo. App. 187, 168 S. W. 647.

91. *Short v. St. Louis & S. F. R. Co.*, 150 Mo. App. 359, 130 S. W. 488.

92. *Reed v. Great Northern Ry. Co.*, 76 Minn. 163, 78 N. W. 974; *Rivers v. Kansas City, M. & B. R. Co.*, 86 Miss. 571, 38 So. 508.

[a] Where the evidence is not clear as to the time the plaintiff presented himself at the defendant's station to buy a ticket and as there is room for doubt as to what is a reasonable time under the circumstances, the question of what is a reasonable time is a mixed question of law and fact. *Louisville & N. R. Co. v. Kay*, 8 Ala. App. 562, 62 So. 1014.

93. *Spirk v. Chicago, B. & Q. R. Co.*, 57 Neb. 565, 78 N. W. 272.

94. *Gulf, C. & S. F. R. Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951.

95. *Samanowitz v. New York Rys. Co.*, 163 N. Y. Supp. 550.

96. Fla.—*Seaboard Air Line R. Co.*

v. Scarborough, 52 Fla. 425, 42 So. 706. Ill.—*Chicago & E. I. R. Co. v. Casazza*, 83 Ill. App. 421. N. Y.—*Huba v. Schenectady R. Co.*, 85 App. Div. 199, 83 N. Y. Supp. 157. Tex.—*International & G. N. R. Co. v. Wilkes*, 68 Tex. 617, 5 S. W. 491, 2 Am. St. Rep. 515.

97. *McKeown v. Southern R. Co.*, 98 S. C. 338, 82 S. E. 437.

98. *Donovan v. Greenfield & T. F. St. R. Co.*, 183 Fed. 526, 106 C. C. A. 72, where passenger was intoxicated. Ala.—*King v. Brown*, 108 Ala. 68, 18 So. 935. Ill.—*Illinois Cent. R. Co. v. Latimer*, 128 Ill. 163, 21 N. E. 7; *Chicago C. R. Co. v. O'Donnell*, 109 Ill. App. 616. Ia.—*Brown v. Chicago, R. I. & P. R. Co.*, 51 Iowa 235, 1 N. W. 487. Kan.—*Union Pac. R. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244, where train was moving. Mass.—*Murphy v. Union R. Co.*, 118 Mass. 228, 8 Am. Neg. Cas. 405, where train was in motion. Miss.—*Jackson v. Alabama & V. Ry. Co.*, 76 Miss. 703, 25 So. 353. N. Y.—*Buckley v. Hudson Val. R. Co.*, 212 N. Y. 440, 106 N. E. 121, Ann. Cas. 1915D, 143, L. R. A. 1915C, 134, reversing 151 App. Div. 909, 135 N. Y. Supp. 1102. Pa.—*Tilburg v. Northern Cent. R. Co.*, 217 Pa. 618, 66 Atl. 846, 12 L. R. A. (N. S.) 359. Tex.—*Gulf, C. & S. F. R. Co. v. Green* (Tex. Civ. App.), 141 S. W. 341.

[a] **Ejection From Moving Train.** *Union Pac. R. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244; *Healey v. City Passenger R. Co.*, 28 Ohio St. 23.

ably necessary,⁹⁹ whether he used abusive language,¹ or was guilty of malice,² whether he was justified in striking the passenger after he had been ejected,³ and whether under the circumstances an ejected passenger was justified in pursuing the course he adopted after being ejected,⁴ as well as the questions whether the eviction of a parent amounted to the eviction of a child or vice versa,⁵ and whether or not a dwelling house was near the place of ejection under a statute requiring it,⁶ are usually all questions for the jury.

3. Actions Relating to Transportation in Sleeping Cars.⁷ — For breach of a contract for sleeping car accommodations, a passenger may bring assumpsit or case at his election.⁸ The same remedies are available where, notwithstanding the fact that it has accommodations, the sleeping car company refuses to furnish them on a proper application.⁹ Passengers in sleeping cars injured,¹⁰ or ejected therefrom,¹¹ may sue

99. Ill.—Chicago & E. I. R. Co. v. Casazza, 83 Ill. App. 421. **Minn.**—Willard v. St. Paul C. R. Co., 116 Minn. 183, 133 N. W. 465. **Mo.**—Randell v. Chicago, R. I. & P. R. Co., 102 Mo. App. 342, 352, 76 S. W. 493. **N. J.**—Bottstein v. Erie R. Co., 84 N. J. L. 404, 87 Atl. 94. **N. Y.**—Dowd v. Albany Ry., 47 App. Div. 202, 62 N. Y. Supp. 179; Samanowitz v. New York Rys. Co., 163 N. Y. Supp. 550. **N. C.**—McNairy v. Norfolk & W. R. Co., 172 N. C. 505, 90 S. E. 497. **S. C.**—McKeown v. Southern R. Co., 98 S. C. 338, 82 S. E. 437; Norman v. Southern R. Co., 65 S. C. 517, 44 S. E. 83, 95 Am. St. Rep. 809; Griffin v. Southern R. Co., 65 S. C. 122, 43 S. E. 445.

1. Adams v. Southern R. Co., 103 S. C. 327, 87 S. E. 1007.

2. Hartridge v. United Rys. Co. (Mo. App.), 196 S. W. 59.

3. Lindsay v. Wabash R. Co., 141 Mich. 204, 104 N. W. 656.

4. Cal.—Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 Pac. 326, 32 L. R. A. 193. **Mo.**—Drew v. Wabash R. Co., 129 Mo. App. 459, 107 S. W. 478. **Pa.**—Tilburg v. Northern Cent. R. Co., 221 Pa. 245, 70 Atl. 723; Malone v. Pittsburgh & L. E. R. Co., 152 Pa. 390, 25 Atl. 638, where plaintiff attempted to walk back to station.

5. Forrest v. Greenville, S. & A. R. Co., 102 S. C. 54, 86 S. E. 193.

6. Loomis v. Jewett, 35 Hun (N. Y.) 313.

7. For loss of baggage in a sleeping car see supra, II, B, 4, e, (I).

8. Ga.—See Bryant v. Atlantic C. L. R. Co., 19 Ga. App. 536, 91 S. E. 1047, holding petition states cause of action. **Ill.**—Nevin v. Pullman Palace

Car Co., 106 Ill. 222, 46 Am. Rep. 688. **N. Y.**—Aplington v. Pullman Co., 110 App. Div. 250, 97 N. Y. Supp. 329, 17 N. Y. Ann. Cas. 455. **Tex.**—Pullman Palace-Car Co. v. Booth (Tex. Civ. App.), 28 S. W. 719, where plaintiff reserved accommodations without paying therefor at the time.

[a] **Venue.**—Bryant v. Atlantic C. L. R. Co., 19 Ga. App. 536, 91 S. E. 1047.

[b] **Whether plaintiff's conduct is reasonable in refusing to accept an upper berth or another lower berth which he would have to give up early in the morning is a question for the jury.** Aplington v. Pullman Co., 110 App. Div. 250, 97 N. Y. Supp. 329, 17 N. Y. Ann. Cas. 455.

9. Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688.

10. Pullman Co. v. Norton (Tex. Civ. App.), 91 S. W. 841, holding answer of the railroad company sufficiently sets up the contract with the Pullman company showing its liability to the railroad company.

As to injuries to passengers generally, see supra, II, B, 2, b.

11. U. S.—Calhoun v. Pullman Palace Car Co., 149 Fed. 546, where an agent informed passenger it was not necessary to validate ticket. **Ala.**—Pullman Co. v. Riley, 5 Ala. App. 561, 59 So. 761. **Tex.**—Pullman Co. v. Hoyle, 52 Tex. Civ. App. 534, 115 S. W. 315, where both sleeping car company and railroad company were joined.

As to actions for ejection of passengers generally, see supra, II, B, 2, c.

[a] **Pleadings and Proof.**—Under allegations of wrongful, malicious and

for damages in accordance with general rules relating to such actions.

4. Actions for Damage, Loss or Delay of Baggage and Personal Effects.¹² — a. *Form and Right of Action.* — (I.) *In General.* — A passenger who is not carried gratuitously¹³ may sue for the injury to, and delay or loss of his personal baggage, either on the contract or in tort,¹⁴ unless he accepts the injured baggage, in which case he must sue in tort for damages.¹⁵ If an intending passenger's luggage is lost after delivery to the carrier, but before he has purchased a ticket and becomes a passenger, the remedy of the party is in case to recover damages for negligence.¹⁶

(II.) *As Affected by Character and Ownership of Baggage.* — If property not properly baggage is carried as such without notice of its character, the carrier can be held liable only in an action for gross negligence or wilfulness,¹⁷ brought by the owner, if the passenger does not own it.¹⁸ If, however, the carrier is given notice that the trunks contain property not personal baggage of the passenger, and receives

wilful breach of contract to reserve accommodation, the plaintiff may prove rudeness of the conductor in ejecting the plaintiff from the car. *Pullman Palace-Car Co. v. Booth* (Tex. Civ. App.), 28 S. W. 719.

[b] Whether plaintiff is negligent in failing to discover conditions in Pullman ticket is for the jury. *Applington v. Pullman Co.*, 110 App. Div. 250, 97 N. Y. Supp. 329, 17 N. Y. Ann. Cas. 455.

12. See also the title "Freight Carriers."

Judicial notice as to carriage of samples of drummers as baggage, see 7 ENCY. OF EV. 941, note 62.

13. See *infra*, this note.

[a] *Assumpsit cannot be maintained* (1) for loss of baggage where the passenger and his baggage are carried gratuitously. *Flint & P. M. R. Co. v. Wier*, 37 Mich. 111, 26 Am. Rep. 499. (2) But a child's baggage which is checked on the ticket of an adult accompanying him is not carried free within the rule although the child is not required to have a ticket. *Withey v. Pere Marquette R. Co.*, 141 Mich. 412, 104 N. W. 773, 113 Am. St. Rep. 533, 1 L. R. A. (N. S.) 352.

14. *Wolf v. Grand Rapids, H. & C. Ry.*, 149 Mich. 75, 112 N. W. 732; *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 534.

[a] *Whether Trover Will Lie.* *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; *Tolano v. National Steam Nav. Co.*, 4 Abb. Pr. (N. S.) 316, 35 How. Pr. 496, 5 Robt.

318; *Cass v. New York & N. H. R. Co.*, 1 E. D. Smith (N. Y.) 522. See generally the title "Trover and Conversion."

[b] If a carrier refuses to carry the passenger in violation of his contract and proceeds without giving him a reasonable opportunity to remove his luggage or proceeds with a view to carry it out of the passenger's reach, trespass will lie. *Holmes v. Doane*, 3 Gray (Mass.) 328.

[c] Where a carrier forwards baggage by freight without the consent of the passenger, and it is lost, the latter may sue for breach of duty arising by operation of law out of dealing with trunks as freight, or he may sue in trover. *Southern R. Co. v. Brown*, 192 Ala. 389, 68 So. 321.

15. *Atehison, T. & S. F. Ry. Co. v. Wilkinson*, 55 Kan. 83, 39 Pac. 1043, cannot sue on account for the value of the articles.

16. *Corry v. Pennsylvania R. Co.*, 194 Pa. 516, 45 Atl. 341, and not by an action founded on breach of contract to carry him and his baggage.

17. *Briek v. Atlantic C. L. R. Co.*, 145 N. C. 203, 58 S. E. 1073, 122 Am. St. Rep. 440.

18. *Briek v. Atlantic C. L. R. Co.*, 145 N. C. 203, 58 S. E. 1073; *Toledo & O. C. R. Co. v. Ambach*, 10 Ohio Cir. Ct. 490.

[a] *The passenger cannot recover* (1) in an action for the injury or loss of such baggage, in his own name (*Ill.*—*Doherty v. Grand Trunk W. R. Co.*, 194 Ill. App. 354. *Ky.*—*Illinois*

them as baggage, the owner may sue in tort,¹⁹ or, it has been held, on the contract.²⁰ The law recognizes exceptions to these rules where the passenger and the owner of the baggage stand in a relation of husband and wife,²¹ or parent and child.²² A passenger entrusted with money to defray the expenses of a person traveling with him may bring an action against a carrier whose servant stole it.²³

b. *Venue*.²⁴—An action for loss of baggage may be brought in

Cent. R. Co. v. Matthews, 114 Ky. 973, 72 S. W. 302, 102 Am. St. Rep. 316, 60 L. R. A. 846. **N. C.**—Brick v. Atlantic C. L. R. Co., 145 N. C. 203, 58 S. E. 1073, 122 Am. St. Rep. 440), unless (2) he has an interest by being responsible therefor and is on that account regarded as the owner. Illinois Cent. R. Co. v. Matthews, 114 Ky. 973, 72 S. W. 302, 102 Am. St. Rep. 316, 60 L. R. A. 846. See Ft. Worth & R. G. R. Co. v. Rosenthal Millinery Co. (Tex. Civ. App.), 29 S. W. 196, query.

19. Lake Shore & M. S. Ry. Co. v. Hochstim, 67 Ill. App. 514; Fort Worth & R. G. R. Co. v. Rosenthal Millinery Co. (Tex. Civ. App.), 29 S. W. 196.

[a] **A principal who provides articles for his agent** (1) which are properly baggage, may sue to recover for the loss in an action on the case (Grant v. Newton, 1 E. D. Smith (N. Y.) 95, where a father employed his son and sends him on a journey and places certain articles of wearing apparel in the son's trunk for the use of the son), (2) but not, it has been held, on the contract. Weed v. Saratoga & S. R. Co., 19 Wend. (N. Y.) 534, 544.

20. Fort Worth & R. G. R. Co. v. Rosenthal Millinery Co. (Tex. Civ. App.), 29 S. W. 196, though the contract is not made with the owner, it is made for his benefit. See also Lake Shore & M. S. Ry. Co. v. Hochstim, 67 Ill. App. 514, although an action on the case, the court said the shipment was really made by the owner, *qui facit per alium facit per se*, and the undiscovered principal might sue on the contract.

21. See *infra*, this note.

[a] **A husband** (1) may sue for the loss of baggage of his wife. Rogers v. Long Island R. Co., 1 Thomp. & C. (N. Y.) 396; Battle v. Columbia, N. & L. R. R., 70 S. C. 329, 49 S. E. 849. (2) Whether he furnished the articles is immaterial. Withey v. Pere Marquette R. Co., 141 Mich. 412, 104

N. W. 773, 113 Am. St. Rep. 533, 1 L. R. A. (N. S.) 352; Burnes v. Chicago, R. I. & P. R. Co., 167 Mo. App. 62, 150 S. W. 1100. But see Richardson v. Louisville & N. R. Co., 85 Ala. 559, 5 So. 308, 2 L. R. A. 716. (3) Even though the husband travels on another train, he may sue. Curtis v. Delaware, L. & W. R. Co., 74 N. Y. 116, 30 Am. Rep. 271. (4) And he may sue even though he had no ticket and paid no fare (Railroad Co. v. Baldwin, 113 Tenn. 205, 81 S. W. 599), or (5) if he rides on a pass. Malone v. Boston & W. R. Corp., 12 Gray (Mass.) 388, 74 Am. Dec. 598.

[b] **A husband who has possession of baggage of the wife may sue for its loss.** Godfrey v. Pullman Co., 87 S. C. 361, 69 S. E. 666, Ann. Cas. 1912 B, 971.

[c] **The wife** (1) may sue for loss of her baggage (State of New York, 7 Ben. 450, 22 Fed. Cas. No. 13,328), (2) even if the articles were given to her by her husband. Rawson v. Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543.

As to joinder of husband and wife, see *infra*, II, B, 4, d.

22. See *infra*, this note.

[a] **A father** may maintain assumpsit for the loss or injury to baggage of the child carried with his baggage. Withey v. Pere Marquette R. Co., 141 Mich. 412, 104 N. W. 773, 113 Am. St. Rep. 533, 1 L. R. A. (N. S.) 352. See also Ala.—Richardson v. Louisville & N. R. Co., 85 Ala. 559, 5 So. 308, 2 L. R. A. 716. Md.—Baltimore Steam-Packet Co. v. Smith, 23 Md. 402, 87 Am. Dec. 575. **N. Y.** Prentice v. Decker, 49 Barb. 21; Grant v. Newton, 1 E. D. Smith 95, a father may maintain case for the baggage of a son.

23. Pullman Palace-Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, 42 Am. St. Rep. 902, 21 L. R. A. 298.

24. See generally the title "*Venue*."

the county in which the plaintiff purchased his ticket and in which the railroad company has an agent.²⁵

c. *Parties*.²⁶ — The proper party plaintiff is generally the passenger;²⁷ but an assignee may maintain trover.²⁸ In an action ex contractu, passengers may be joined as plaintiffs who have personal baggage in a trunk that is lost,²⁹ and for breach of a contract to carry baggage of a number of persons, each party may bring a separate action.³⁰ But in a tort action, persons having separate interests in and sustaining separate damage to the contents of a trunk or other receptacle cannot join, although the same act caused the damage.³¹ If the baggage lost belongs to a married woman, she and her husband may join as parties plaintiff.³² The fact that plaintiff alleges that the defendant and the connecting carriers are partners does not necessitate joining them.³³

d. *Pleadings*. — (I.) *Declaration and Complaint*. — In an action for injury to or loss of baggage, the declaration or complaint must state a cause of action in accordance with the general rules relating to such pleadings.³⁴ He must allege a contract for carriage³⁵ of himself

25. *Pullman Palace-Car Co. v. Arnts*, 28 Tex. Civ. App. 71, 66 S. W. 329, although the fare was not collected until the train had entered Mexico, the plaintiff was a passenger from Texas and the contract "was practically entered into there."

[a] Even though baggage is checked to a county, the carrier's plea of privilege that it has no agent there will be sustained. *Gulf, C. & S. F. R. Co. v. Jackson*, 4 Wills. Civ. Cas. §47, 15 S. W. 128.

26. See generally the title "*Parties*."

27. As to right of action, see *supra*, II, B, 4, a.

28. *Cass v. New York & N. H. R. Co.*, 1 E. D. Smith (N. Y.) 522, where the baggage is wrongfully detained.

29. *Park v. Southern R. Co.*, 78 S. C. 302, 58 S. E. 931.

30. *Spencer v. Wabash R. Co.*, 36 App. Div. 446, 55 N. Y. Supp. 948, the promise made to the agent of the company is for the benefit of each member.

31. *St. Louis & S. F. R. Co. v. Dickerson*, 29 Okla. 386, 118 Pac. 140.

32. *Keith v. New York C. R. R.*, 2 Ohio Dec. (Reprint) 125, 1 W. L. M. 451; *Railroad Co. v. Baldwin*, 113 Tenn. 205, 81 S. W. 599. See generally the title "*Husband and Wife*."

As to right of action for wife's baggage, see *supra*, II, B, 4, a, (I).

33. *International & G. N. R. Co. v.*

Foltz, 3 Tex. Civ. App. 644, 22 S. W. 541.

Necessity for joining partners, see the title "*Partnership*."

34. See the following: *Ala.*—*Birmingham Ry., L. & P. Co. v. Grant*, 2 Ala. App. 552, 56 So. 769. *N. Y.* *Spencer v. Wabash R. Co.*, 36 App. Div. 446, 55 N. Y. Supp. 948. *Tex.* *Bonner v. De Mendoza*, 4 Wills. Civ. Cas. §234, 16 S. W. 976, petition for rifting of valise left in coach held sufficient.

And see generally the title "*Declaration and Complaint*."

Form of complaint for loss of baggage, see 9 STANDARD PROC. 941.

[a] *Sufficient Petition for Damages for Delay*.—*Ford v. Atlantic Coast L. R. Co.*, 8 Ga. App. 295, 68 S. E. 1072.

35. *Bonner v. De Mendoza*, 4 Wills. Civ. Cas. (Tex.) §234, 16 S. W. 976.

[a] *Sufficient Allegation*.—*Bonner v. De Mendoza*, 4 Wills. Civ. Cas. (Tex.) §234, 16 S. W. 976.

[b] That the hire for carrying the baggage was part of the purchase money of plaintiff's ticket need not be alleged. *Ranchau v. Rutland R. Co.*, 71 Vt. 142, 43 Atl. 11, 76 Am. St. Rep. 761.

[c] An allegation that the owner of the baggage was a passenger on the road with the baggage is not indispensable. *Illinois Cent. R. Co. v. Cope-*

and his baggage, a delivery of the baggage to the carrier,³⁶ for the purpose of being carried by the defendant,³⁷ a demand for redelivery at the place of destination,³⁸ and a failure to redeliver,³⁹ or redelivery in a damaged condition.⁴⁰ An itemized list of the articles of baggage lost, destroyed, or damaged and a statement of the nature and character of each article, its value and the damage, must be made,⁴¹ unless the action is brought for damages for delay in transportation.⁴² If special damages are claimed, facts putting the defendant on notice of special circumstances incident to the carriage of the baggage must be alleged.⁴³ It is not necessary to allege negligence,⁴⁴ except in those cases in which the carrier is liable only on proof of negligence.⁴⁵ Nor is it necessary to describe the articles delivered as the baggage of the plaintiff,⁴⁶ or to allege facts showing that the enumerated articles constitute baggage as this would be pleading evidence.⁴⁷ If the action is brought against a connecting carrier, it must be alleged that it and the first carriers are joint contractors,⁴⁸ or that it received the baggage.⁴⁹

(II.) Answer or Plea. — The general rules relating to pleas and answers apply to this action.⁵⁰

land, 24 Ill. 332, 76 Am. Dec. 749; Chicago, R. I. & P. R. Co. v. Conklin, 32 Kan. 55, 3 Pac. 762.

36. Cleveland, C. C. & St. L. R. Co. v. Tyler, 9 Ind. App. 689, 35 N. E. 523.

37. Southern R. Co. v. Rosenheim & Sons, 1 Ga. App. 766, 58 S. E. 81, omission of this averment makes the declaration one merely for breach of contract of bailment.

38. Cleveland, C. C. & St. L. R. Co. v. Tyler, 9 Ind. App. 689, 35 N. E. 523.

[a] Presentation of the check need not be alleged. Cleveland, C. C. & St. L. R. Co. v. Tyler, 9 Ind. App. 689, 35 N. E. 523.

39. Cleveland, C. C. & St. L. R. Co. v. Tyler, 9 Ind. App. 689, 35 N. E. 523.

40. See cases cited *supra*, this section.

41. Houston, E. & W. T. Ry. Co. v. Seale, 28 Tex. Civ. App. 364, 67 S. W. 437.

[a] Sufficient Description. — Montgomery & E. R. Co. v. Culver, 75 Ala. 587, 51 Am. Rep. 483.

42. Texas & N. O. R. Co. v. Russell (Tex. Civ. App.), 97 S. W. 1090.

43. Wehman v. Southern Ry., 74 S. C. 286, 54 S. E. 360.

44. Chicago, R. I. & P. R. Co. v. Conklin, 32 Kan. 55, 3 Pac. 762; Wallace v. Detroit, G. H. & M. R. Co., 176 Mich. 128, 142 N. W. 558, Ann. Cas. 1915B, 631.

45. See the cases cited *infra*, this note.

[a] Thus, negligence must be alleged (1) where the carrier by special contract limits its liability and the plaintiff seeks to recover in excess of the limitation (Wells v. Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A. (N. S.) 818); (2) where the baggage is not claimed in a reasonable time after arrival and the carrier is liable as a warehouseman only (see Wallace v. Detroit, G. H. & M. R. Co., 176 Mich. 128, 142 N. W. 558, Ann. Cas. 1915B, 631); (3) where the baggage lost was retained in the control of the passenger. Carpenter v. New York, N. H. & H. R. Co., 10 N. Y. St. 712; Bonner v. Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010.

Where merchandise is carried, see *supra*, II, B, 4, a, (II).

[b] Sufficient Allegation of Negligence.—Pullman Palace-Car Co. v. Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767.

46. Ranchau v. Rutland R. Co., 71 Vt. 142, 43 Atl. 11, 76 Am. St. Rep. 761.

47. Carter-Mullaly T. Co. v. Angell (Tex. Civ. App.), 181 S. W. 237.

48. Felder v. Columbia & G. R. Co., 21 S. C. 35, 53 Am. Rep. 656.

49. Felder v. Columbia & G. R. Co., 21 S. C. 35, 53 Am. Rep. 656.

50. See the titles "Answers;" "Denials;" "Pleas;" and Louisville

(III.) **Replication.** — The plaintiff is sometimes required to reply to the answer.⁵¹

e. **Variance.** — The plaintiff, in an action for loss or damage to baggage, must recover *secundum allegata et probata* in accordance with the general rules.⁵²

f. **Questions of Law and Fact.** — The general rules as to what are questions of law and fact apply to actions relating to baggage.⁵³

& N. R. Co. v. Hestle (Ala.), 75 So. 885, holding plea showing exemption from liability as an insurer sufficient.

[a] **Any valid excuses for failure to redeliver** the baggage at the place of destination must be set up in the answer. Cleveland, C. C. & St. L. R. Co. v. Tyler, 9 Ind. App. 689, 35 N. E. 523.

[b] **An allegation (1) of a notice on the check limiting liability** is no allegation of a contract to that effect, there being no showing as to plaintiff's knowledge thereof. Martin v. Central R. Co., 121 App. Div. 552, 106 N. Y. Supp. 226. (2) So also a plea of limitation of liability by virtue of a notice on the baggage check is insufficient which shows no special contract entered into in consideration of reduced charges or special concessions, and does not negative the unreasonableness thereof. Louisville & N. R. Co. v. Hestle (Ala.), 75 So. 885.

[c] **Inconsistent Defenses.** — A plea that defendant tendered the trunk to the plaintiff does not modify a general denial so as to amount to an admission of plaintiff's cause of action. Lake Shore & M. S. Ry. Co. v. Warren, 3 Wyo. 134, 6 Pac. 724.

51. See *infra*, this note, and generally the title "**Replication and Reply.**"

[a] **Particular facts excusing a failure to claim baggage** within a reasonable time after arrival must be set up by way of replication where the answer shows it was not so claimed. Louisville & N. R. Co. v. Hestle (Ala.), 75 So. 885.

52. Montgomery & E. R. Co. v. Culver, 75 Ala. 587, 51 Am. Rep. 483; Ranchau v. Rutland R. Co., 71 Vt. 142, 43 Atl. 11, 76 Am. St. Rep. 761. See generally the title "**Variance and Failure of Proof.**"

[a] **Under a general denial (1)** the carrier cannot prove a limitation of liability (Crowley Bros. v. Grand Trunk R. Co., 185 Mich. 482, 152 N. W. 215), or (2) a liability as to the baggage in

question as a warehouseman merely and loss without fault on its part. Heiden v. Atlantic C. L. R. R., 84 S. C. 117, 65 S. E. 987.

53. See *infra*, this note and generally the title "**Province of Judge and Jury.**"

[a] **So that (1)** where the evidence is disputed, it is a question for the jury whether there was delivery of baggage to the carrier (Ga.—Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460. Ia.—Green v. Milwaukee & St. P. R. Co., 41 Iowa 410. Minn.—McKibbin v. Great Northern Ry. Co., 75 Minn. 232, 80 N. W. 1052); (2) whether it was delivered an unreasonable time before the departure of a train (Cone v. Southern Ry., 85 S. C. 524, 67 S. E. 779); (3) whether the baggage reached the station to which it was checked (Louisville & N. R. Co. v. Hestle (Ala.), 75 So. 885), or (4) whether it was delivered to the passenger (Matteson v. New York Cent. & H. R. R. Co., 76 N. Y. 381), or (5) claimed by him within a reasonable time after arrival. Ala.—Louisville & N. R. Co. v. Hestle, 75 So. 885. Ia.—Ditman B. & S. Co. v. Keokuk & W. R. Co., 91 Iowa 416, 59 N. W. 257, 51 Am. St. Rep. 352. Ky.—Louisville, C. & L. R. Co. v. Mahan, 8 Bush 184. Mich. Crowley Bros. v. Grand Trunk R. Co., 185 Mich. 482, 152 N. W. 215; Wallace v. Detroit, G. H. & M. R. Co., 176 Mich. 128, 142 N. W. 558, Ann. Cas. 1915 B, 631. Miss.—Zeigler Bros. v. Mobile & O. R. Co., 87 Miss. 367, 39 So. 811. N. Y.—Roth v. Buffalo & S. L. R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Moffat v. Long Island R. Co., 123 App. Div. 719, 107 N. Y. Supp. 1113; Gilhooly v. New York & S. S. N. Co., 1 Daly 197. (6) And similarly it is a question of fact whether the carrier had notice that the package tendered as baggage contained articles not properly baggage (N. Y.—Trimble v. New York Cent. & H. R. R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; Sloman v.

What Is Baggage. — The question as to what is embraced in the term baggage is one of mixed law and fact.⁵⁴ If the evidence is undisputed and is susceptible of one inference only the question is for the court;⁵⁵ but it is otherwise if the evidence is susceptible of more than one inference.⁵⁶ Subject to this rule, it is a question for the jury, whether certain classes of articles usually transported by the different modes of public conveyance are included in the term "baggage,"⁵⁷ but it is the province of the jury to determine whether a particular article, claimed as baggage, comes within the definition in view of the nature of the journey and the condition of the passenger.⁵⁸ Likewise, when the question is as to the quantity of the articles generally coming under

Great Western R. Co., 67 N. Y. 208. Ohio.—Bowler & B. Co. v. Toledo & O. C. R. Co., 10 Ohio Cir. Ct. 272. Tex.—St. Louis, I. M. & S. R. Co. v. Green, 44 Tex. Civ. App. 13, 97 S. W. 531; (7) whether a passenger had knowledge of a notice limiting the carrier's liability (Brown v. Eastern R. Co., 11 Cush. [Mass.] 97; Madan v. Sherard, 73 N. Y. 329, 29 Am. Rep. 153), and (8) whether baggage room is kept in a reasonably safe condition. Nealand v. Boston & Me. R. R., 161 Mass. 67, 36 N. E. 592.

[b] If the evidence is undisputed, what is a reasonable time in which to call for baggage is a question for the court. Colo.—Denver & R. G. R. Co. v. Doyle, 58 Colo. 327, 145 Pac. 688, L. R. A. 1915D, 113. Mich. Crowley Bros. v. Grand Trunk R. Co., 185 Mich. 482, 152 N. W. 215. N. Y. Roth v. Buffalo & S. L. R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Mortland v. Philadelphia & R. Ry. Co., 81 Hun 473, 30 N. Y. Supp. 1021, 63 N. Y. St. 215.

54. Neb.—Gibbons v. Chicago, B. & Q. R. Co., 98 Neb. 696, 154 N. W. 226. S. C.—Vlasservitch v. Augusta & A. R. Co., 85 S. C. 291, 67 S. E. 306. Tex. Jones v. Priester, 1 White & W. Civ. Cas. §613.

55. Ark.—St. Louis, I. M. & S. R. Co. v. Miller, 103 Ark. 37, 145 S. W. 889, 39 L. R. A. (N. S.) 634. Mass. Connolly v. Warren, 106 Mass. 146, 8 Am. Rep. 300. Neb.—Gibbons v. Chicago, B. & Q. R. Co., 98 Neb. 696, 154 N. W. 226. N. Y.—Wheeler v. Oceanic Steam Nav. Co., 52 Hun 75, 5 N. Y. Supp. 101, 22 N. Y. St. 590. S. C.—Vlasservitch v. Augusta & A. R. Co., 85 S. C. 291, 67 S. E. 306. S. D. House v. Chicago & N. W. R. Co., 30 S. D. 321, 336, 138 N. W. 809.

[a] A feather bed not intended for

use on a voyage will be held not to be an article of baggage as a matter of law. Connolly v. Warren, 106 Mass. 146, 8 Am. Rep. 300.

56. Neb.—Gibbons v. Chicago, B. & Q. R. Co., 98 Neb. 696, 154 N. W. 226. N. Y.—Wheeler v. Oceanic Steam Nav. Co., 52 Hun 75, 5 N. Y. Supp. 101, 22 N. Y. St. 590. S. C.—Vlasservitch v. Augusta & A. R. Co., 85 S. C. 291, 67 S. E. 306.

57. Missouri, K. & T. R. Co. v. Meek, 33 Tex. Civ. App. 47, 75 S. W. 317; Jones v. Priester, 1 White & W. Civ. Cas. (Tex.) §613.

58. Ark.—Chicago, R. I. & P. R. Co. v. Whitten, 90 Ark. 462, 119 S. W. 835; Little Rock & H. S. W. R. Co. v. Record, 74 Ark. 125, 85 S. W. 421, 109 Am. St. Rep. 67. Fla.—Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356. Ga.—Dibble v. Brown, 12 Ga. 217, 53 Am. Dec. 460. Ill.—Wingate v. Pere Marquette R. Co., 172 Ill. App. 314. Mass.—Doerner v. St. Louis & S. F. R. Co., 149 Mo. App. 170, 130 S. W. 62. N. Y.—Knieriem v. New York Cent. & H. R. R. Co., 109 App. Div. 709, 96 N. Y. Supp. 602, 17 N. Y. Ann. Cas. 415; Rawson v. Pennsylvania R. Co., 2 Abb. Pr. (N. S.) 220; Grant v. Newton, 1 E. D. Smith 95. Ore.—Oakes v. Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 23 Am. St. Rep. 126, 12 L. R. A. 318. S. C.—Vlasservitch v. Augusta & A. R. Co., 85 S. C. 291, 67 S. E. 306. S. D.—House v. Chicago & N. W. R. Co., 30 S. D. 321, 138 N. W. 809. Tenn.—Bomar v. Maxwell, 9 Humph. 621, 51 Am. Dec. 682. Tex.—Texas & N. O. R. Co. v. Russell (Tex. Civ. App.), 97 S. W. 1090; Missouri K. & T. R. Co. v. Meek, 33 Tex. Civ. App. 47, 75 S. W. 317; Missouri Pac. R. Co. v. York, 2 Wills. Civ. Cas. §§638, 641. Vt.—Ouimit v. Henshaw, 35 Vt. 605, 84 Am. Dec. 646.

that denomination, the question is one of fact.⁵⁹

5. Suits or Actions Relating to Excessive Fares and Refusal To Issue Transfers.—a. *Actions for Penalties.*—The right to recover penalties imposed for the charging of excessive fares and for refusing to issue transfers, being purely statutory, it follows that no other process or procedure can be made use of to enforce the penalty than that prescribed in the statute.⁶⁰ Generally the party aggrieved may recover the penalty in a civil action in his own name,⁶¹ which should be brought, if it is to recover a penalty for excessive charges, in the county where the contract arose.⁶² The pleading of the plaintiff should comply with the general rules regulating pleadings and must state a cause of action within the statute;⁶³ and the answer of the defendant should state what defenses he may have.⁶⁴

The general rules relating to actions to recover penalties and forfeitures apply to the trial and judgment in this action.⁶⁵

59. U. S.—*Railroad Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531. **Ill.**—*Wingate v. Pere Marquette R. Co.*, 172 Ill. App. 314. **Kan.**—*Kansas City, Ft. S. & G. R. Co. v. Morrison*, 34 Kan 502, 9 Pac. 225, 55 Am. Rep. 252. **N. Y.**—*Merrill v. Grinnell*, 30 N. Y. 594. **Pa.**—*Porter v. Hildebrand*, 14 Pa. 129. **Tex.**—*Missouri, K. & T. R. Co. v. Meek*, 33 Tex. Civ. App. 47, 75 S. W. 317; *Jones v. Priester*, 1 White & W. Civ. Cas., §613.

60. *Reed v. Omnibus R. Co.*, 33 Cal. 212. See generally the title "**Penalties, Forfeitures and Fines.**"

[a] **Indorsement of Process.**—*Hunter v. Erie R. Co.*, 70 N. J. L. 101, 56 Atl. 139.

61. *Cincinnati, S. & C. R. Co. v. Cook*, 37 Ohio St. 265.

62. *Pennsylvania Co. v. O'Connell*, 84 Ohio St. 218, 95 N. E. 773, Ann. Cas. 1912C, 540, contract arises in county where the ticket is sold and delivered.

63. *Nellis v. New York Cent. R. Co.*, 30 N. Y. 505; *Mendoza v. Metropolitan St. Ry. Co.*, 51 App. Div. 430, 64 N. Y. Supp. 745 (sufficiency of complaint for penalty for refusal to issue transfer considered); *Cincinnati, S. & C. R. Co. v. Cook*, 37 Ohio St. 265.

[a] **That the plaintiff was a passenger** on the defendant's cars or that the ticket purchased was used need not be stated in a complaint for a penalty for excessive charge when the statute does not impose this as a condition. *Cincinnati, S. & C. R. Co. v. Cook*, 37 Ohio St. 265.

[b] **Where the bad faith of plaintiff** in paying excessive fare merely

to obtain the penalty is a matter of defense, the complaint need not negative bad faith. *Cincinnati, S. & C. R. Co. v. Cook*, 37 Ohio St. 265. Compare present statute in Ohio.

Joinder of Causes of Action.—See 14 STANDARD PROC. 699, note 46; also 14 STANDARD PROC. 709.

64. See generally the title "**Answers.**"

[a] **In an action for penalty for refusal to issue a transfer**, an answer which sets up an alternative route must state that transfers are issued on such route. *Holmes v. Interurban St. Ry. Co.*, 92 N. Y. Supp. 57.

65. See generally the title "**Penalties, Forfeitures and Fines.**"

[a] **Variance.**—In actions of this character, a strict conformity of the proof to the pleadings is required. *Stevenson v. New York City R. Co.*, 104 N. Y. Supp. 866, where the complaint alleged a refusal to give a transfer on December seventh and the proof showed the date to be July seventh, the variance was fatal. See also *Catalano v. International R. Co.*, 145 N. Y. Supp. 1005 (holding variance to be immaterial where plaintiff alleged that the defendant subjected itself to a penalty under a certain statute which had been incorporated into another statute); and generally the title "**Variance and Failure of Proof.**"

[b] **Questions of Law and Fact.** Whether the carrier is guilty of gross negligence in its manner of informing its conductors of a change in tariff is a question of fact. *King v. Syracuse, L. S. & N. R. Co.*, 131 N. Y. Supp.

b. *Injunction*.⁶⁶ — In a proper case a carrier of passengers may be enjoined from charging excessive rates.⁶⁷

878. See generally the title "**Province of Judge and Jury.**"

66. As to injunctions generally, see the title "**Injunctions.**"

67. *Westwood v. Dedham & F. St. R. Co.*, 209 Mass. 213, 95 N. E. 81; *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425.

[a] **Joinder of Parties Plaintiff.**

In an action to enjoin a street railroad from charging a fare in excess of the amount agreed on in the grant by the supervisors of the right to lay tracks, the abutting property owners cannot join with the township authorities as parties plaintiff. *Millcreek v. Erie R. T. St. R. Co.*, 209 Pa. 300, 58 Atl. 613.

PASTURE. — See **Animals.**

Vol. **XXI**

PATENTS

By the Editorial Staff.

I. REVIEW OF DECISIONS OF PATENT OFFICE, 173

- A. *In General*, 173
- B. *Conclusiveness of Decision*, 173
 - 1. *Res Judicata*, 173
 - 2. *Collateral Attack*, 174
- C. *Remedies To Review, etc.*, 175
 - 1. *Appeal*, 175
 - a. *In General*, 175
 - b. *Taking and Perfecting*, 176
 - c. *Proceedings in Appellate Court*, 177
 - 2. *Bill in Equity*, 178
 - a. *In General*, 178
 - b. *Jurisdiction and Venue*, 179
 - c. *Time To Bring Suit*, 179
 - d. *Parties*, 179
 - e. *Pleading*, 179
 - f. *Hearing and Determination*, 179
 - g. *Costs*, 180
 - 3. *Mandamus*, 180

II. SALE, ASSIGNMENT OR LICENSE, 180

- A. *Remedies Respecting*, 180
 - 1. *Action for Damages*, 180
 - 2. *Specific Performance*, 181
 - 3. *Injunction*, 182
 - 4. *Rescission and Cancellation*, 182
- B. *Jurisdiction of Proceedings Based on*, 182
 - 1. *In General*, 182
 - 2. *Particular Cases*, 183

III. INFRINGEMENT, 184

- A. *Remedies*, 184
 - 1. *At Law*, 184
 - 2. *In Equity*, 184
- B. *Jurisdiction as Between State and Federal Courts*, 185
- C. *Venue*, 187
- D. *Parties*, 187
 - 1. *Plaintiff*, 187

- a. *In General*, 187
 - b. *By Patentee*, 187
 - c. *By Assignee*, 188
 - d. *By Licensee*, 189
- 2. *Defendant*, 189
 - a. *In General*, 189
 - b. *Corporations and Their Agents*, 190
 - c. *The United States and Its Officers*, 190
- 3. *Joinder of Parties*, 191
 - a. *Plaintiff*, 191
 - b. *Defendant*, 191
- E. *Joinder of Causes*, 192
- F. *Pleading*, 193
 - 1. *In Actions at Law*, 193
 - a. *In General*, 193
 - b. *Declaration or Complaint*, 193
 - c. *Answer or Plea*, 194
 - (I.) *In General*, 194
 - (II.) *The General Issue With or Without Notice*, 194
 - (A.) *In General*, 194
 - (B.) *Contents of Notice*, 195
 - (C.) *Time of Service*, 196
 - (D.) *Form of Notice*, 196
 - (E.) *Permission To Serve*, 197
 - (F.) *Verification*, 197
 - (G.) *Waiver of Notice*, 197
 - 2. *In Suits in Equity*, 197
 - a. *The Bill*, 197
 - (I.) *In General*, 197
 - (II.) *Particular Averments*, 197
 - (III.) *Prayer*, 200
 - (IV.) *Verification*, 200
 - (V.) *Profert of Patent*, 200
 - (VI.) *Multifariousness*, 201
 - (VII.) *Discovery*, 201
 - b. *Demurrer or Motion To Dismiss*, 202
 - c. *Answer*, 203
 - (I.) *In General*, 203
 - (II.) *Answer With Notice*, 204
 - (III.) *Set-Off or Counterclaim*, 204
 - d. *Supplemental Pleadings*, 205
 - e. *Amendments*, 205
 - 3. *Bills of Particulars*, 206
- G. *Issues, Proof and Variance*, 206
- H. *Trial in Actions at Law*, 207
 - 1. *In General*, 207

2. *Questions of Law and Fact*, 207
3. *Instructions*, 208
4. *Verdict*, 209
- I. *Hearing in Equity*, 209
- J. *Judgment or Decree*, 210
 1. *In General*, 210
 2. *Costs*, 210
 - a. *In Actions at Law*, 210
 - b. *In Suits in Equity*, 211
- K. *Rehearing*, 211
- L. *Operation and Effect of Judgment or Decree*, 212
- M. *Appeal*, 212
 1. *In General*, 212
 2. *Subsequent Proceedings in Lower Court*, 213
- N. *Injunctions*, 213
 1. *In General*, 213
 2. *Preliminary Injunction*, 214
 - a. *In General*, 214
 - b. *Validity of Patent Must Be Established*, 216
 - c. *Prior Adjudication of Validity*, 217
 3. *Permanent Injunction*, 219
 - a. *In General*, 219
 - b. *Suspending or Dissolving*, 220
 4. *Violation of Injunction*, 220

IV. INFRINGEMENT OF PART OF PATENT, 221

V. INJUNCTION AGAINST THREATENED INFRINGEMENT SUITS, 221

VI. RECOVERY OF PENALTIES, 222

- A. *Wrongful Marking of Unpatented Article*, 222
- B. *Unauthorized Use of Patented Design*, 222

VII. ACTIONS FOR REFUSAL TO FURNISH COPIES OF PATENT, 223

VIII. CANCELLATION OF PATENT, 223

- A. *By the Government*, 223
- B. *By Individuals*, 224
 1. *In General*, 224
 2. *Injunction*, 225
 3. *Pleading*, 225

- a. *Bill*, 225
- b. *Answer*, 225
- 4. *Demurrer or Motion To Dismiss*, 225
- 5. *Hearing*, 226
- 6. *Decree*, 226

CROSS-REFERENCES:

Copyright Proceedings; Public Lands;
Mines and Minerals; Trade-Marks and Trade Names.

For forms, see 9 STANDARD PROC. 943, et seq.

As to presumptions, mode of proof and production of evidence, see ENCYCLOPÆDIA OF EVIDENCE, title "Patents."

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. REVIEW OF DECISIONS OF PATENT OFFICE. — A. IN GENERAL. — Decisions of the patent office are within certain prescribed limitations, reviewable by the courts.¹ The proper tribunals to make such review are the federal courts designated by act of congress,² no jurisdiction in the matter resting in the state courts,³ or in the patent official himself.⁴

B. CONCLUSIVENESS OF DECISION.⁵ — 1. *Res Judicata*. — A valid decision of the patent commissioner ought, on principle, to enjoy the same degree of conclusiveness as a *res judicata*, as the determinations of other officials when acting in a judicial or quasi judicial capacity.⁶

1. *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. ed. 719; *National Mach. Corp. v. Benthall Mach. Co.*, 241 Fed. 72, 154 C. C. A. 72; *American Graphophone Co. v. Gimbel Bros.*, 234 Fed. 344.

[a] **Constitutionality of Statute.** While the commissioner of patents is, generally speaking, an executive officer, yet, in deciding whether or not a patent shall issue, or on questions of interference between contesting claimants, he exercises judicial functions, and it is within the constitutional power of congress to provide for the revision of his decisions in such matters by a judicial tribunal. *United States v. Duell*, 172 U. S. 576, 19 Sup. Ct. 286, 43 L. ed. 559.

2. *Reckendorfer v. Faber*, 92 U. S. 347, 23 L. ed. 719; *National Mach. Corp. v. Benthall Mach. Co.*, 241 Fed. 72, 154 C. C. A. 72; *Hayes-Young Tie Plate Co. v. St. Louis Transit Co.*, 137

Fed. 80, 70 C. C. A. 1; *American Graphophone Co. v. Gimbel Bros.*, 234 Fed. 344; *Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 982; *Minneapolis Harvester Wks. v. McCormick Harvesting-Mach. Co.*, 28 Fed. 565.

3. *Cowan v. Mitchell*, 11 Heisk. (Tenn.) 87.

4. *Ex parte Simpson*, 22 Fed. Cas. No. 12,878; *Ex parte Larowe*, 14 Fed. Cas. No. 8,093; *In re Hoeveler*, 21 App. Cas. (D. C.) 107.

[a] **Correction of Patent.** — The commissioner of patents has no jurisdiction to alter a patent, and a certificate of correction issued by him is wholly void. *Edison Electric Light Co. v. United States Electric Lighting Co.*, 52 Fed. 300, 3 C. C. A. 83.

5. On appeal, see *infra*, I, C, 1, c. On review by bill in equity see *infra*, I, C, 2, f.

6. *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L.

And such undoubtedly would be its effect in the absence of controlling statutory provisions,⁷ which render the patent merely *prima facie* evidence of its validity,⁸ and permit defendant in infringement suits to raise, by way of defense,⁹ questions such as that of patentability,¹⁰ invention,¹¹ priority,¹² and abandonment.¹³

2. Collateral Attack.¹⁴—The commissioner's decision is not subject to collateral attack,¹⁵ except upon the usual grounds of fraud, or want of jurisdiction,¹⁶ subject to the limitation already noticed, that in an infringement suit it is only *prima facie* evidence as to certain matters.¹⁷

ed. 665; *Allen v. Blunt*, 3 Story 742, 1 Fed. Cas. No. 216.

Res judicata see generally the titles "**Judgments**;" "**Res Judicata**."

7. *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. ed. 657; U. S. Rev. St., §4920, 5 Fed. Ann. St., §567.

8. *National Mach. Corp. v. Benthall Mach. Co.*, 241 Fed. 72, 154 C. C. A. 72; *Gold v. Gold*, 237 Fed. 84, 150 C. C. A. 286; *Packard v. Lacing-Stud Co.*, 70 Fed. 66, 16 C. C. A. 639; *Williamson v. Electric Service Supplies Co.*, 236 Fed. 353; *Meccano v. Wagner*, 234 Fed. 912; *Maxwell Steel Vault Co. v. National Casket Co.*, 205 Fed. 515; *Sands v. Wardwell*, 3 Cliff. 277, 21 Fed. Cas. No. 12,306; *Potter v. Holland*, 4 Blatchf. 238, 19 Fed. Cas. No. 11,330; *Allen v. Blunt*, 3 Story 742, 1 Fed. Cas. No. 216.

[a] **To overcome the decision of the patent office** as to priority in an interference proceeding, which is afterwards called in question in an infringement suit, the evidence must be of a most convincing and satisfactory nature. *Reed v. Cropp Concrete Mach. Co.*, 239 Fed. 869, 152 C. C. A. 653 (*reversing* 218 Fed. 643); *Smart v. Wright*, 227 Fed. 84, 141 C. C. A. 632; *Computing Scale Co. v. Standard Computing Scale Co.*, 195 Fed. 508, 115 C. C. A. 418.

[b] **In case of admitted error**, where the patent office officials acknowledge that the patent was granted inadvertently to the wrong party, the usual principle that it is *prima facie* valid is inapplicable. *Safe-Cabinet Co. v. Globe-Wernicke Co.*, 242 Fed. 497, 155 C. C. A. 273.

[c] **An extension may strengthen the presumption of patentability.** *Everts v. Ford*, 8 Fed. Cas. No. 4,574; *Cook v. Ernest*, 1 Woods 195, 6 Fed. Cas. No. 3,155.

9. See *infra*, III.

10. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. ed.

121; *Duff v. Sterling Pump Co.*, 107 U. S. 636, 2 Sup. Ct. 487, 27 L. ed. 517; *Cohn v. United States Corset Co.*, 93 U. S. 366, 23 L. ed. 907; *Coffin v. Ogden*, 18 Wall. (U. S.) 120, 21 L. ed. 821; *Seymour v. Osborne*, 11 Wall. (U. S.) 516, 20 L. ed. 33.

11. *Ashcroft v. Boston & L. R. Co.*, 97 U. S. 189, 24 L. ed. 982; *American Graphophone Co. v. Gimbel Bros.*, 234 Fed. 344; *Hubel v. Tucker*, 24 Fed. 701, 23 Blatchf. 297.

12. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. ed. 952; *Gloucester Isinglass & G. Co. v. Brooks*, 19 Fed. 426; *Whipple v. Miner*, 15 Fed. 117.

13. *Woodbury Patent Planing Mach. Co. v. Keith*, 101 U. S. 479, 25 L. ed. 939; *United States Rifle, etc. Co. v. Whitney Arms Co.*, 14 Blatch. 94, 28 Fed. Cas. No. 16,793, *affirmed*, 118 U. S. 22, 6 Sup. Ct. 950, 30 L. ed. 53.

14. See generally 15 STANDARD PROC. 377.

15. *Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 982; *Dorsey Harvester Revolving Rake Co. v. Marsh*, 9 Phila. 395, 7 Fed. Cas. No. 4,014; *Blackford v. Wilder*, 28 App. Cas. (D. C.) 535.

[a] **The patent office is a special tribunal** intrusted with full powers in the matter of granting patents, and its action based on mere errors of judgment is not subject to collateral review by the courts. *United States v. American Bell Tel. Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. ed. 144.

16. *Garrard v. Silver Peak Mines*, 82 Fed. 578, *affirmed*, 94 Fed. 983, 36 C. C. A. 603; *In re Mattulath*, 37 App. Cas. (D. C.) 410; *Moore v. United States*, 33 App. Cas. (D. C.) 597; *United States v. Seymour*, 10 App. Cas. (D. C.) 294.

17. See *supra*, I, B, 2.

C. REMEDIES TO REVIEW, ETC. — 1. Appeal. — a. *In General*. — Any party aggrieved by an adverse decision¹⁸ of the commissioner of patents¹⁹ in a proceeding to obtain a patent or the reissuance of a patent,²⁰ or in an interference proceeding,²¹ may appeal therefrom to the court of appeals of the District of Columbia.²² But from such latter tribunal no further appeal lies to the United States supreme court.²³

The decision must be final, and on the merits, for no appeal lies from mere interlocutory orders or rulings of the commissioner,²⁴ particularly

18. *Elsom v. Bonner*, 46 App. Cas. (D. C.) 230.

[a] A ruling affirming the patentability of an invention, not appealable. *Elsom v. Bonner*, 46 App. Cas. (D. C.) 230; *Sobey v. Holsclaw*, 28 App. Cas. (D. C.) 65.

[b] One in whose favor an interference proceeding has been decided cannot appeal because the decision rested on one issue, a second issue being held a structural not a patentable difference from the first issue. *Shellabarger v. Schnabel*, 10 App. Cas. (D. C.) 145.

19. *Westinghouse v. Duncan*, 2 App. Cas. (D. C.) 131.

[a] From a decision of the primary examiner in the patent office, no appeal lies. *Westinghouse v. Duncan*, 2 App. Cas. (D. C.) 131.

20. *Elsom v. Bonner*, 46 App. Cas. (D. C.) 230; *Carlin v. Goldberg*, 45 App. Cas. (D. C.) 540; *Cosper v. Gold*, 34 App. Cas. (D. C.) 194; *In re Fullagar*, 32 App. Cas. (D. C.) 222.

21. *Elsom v. Bonner*, 46 App. Cas. (D. C.) 230; *Carlin v. Goldberg*, 45 App. Cas. (D. C.) 540; *Cosper v. Gold*, 34 App. Cas. (D. C.) 194; *In re Fullagar*, 32 App. Cas. (D. C.) 222.

[a] Prior to the act of 1893, there was no appeal from the commissioner's decision in an interference, the only remedy being a bill in equity in the United States circuit court. *Butler v. Shaw*, 21 Fed. 321.

22. *Carlin v. Goldberg*, 45 App. Cas. (D. C.) 540.

[a] The appeal is a legal, not an equitable proceeding. *Sobey v. Holsclaw*, 28 App. Cas. (D. C.) 65; *Doyle v. McRoberts*, 10 App. Cas. (D. C.) 445.

[b] The United States is not authorized by this statute to appeal. *United States v. American Bell Tel. Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. ed. 144.

When mandamus and not appeal proper remedy, see *infra*, I, C, 3.

23. *Durham v. Seymour*, 161 U. S. 235, 16 Sup. Ct. 452, 40 L. ed. 682; *Rousseau v. Brown*, 21 App. Cas. (D. C.) 73.

24. *Carlin v. Goldberg*, 45 App. Cas. (D. C.) 540; *In re Bastian*, 44 App. Cas. (D. C.) 425; *Mann v. Brown*, 43 App. Cas. (D. C.) 457; *Universal Motor Truck Co. v. Universal Motor Co.*, 41 App. Cas. (D. C.) 261; *In re Mygatt*, 40 App. Cas. (D. C.) 32; *Cosper v. Gold*, 34 App. Cas. (D. C.) 194; *In re Fullagar*, 32 App. Cas. (D. C.) 222; *United States v. Allen*, 22 App. Cas. (D. C.) 56; *Westinghouse v. Duncan*, 2 App. Cas. (D. C.) 131.

[a] In an interference proceeding only the decision on the question of priority is appealable. *Wilson v. Ellis*, 42 App. Cas. (D. C.) 555; *Rice v. Schutte*, 38 App. Cas. (D. C.) 175; *Arbetter v. Lewis*, 34 App. Cas. (D. C.) 491; *Lecroix v. Tyberg*, 33 App. Cas. (D. C.) 586.

[b] A motion to dissolve an interference (1) before the final hearing of the question of priority, and before the case is ready for such hearing, is an interlocutory proceeding and a decision thereon is not appealable. *Carlin v. Goldberg*, 45 App. Cas. (D. C.) 540; *Griffin v. Young*, 44 App. Cas. (D. C.) 210; *Cosper v. Gold*, 34 App. Cas. (D. C.) 194; *Allen v. United States ex rel. Lowry*, 26 App. Cas. (D. C.) 8. (2) But when such motion is made at a proper time and is sustained, this decision may be regarded, in a proper case, as a formal award of priority and appealable. *United States ex rel. Scott v. Moore*, 39 App. Cas. (D. C.) 36; *Cosper v. Gold*, 36 App. Cas. (D. C.) 302.

[c] An award of priority in an interference between several parties is a final judgment from which any or all of the unsuccessful parties may appeal. *Browne v. Dyson*, 38 App. Cas. (D. C.) 5.

[d] A denial of motion for reference to the examiner with directions

those involving mere matters of practice and procedure in the patent office.²⁵

b. *Taking and Perfecting*.—Strict compliance with the statute is necessary in taking and perfecting the appeal.²⁶ It must be done within the prescribed time,²⁷ and upon proper notice to the commissioner of patents.²⁸ A specific statement²⁹ of the party's reasons for appealing must be filed in the patent office,³⁰ and he must, moreover, provide the court with certified copies of all the original papers and evidence in the case.³¹ It is incumbent upon the commissioner to file a statement of the grounds for his decision.³²

to declare an interference is not appealable. *In re Bastian*, 44 App. Cas. (D. C.) 425; *Westinghouse v. Duncan*, 2 App. Cas. (D. C.) 131.

[e] **From denial of motion for rehearing**, no appeal. *Ross v. Loewer*, 9 App. Cas. (D. C.) 563.

25. *United States v. Allen*, 22 App. Cas. (D. C.) 56; *In re Frasch*, 20 App. Cas. (D. C.) 298.

26. *Carlin v. Goldberg*, 45 App. Cas. (D. C.) 540.

27. *In re Hien*, 166 U. S. 432, 17 Sup. Ct. 624, 41 L. ed. 1066.

[a] **Forty days** is fixed by rule 20 of the appellate court (1), within which to appeal (*In re Hien*, 166 U. S. 432, 17 Sup. Ct. 624, 41 L. ed. 1066), (2) and the time begins to run from the date of the ruling or order. *Burton v. Bentley*, 14 App. Cas. (D. C.) 471.

[b] **By filing a second application** for the same invention, the appellant cannot work an extension of the time to appeal. *Appeal of Barratt*, 14 App. Cas. (D. C.) 255.

28. 16 U. S. St. at L. 205; U. S. Rev. St., §4912; 8 U. S. Comp. St., 1916, §9457.

29. *Blackinton v. Douglass*, 1 McA. Pat. Cas. 622, 3 Fed. Cas. No. 1,470.

[a] **Such reasonable certainty** as will satisfy an intelligent mind is required. *Blackinton v. Douglass*, 1 McA. Pat. Cas. 622, 3 Fed. Cas. No. 1,470.

[b] **An assignment is too vague** (1) which avers merely that the commissioner "erred in many material respects" (*In re Frasch*, 27 App. Cas. [D. C.] 25), or (2) states that the decision is against the evidence and the weight of the evidence (*Blackinton v. Douglass*, 1 McA. Pat. Cas. 622, 3 Fed. Cas. No. 1,470), or (3) "that the decision is in opposition to a clear apprehension of the merits of the case."

In re Winslow, 30 Fed. Cas. No. 17,879.

[c] **Amendment** to make specific, proper. *Horine v. Wende*, 29 App. Cas. (D. C.) 415.

30. *Greenough v. Clark*, 10 Fed. Cas. No. 5,784.

[a] **The Filing of the Reasons of Appeal Is Essentially the Appeal Itself**.—The judge can judicially know nothing of the case until the aggrieved party presents to him his petition for revision on appeal, and this the latter is not authorized to do until after an adverse decision, after he has notified the commissioner of his appeal, and after his reasons of appeal are filed. *Greenough v. Clark*, 10 Fed. Cas. No. 5,784.

31. 16 U. S. St. at L. 205; U. S. Rev. St., §4913; 8 U. S. Comp. St., 1916, §9458; *In re Jackson*, 13 Fed. Cas. No. 7,126; *Howell v. Hess*, 28 App. Cas. (D. C.) 167; *In re Drawbaugh's Appeal*, 9 App. Cas. (D. C.) 219.

[a] **Immaterial affidavits**, such as those refused or not considered by the commissioner in arriving at his decision, are not properly included in appellant's record on appeal. *In re Jackson*, 13 Fed. Cas. No. 7,126; *In re Merrill*, 41 App. Cas. (D. C.) 294.

[b] **Additional affidavits** will not be received to correct or contradict the records of the patent office, but may be received in explanation of a material change in an exhibit occurring subsequent to the appeal, when necessary to a correct determination of an issue in the case. *Blackford v. Wilder*, 21 App. Cas. (D. C.) 1.

32. 16 U. S. St. at L. 205; U. S. Rev. St., §4913; 8 U. S. Comp. St., 1916, §9458; *In re Henry*, 11 Fed. Cas. No. 6,371; *Chandler v. Ladd*, 5 Fed. Cas. No. 2,593.

[a] **No reply will be permitted** to be filed to the grounds of the com-

c. *Proceedings in Appellate Court.*—Notice of the time and place of hearing must be given by the court to the commissioner, and by him to all interested parties,³³ and if the appellant fails to appear and argue the case, or file briefs in support thereof, the court will, on motion, affirm the commissioner's decision.³⁴ Likewise in a very clear case the court may on appellee's motion affirm the decision without a hearing, on the facts disclosed by the record.³⁵

Hearing and Decision.—The hearing is confined to the points set forth in the reasons for appeal,³⁶ and no questions will be considered which were not raised below.³⁷ Rulings on matters of practice will not be disturbed,³⁸ nor will discretionary decisions on matters of fact be inquired into unless such discretion is clearly abused.³⁹ The decision of the commissioner may be revised in a summary way by the appellate court on the evidence produced before the commissioner.⁴⁰ At the hearing the commissioner, or any of the examiners, under oath, may be interrogated by the appellant or the court on the principles of the

commissioner's refusal to grant a patent for an alleged invention. *In re Aiken*, 1 Fed. Cas. No. 108.

[b] **Whether the appeal is from a single application or an interference**, the commissioner must file a statement of his reasons for the decision. *In re Henry*, 11 Fed. Cas. No. 6,371.

33. 16 U. S. St. at L. 205; U. S. Rev. St., §4913; 8 U. S. Comp. St., 1916, §9458.

34. *Peckham v. Price*, 26 App. Cas. (D. C.) 556.

35. *Jones v. Starr*, 26 App. Cas. (D. C.) 64.

36. 16 U. S. St. at L. 205; U. S. Rev. St., §4914; 8 U. S. Comp. St., 1916, §9459; *Sturtevant v. Greenough*, 23 Fed. Cas. No. 13,579; *Burlew v. O'Neil*, 4 Fed. Cas. No. 2,167; *Arnold v. Bishop*, 1 Fed. Cas. No. 553; *In re Aiken*, 1 Fed. Cas. No. 107; *In re Conklin*, 1 MacArthur (D. C.) 375.

37. *Smith v. Flickenger*, 22 Fed. Cas. No. 13,047; *In re Bishop*, 1 McA. Pat. Cas. 519, 3 Fed. Cas. No. 1,439; *Allen v. Alter*, 1 Fed. Cas. No. 212; *Field v. Colman*, 40 App. Cas. (D. C.) 598; *Bower v. Gray*, 40 App. Cas. (D. C.) 483; *Leonard v. Horton*, 40 App. Cas. (D. C.) 22; *Manly v. Williams*, 37 App. Cas. (D. C.) 194; *In re Heinz*, 34 App. Cas. (D. C.) 187; *Leecroix v. Tyberg*, 33 App. Cas. (D. C.) 586; *McFarland v. Watson*, 33 App. Cas. (D. C.) 445.

38. *Spear v. Abbott*, 22 Fed. Cas. No. 13,222; *In re Chambers*, 5 Fed. Cas. No. 2,581; *Dalton v. Wilson*, 44 App. Cas. (D. C.) 249; *Field v. Colman*, 40 App. Cas. (D. C.) 598; *Phillips*

v. Sensenich, 31 App. Cas. (D. C.) 159.

[a] **Ruling on amendment of preliminary statement**, not reviewable unless abuse of discretion appears. *Warrington v. Combs*, 41 App. Cas. (D. C.) 568; *Thomas v. Weintraub*, 38 App. Cas. (D. C.) 281; *Cross v. Phillips*, 14 App. Cas. (D. C.) 228.

39. *Hathaway v. Colman*, 46 App. Cas. (D. C.) 40; *Elsom v. Bonner*, 46 App. Cas. (D. C.) 230; *Cheatham v. Collins*, 43 App. Cas. (D. C.) 16; *Gammeter v. Thropp*, 42 App. Cas. (D. C.) 564; *Lorimer v. Keith*, 41 App. Cas. (D. C.) 562; *Sobey v. Holsclaw*, 28 App. Cas. (D. C.) 65; *Davis v. Garrett*, 28 App. Cas. (D. C.) 9; *Jones v. Starr*, 26 App. Cas. (D. C.) 64; *In re Neill*, 11 App. Cas. (D. C.) 584.

[a] **Ruling on sufficiency of a disclosure** by an applicant to support the claims made the issue of an interference. *Hubbard v. Berg*, 40 App. Cas. (D. C.) 577; *Hewitt v. Weintraub*, 38 App. Cas. (D. C.) 548; *Gold v. Gold*, 34 App. Cas. (D. C.) 229; *Bosart v. Pohl*, 31 App. Cas. (D. C.) 218.

[b] **An Award of Priority.**—*Wickers v. McKee*, 29 App. Cas. (D. C.) 21; *Bourn v. Hill*, 27 App. Cas. (D. C.) 291; *Ball v. Flora*, 26 App. Cas. (D. C.) 394; *Hien v. Buhoup*, 11 App. Cas. (D. C.) 293; *Hill v. Parmelee*, 9 App. Cas. (D. C.) 503.

40. 16 U. S. St. at L. 205; U. S. Rev. St., §4914; 8 U. S. Comp. St., 1916, §9459; *Ex parte Sanders*, 21 Fed. Cas. No. 12,292; *In re Fultz*, 9 Fed.

thing for which a patent is demanded.⁴¹ A party to an interference will not be permitted to narrow a claim to meet the exigencies of a particular situation.⁴² Except in extreme cases where palpable error has been committed,⁴³ a case will not be remanded for further proceedings by the patent office,⁴⁴ especially after an affirmance,⁴⁵ even though the court may entertain a doubt as to the correctness of the ultimate fact which its decision affirms.⁴⁶

2. **Bill in Equity.** — a. *In General.* — Even before the remedy by appeal has been exhausted,⁴⁷ a bill in equity⁴⁸ to review the commissioner's decision will lie at the instance of one who is aggrieved by the denial of,⁴⁹ or the refusal to reissue⁵⁰ a patent. In such a proceeding an injunction will not be granted restraining the issuance of a

Cas. No. 5,156; *Robinson v. Seelinger*, 25 App. Cas. (D. C.) 237.

41. 16 U. S. St. at L. 205; U. S. Rev. St., §4913; 8 U. S. Comp. St., 1916, §9458; *In re Seely*, 21 Fed. Cas. No. 12,632; *Richardson v. Hicks*, 20 Fed. Cas. No. 11,783; *Perry v. Cornell*, 19 Fed. Cas. No. 11,001.

42. *Milmoe v. Holly*, 46 App. Cas. (D. C.) 455; *Monte v. Dunkley*, 46 App. Cas. (D. C.) 70; *Murphy v. Cooper*, 45 App. Cas. (D. C.) 307; *Kirby v. Clements*, 44 App. Cas. (D. C.) 12; *Rotter v. Hodgkinson*, 43 App. Cas. (D. C.) 254; *Leonard v. Horton*, 40 App. Cas. (D. C.) 22; *Geltz v. Crozier*, 32 App. Cas. (D. C.) 324.

[a] But where the difference in the inventions clearly appears, the claims will be given a reasonable interpretation consistent with the specification in which they originated, to the end that the real inventor may be given the award of priority. *Murphy v. Cooper*, 45 App. Cas. (D. C.) 307.

43. *Phillips v. Sensenich*, 31 App. Cas. (D. C.) 159; *Podlesak v. McInerney*, 26 App. Cas. (D. C.) 399.

44. *Ex parte Sanders*, 21 Fed. Cas. No. 12,292; *De Ferranti v. Lindmark*, 32 App. Cas. (D. C.) 6. See *Richards v. Meissner*, 24 App. Cas. (D. C.) 305.

45. *Nielson v. Bradshaw*, 16 App. Cas. (D. C.) 92.

46. *Arnold v. Bishop*, 1 Fed. Cas. No. 553; *In re Willard*, 45 App. Cas. (D. C.) 549; *In re Harbeck*, 39 App. Cas. (D. C.) 555; *In re Moore*, 38 App. Cas. (D. C.) 276.

[a] In affirming an award of priority in an interference, the court, though it is in doubt as to the patentability of the invention, will not remand with directions to try that ques-

tion. *Elsom v. Bonner*, 46 App. Cas. (D. C.) 230; *Hathaway v. Colman*, 46 App. Cas. (D. C.) 40; *Slingluff v. Sweet*, 45 App. Cas. (D. C.) 302; *Norling v. Hayes*, 37 App. Cas. (D. C.) 169.

47. *Prindle v. Brown*, 155 Fed. 531, reversing 136 Fed. 616. But see *McKnight v. Metal Volatilization Co.*, 128 Fed. 51; *Smith v. Muller*, 75 Fed. 612; *Kirk v. Commissioner of Patents*, 5 Mackey (D. C.) 229, to the effect that the appeal must first be exhausted.

48. **Distinguished from appeal**, see *In re Hien*, 166 U. S. 432, 17 Sup. Ct. 624, 41 L. ed. 1066; *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. ed. 656; *Dover v. Greenwood*, 154 Fed. 854.

49. 16 U. S. St. at L. 205; U. S. Rev. St., §4915; 8 U. S. Comp. St. 1916, §9460; *American Bell Tel. Co. v. United States*, 68 Fed. 542, 15 C. C. A. 569 (affirmed in 167 U. S. 224, 17 Sup. Ct. 807, 42 L. ed. 144); *Bernardin v. Northall*, 77 Fed. 849; *New York Belting & Packing Co. v. Sibley*, 15 Fed. 386; *Jones v. Starr*, 26 App. Cas. (D. C.) 64.

[a] **Administrative Proceeding.** — An ex parte suit under this section is often merely an administrative proceeding, a continuation of the application for a patent. *Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co.*, 181 Fed. 974.

[b] But one who has been granted a patent cannot resort to a bill in equity to compel issuance thereof. *Butterworth v. United States*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. ed. 656; *Moore v. Heany*, 34 App. Cas. (D. C.) 31.

50. *Ingersoll v. Holts*, 104 Fed. 682.

patent to an adverse party making claim therefor.⁵¹

b. *Jurisdiction and Venue.*—Jurisdiction over such suits resides in the federal district court⁵² of any district whereof the defendant is an inhabitant.⁵³

e. *Time To Bring Suit.*—A bill in equity to obtain a patent must be brought within the time limited for completing an application after the dismissal of the appeal from the commissioner's decision, unless delay is unavoidable.⁵⁴

d. *Parties.*—The bill may be filed in the name of the applicant,⁵⁵ or of an assignee,⁵⁶ and against the commissioner,⁵⁷ or an adverse claimant,⁵⁸ or an assignee of the latter.⁵⁹

e. *Pleading.*—The bill, whether for a patent or a reissue, must fully disclose the facts upon which the invention is claimed.⁶⁰

It is improper to join in one bill an application for a patent as against an adverse party, with an application for a reissue of a patent against the commissioner.⁶¹

f. *Hearing and Determination.*—The hearing on a bill in equity to obtain a patent is governed by the general equity rules.⁶² The com-

51. *Illingworth v. Atha*, 42 Fed. 141.

[a] **The remedy of the applicant if successful, is a proceeding in equity against the patentee for infringement.** *Jones v. Starr*, 26 App. Cas. (D. C.) 64.

52. See *Bernardin v. Northall*, 77 Fed. 849, and *Vermont Farm Mach. Co. v. Marble*, 20 Fed. 117.

53. *Butterworth v. Hill*, 114 U. S. 128, 5 Sup. Ct. 796, 29 L. ed. 119; *Thoma v. Perri*, 205 Fed. 632; *Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co.*, 181 Fed. 974.

[a] **When the suit is against the commissioner of patents it must be brought in the District of Columbia, unless he appears in the suit.** *Schmertz Wire Glass Co. v. Western Glass Co.*, 178 Fed. 973.

54. U. S. Rev. St., §4894, amended Mar. 3, 1897, ch. 391, §4, and July 6, 1916, ch. 225, §1; 16 U. S. St. at L. 202, 29 U. S. St. at L. 692, 39 U. S. St. at L. 348; 8 U. S. Comp. St., 1916, §9438; *In re Hien*, 166 U. S. 432, 17 Sup. Ct. 624, 41 L. ed. 1066; *Gandy v. Marble*, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. ed. 1223; *American Bell Tel. Co. v. United States*, 68 Fed. 542, 15 C. C. A. 569 (*affirmed* in 167 U. S. 224, 17 Sup. Ct. 807, 42 L. ed. 144); *Wende v. Horine*, 191 Fed. 620; *Westinghouse Electric & Mfg. Co. v. Ohio Brass Co.*, 186 Fed. 518.

[a] **A period of one year allowed.** U. S. Rev. St., §4894, amended Mar.

3, 1897, ch. 391, §4, and July 6, 1916, ch. 225, §1; 8 U. S. Comp. St., 1916, §9438.

[b] **Extension by reason of war, see** 8 U. S. Comp. St., 1916, §9438b; Act of Aug. 17, 1916, ch. 350, §2.

55. *Wende v. Horine*, 191 Fed. 620.

56. *Smith v. Thompson*, 177 Fed. 721.

[a] **But where the assignment does not authorize or request that a patent be issued in the name of the assignee, the assignor should sue, unless, perhaps, where the assignor fails or refuses to bring suit.** *Wende v. Horine*, 191 Fed. 620.

57. *Kirk v. Patent Comr.*, 5 Mackey (D. C.) 229.

[a] **Joinder of the secretary of the interior is not necessary in such suit.** *Kirk v. Patent Comr.*, 5 Mackey (D. C.) 229.

[b] **Where there are adverse parties the commissioner of customs is not a necessary party.** *Graham v. Teter*, 25 Fed. 555.

58. *Graham v. Teter*, 25 Fed. 555.

59. *Thoma v. Perri*, 205 Fed. 632.

[a] **The Assignee Is a Necessary Party.**—*Graham v. Teter*, 25 Fed. 555.

60. *Ingersoll v. Holt*, 104 Fed. 682.

61. *Gold v. Gold*, 181 Fed. 544.

62. See the title "Equity Jurisdiction and Procedure."

[a] **Testimony May Be Taken Before an Examiner.**—*In re Squire*, 22 Fed. Cas. No. 13,269.

plainant must establish his right to a patent,⁶³ even though the adverse party defaults,⁶⁴ but he is not confined to the evidence or record of the patent office,⁶⁵ and the court may consider and determine the questions of priority⁶⁶ and patentability.⁶⁷ The court may adjudge that the applicant is entitled to receive a patent for his invention,⁶⁸ providing it is patentable,⁶⁹ and such adjudication, when filed in the patent office, will authorize the commissioner to issue a patent to the applicant.⁷⁰

g. Costs.—In *ex parte* cases, though the commissioner must be served, the costs must be paid by the applicant, whether or not the final decision is in his favor.⁷¹ But when there is an adverse party other than the commissioner the general rules as to costs should be followed.⁷²

3. Mandamus.—Mandamus is an appropriate remedy to compel the commissioner to take a necessary or proper step in a patent proceeding,⁷³ but not to control him in the exercise of his judgment or discretion.⁷⁴

II. SALE, ASSIGNMENT OR LICENSE.—**A. REMEDIES RESPECTING.**—**1. Action for Damages.**—An action for damages lies

As to hearing in equity, see generally the title "Hearing."

63. *Gold v. Gold*, 237 Fed. 84, 150 C. C. A. 286; *Davis v. Garrett*, 152 Fed. 723.

64. *Davis v. Garrett*, 152 Fed. 723.

65. *Christie v. Seybold*, 55 Fed. 69, 5 C. C. A. 33; *In re Squire*, 22 Fed. Cas. No. 13,269.

66. *Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co.*, 168 Fed. 73; *Wheaton v. Kendall*, 85 Fed. 666.

67. *Gold v. Gold*, 237 Fed. 84, 150 C. C. A. 286; *Hansen v. Slick*, 216 Fed. 164.

68. 16 U. S. St. at L. 205; U. S. Rev. St., §4915; 8 U. S. Comp. St., 1916, §9460.

69. *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. 228, 33 L. ed. 502 (*reversing* 22 Fed. 830); *Leslie v. Tracy*, 100 Fed. 475.

70. 16 U. S. St. at L. 205; U. S. Rev. St., §4915; 8 U. S. Comp. St., 1916, §9460; *Gandy v. Marble*, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. ed. 1223.

71. 16 U. S. St. at L. 205; U. S. Rev. St., §4915; 8 U. S. Comp. St., 1916, §9460.

72. *Butler v. Shaw*, 21 Fed. 321. See generally the title "Costs."

73. *Ex parte Frasch*, 192 U. S. 566, 24 Sup. Ct. 424, 48 L. ed. 564.

[a] Appeal not a proper remedy in such case. *Ex parte Frasch*, 192

U. S. 566, 24 Sup. Ct. 424, 48 L. ed. 564.

[b] To require the forwarding of an appeal from the primary examiner to the examiner in chief. *United States v. Allen*, 192 U. S. 543, 24 Sup. Ct. 416, 48 L. ed. 555.

[c] To Prepare a Patent for the Signature of the Secretary of the Interior.—*Butterworth v. United States*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. ed. 656, *affirming* 3 Mackey (D. C.) 229.

[d] To prepare certified copies of patent papers upon demand and payment of the required fee. *United States v. Hall*, 7 Mackey (D. C.) 14, 1 L. R. A. 738.

[e] He may be compelled to declare an interference (1) which he has found to exist (*Ewing v. United States ex rel. Fowler Car Co.*, 45 App. Cas. [D. C.] 185), but (2) he cannot be compelled to find an interference. *Ewing v. United States ex rel. Fowler Car Co.*, 45 App. Cas. (D. C.) 185.

74. *United States ex rel. Ness v. Fisher*, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. ed. 610; *Butterworth v. United States*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. ed. 656 *affirming* 3 Mackey (D. C.) 229); *Holloway v. Whiteley*, 4 Wall. (U. S.) 522, 18 L. ed. 335; *Ewing v. United States ex rel. Fowler Car Co.*, 45 App. Cas. (D. C.) 185; *Aufiero v. Ewing*, 44 App. Cas. (D. C.) 328; *United States ex rel. Trussed Concrete*

to remedy a breach of a contract of sale⁷⁵ or assignment⁷⁶ or license⁷⁷ of a patent, or for fraud in inducing the patentee to refrain from selling his invention.⁷⁸

For an infringement by the licensee, the licensor may sue for breach of the agreement,⁷⁹ or for infringement.⁸⁰

2. Specific Performance.—Where an action for damages⁸¹ would not furnish adequate relief, the court will decree specific performance

Steel Co. v. Ewing, 42 App. Cas. (D. C.) 179.

75. Ga.—*Barrett v. Verdery*, 93 Ga. 526, 21 S. E. 64. See also *Kidder Press Mfg. Co. v. Fulton Bag & Cotton Mills*, 104 Ga. 785, 30 S. E. 965. **Ill.**—*Lord v. Owen*, 35 Ill. App. 382. **Ind.**—*Ft. Wayne, C. & L. R. Co. v. Haberkorn*, 15 Ind. App. 479, 44 N. E. 322. **N. Y.** *Dalzell v. Fahy's Watch Case Co.*, 138 N. Y. 285, 33 N. E. 1071; *Kirschmann v. Lediard*, 61 Barb. 573; *McDougal v. Fogg*, 2 Bosw. 387.

76. Ga.—*Barrett v. Verdery*, 93 Ga. 526, 21 S. E. 64; *Hornsby v. Butts*, 85 Ga. 694, 11 S. E. 846. **Ill.**—*Lord v. Owen*, 35 Ill. App. 382. **Ind.**—*Ft. Wayne, C. & L. R. Co. v. Haberkorn*, 15 Ind. App. 479, 44 N. E. 322. **Mass.** *Weed v. Draper*, 104 Mass. 28. **Mo.** *Standard Fireproofing Co. v. St. Louis Expanded Metal F. Co.*, 177 Mo. 559, 76 S. W. 1008. **N. J.**—*Johnson v. Johnson R. Signal Co.*, 57 N. J. Eq. 79, 40 Atl. 193. **N. Y.**—*Warth v. Liebovitz*, 179 N. Y. 200, 71 N. E. 734; *Kirschmann v. Lediard*, 61 Barb. 573. **Tex.**—*Clark v. Cyclone Woven Wire Fence Co.*, 22 Tex. Civ. App. 41, 54 S. W. 392. **Vt.**—*Vaughan v. Porter*, 16 Vt. 266.

77. Me.—*Elmer v. Pennel*, 40 Me. 430. **Minn.**—*Wilson v. Hentges*, 26 Minn. 288, 3 N. W. 338. **N. Y.**—*Montgomery v. Waterbury*, 2 Misc. 145, 21 N. Y. Supp. 631, 50 N. Y. St. 521, *affirmed*, 142 N. Y. 652, 37 N. E. 569. **Vt.**—*Sherman v. Champlain Transp. Co.*, 31 Vt. 162.

[a] **For Unpaid Royalties.**—**U. S.** *Sea Gull Specialty Co. v. Humphrey*, 242 Fed. 271, 155 C. C. A. 111; *Sproull v. Pratt & Whitney Co.*, 97 Fed. 807; *Pope Mfg. Co. v. Owsley*, 27 Fed. 100. **Id.**—*Ross v. Dowden Mfg. Co.*, 147 Iowa 180, 123 N. W. 182. **Mass.** *Strong v. Carver Cotton Gin Co.*, 197 Mass. 53, 83 N. E. 328; *Porter v. Standard Measuring Mach. Co.*, 142 Mass. 191, 7 N. E. 925. **Mich.**—*Rodgers v.*

Torrant, 43 Mich. 113, 4 N. W. 507. **Mo.**—*Meissner v. Standard Ry. Equipment Co.*, 211 Mo. 112, 109 S. W. 730. **N. Y.**—*Buffalo Rubber Mfg. Co. v. Batavia Rubber Co.*, 90 Misc. 418, 153 N. Y. Supp. 779. **Pa.**—*Consolidated Oil Well Packer Co. v. Jarecki Mfg. Co.*, 157 Pa. 342, 27 Atl. 543, 545; *Hubbard v. Allen*, 23 Pa. 198.

[b] **One joint owner of a patent** (1) cannot maintain an action for royalties under a license issued solely by another joint owner (Paulus v. M. M. Buck Mfg. Co., 129 Fed. 594, 64 C. C. A. 162; *Lalancé & Grosjean Mfg. Co. v. National Enameling & S. Co.*, 108 Fed. 77; *Levy v. Dattlebaum*, 63 Fed. 992; *Pusey & Jones Co. v. Miller*, 61 Fed. 401), nor (2) will an accounting for a share of such royalties lie against the licensor (**U. S.**—*Blackledge v. Weir & Craig Mfg. Co.*, 108 Fed. 71, 47 C. C. A. 212. **Mass.**—*Vose v. Singer*, 4 Allen 226, 81 Am. Dec. 696. **N. Y.**—*Dewitt v. Elmira Nobles Mfg. Co.*, 5 Hun 301, *affirmed*, 66 N. Y. 459, 23 Am. Rep. 73).

78. Butler v. Watkins, 13 Wall. (U. S.) 456, 20 L. ed. 629.

79. U. S.—*Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. ed. 645, Ann. Cas. 1913D, 880; *Magie Ruffle Co. v. Elm City Co.*, 13 Blatchf. 151, 16 Fed. Cas. No. 8,949; *England v. Thompson*, 3 Cliff. 271, 8 Fed. Cas. No. 4,487; *Cohn v. National Rubber Co.*, 6 Fed. Cas. No. 2,968; *Berdan Fire Arms Mfg. Co. v. United States*, 26 Ct. Cl. 48; *McKeever v. United States*, 14 Ct. Cl. 396. **Minn.**—*Deane v. Hodge*, 35 Minn. 146, 27 N. W. 917, 59 Am. Rep. 321. **N. Y.**—*Griffin v. White*, 142 N. Y. 539, 37 N. E. 468; *Skinner v. Wood Mowing Mach. Co.*, 14 N. Y. St. 317.

80. Henry v. A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. ed. 645, Ann. Cas. 1913D, 880.

Suits for infringement, see *infra*, III, D, 1.

81. See supra, II, A, 1.

of a contract to assign or sell a patent or invention.⁸²

3. Injunction.—In a proper case a licensor may have the violation of the license enjoined.⁸³

4. Rescission and Cancellation.—Fraud of either party in respect to a contract of sale, license or assignment of a patent will justify a rescission or cancellation of the contract at the instance of the other party.⁸⁴

B. JURISDICTION OF PROCEEDINGS BASED ON.—1. In General.⁸⁵ The rule is well established that in the absence of diversity of citizenship,⁸⁶ cases arising under contract relating to a patent must be brought in a state court,⁸⁷ even though a question of infringement is incidentally involved.⁸⁸ But if the matter directly in issue is one of infringe-

82. U. S.—*Dalzell v. Dueber Watch-Case Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. ed. 749; *Kennedy v. Hazleton*, 128 U. S. 667, 9 Sup. Ct. 202, 32 L. ed. 576; *Ambler v. Whipple*, 20 Wall. 546, 22 L. ed. 403; *Thompson v. Automatic Fire Protection Co.*, 197 Fed. 750; *Ball & Socket Fastener Co. v. Patent Button Co.*, 136 Fed. 272. **Conn.**—*Birkery Mfg. Co. v. Jones*, 71 Conn. 113, 40 Atl. 917. **Ill.**—*Bates Mach. Co. v. Bates*, 192 Ill. 138, 61 N. E. 518; *Wheeler v. Fishell*, 32 Ill. App. 343. **N. J.**—*Macon Knitting Co. v. Leicester Mills Co.*, 65 N. J. Eq. 138, 55 Atl. 401. **N. Y.**—*Thourot v. Holub*, 80 N. Y. Supp. 1083.

[a] **But Not If Patent Is Void.** *Kennedy v. Hazleton*, 128 U. S. 667, 9 Sup. Ct. 202, 32 L. ed. 576; *Hammond v. Mason & Hamlin Organ Co.*, 92 U. S. 724, 23 L. ed. 767.

83. Pusey & Jones Co. v. Miller, 61 Fed. 401; *Woodworth v. Weed*, 1 Blatchf. 165, 30 Fed. Cas. No. 18,022; *Day v. Hartshorn*, 7 Fed. Cas. No. 3,683. And see *Wilson v. Sherman*, 1 Blatchf. 536, 30 Fed. Cas. No. 17,833.

84. U. S.—*Duff v. Gilliland*, 139 Fed. 16, 71 C. C. A. 428, reversing 135 Fed. 581. **D. C.**—*Backus Portable Steam Heater Co. v. Simonds*, 2 App. Cas. 290. **Ill.**—*Bell v. Felt*, 205 Ill. 213, 68 N. E. 794, modifying 102 Ill. App. 218. **N. J.**—*Lederer v. Yule*, 67 N. J. Eq. 65, 57 Atl. 309.

[a] **By acquiescence in the acts of the assignee, the assignor waives his right.** *Duff v. Gilliland*, 139 Fed. 16, 71 C. C. A. 428, reversing 135 Fed. 581.

85. Jurisdiction in infringement cases, see infra, III, B.

86. Prest-O-Lite Co. v. Avery Portable Lighting Co., 164 Fed. 60; *McKay v. Mace*, 23 Fed. 76.

87. U. S.—*Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. ed. 645; Ann. Cas. 1913D, 880; *New Marshall Engine Co. v. Marshall Engine Co.*, 223 U. S. 473, 32 Sup. Ct. 238, 56 L. ed. 513; *White v. Rankin*, 144 U. S. 628, 12 Sup. Ct. 768, 36 L. ed. 569; *Kurtz v. Straus*, 106 Fed. 414, 45 C. C. A. 366; *Williams v. Star Sand Co.*, 35 Fed. 369; *McCarty & Hall Trading Co. v. Glaenger*, 30 Fed. 387; *Perry v. Littlefield*, 17 Blatchf. 272, 19 Fed. Cas. No. 11,008; *Nesmith v. Calvert*, 1 Woodb. & M. 34, 18 Fed. Cas. No. 10,123; *Brooks v. Stolley*, 3 McLean 523, 4 Fed. Cas. No. 1,962; *Burr v. Gregory*, 2 Paine 426, 4 Fed. Cas. No. 2,191. **N. Y.**—*Wise v. Tube Bending Mach. Co.*, 194 N. Y. 272, 87 N. E. 430, affirming 119 App. Div. 920, 105 N. Y. Supp. 1150. **Pa.**—*In re Dick's Appeal*, 106 Pa. 589. **Wis.**—*Manning v. Galland-Henning Pneumatic Malt- ing Drum Mfg. Co.*, 141 Wis. 199, 124 N. W. 291.

[a] **A suit involving the construction of a patent contract, the validity of the patent not being in issue, in the absence of diversity of citizenship, is not within the jurisdiction of the federal courts.** *McMullen v. Bowers*, 102 Fed. 494, 42 C. C. A. 470; *Randolph v. Robinson*, 20 Fed. Cas. No. 11,561; *Consolidated Fruit Jar Co. v. Whitney*, 6 Fed. Cas. No. 3,133.

[b] **Wrongful Use of Patented Article.**—When a patented article has been sold, redress for an injury resulting from the use thereof must be obtained in the state courts under state laws. *Chaffee v. Boston Belting Co.*, 22 How. (U. S.) 217, 16 L. ed. 240; *Aiken v. Manchester Print Works*, 2 Cliff. 435, 1 Fed. Cas. No. 113.

88. U. S.—*Pratt v. Paris Gas Light & Coke Co.*, 168 U. S. 255, 18 Sup.

ment, the state courts have no jurisdiction simply because a question concerning a contract respecting the patent arises collaterally in the case.⁸⁹

2. Particular Cases.—The state courts have jurisdiction to enforce an agreement to assign a patent,⁹⁰ or to restrain such an assignment,⁹¹ or to determine the question of ownership under an assignment,⁹² or to set aside as fraudulent an assignment,⁹³ or a contract to assign.⁹⁴ A suit relating to a license is not one arising under the patent laws and should ordinarily be brought in a state court;⁹⁵ such, for example, as to enforce the payment of royalties,⁹⁶ to recover for breach of

Ct. 62, 42 L. ed. 458; *American Graphophone Co. v. Victor Talking Mach. Co.*, 188 Fed. 428, 431, 110 C. C. A. 308; *Harrington v. Atlantic & Pacific Telegraph Co.*, 185 Fed. 493, 107 C. C. A. 595 (reversing 143 Fed. 329); *Reliable Incubator & Brooder Co. v. Stahl*, 105 Fed. 663, 44 C. C. A. 657; *Cleveland Engineering Co. v. Galion Dynamic Motor Truck Co.*, 243 Fed. 405; *Flint v. Hutchinson Smoke-Burner Co.*, 38 Fed. 546. **III.**—*Myers v. Turner*, 17 Ill. 179. **Me.**—*Carleton v. Bird*, 94 Me. 182, 47 Atl. 154. **Mass.**—*Aronson v. Orlov*, 116 N. E. 951; *Binney v. Annan*, 107 Mass. 94, 9 Am. Rep. 10; *David v. Park*, 103 Mass. 501. **N. H.** *Dunbar v. Marden*, 13 N. H. 311. **N. J.** *Green v. Wilson*, 21 N. J. Eq. 211. **Wis.**—*Rice v. Garnhart*, 34 Wis. 453, 462, 17 Am. Rep. 448.

89. *Ingalls v. Tice*, 14 Fed. 352; *Teas v. Albright*, 13 Fed. 406. And see *infra*, III, B.

90. *New Marshall Engine Co. v. Marshall Engine Co.*, 223 U. S. 473, 32 Sup. Ct. 238, 56 L. ed. 513; *Gottlieb v. Thatcher*, 151 U. S. 271, 14 Sup. Ct. 319, 38 L. ed. 157; *St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co.*, 161 Fed. 725, 88 C. C. A. 585; *Wren v. Annin*, 34 Fed. 435; *McCarty & Hall Trading Co. v. Glaenger*, 30 Fed. 387.

91. *Brooklyn Watch-Case Co. v. Leach*, 35 Fed. 2.

92. *Atherton Mach. Co. v. Atwood-Morrison Co.*, 99 Fed. 113; *Montgomery Palace Stock Car Co. v. Street Stable Car Line*, 43 Fed. 329.

[a] But this should not be confused with property rights in a patent obtained by an assignment as distinguished from contract rights. See *New York Phonograph Co. v. Davega*, 127 App. Div. 222, 111 N. Y. Supp. 263, and U. S. Rev. St., §4898; 8 U. S. Comp. St., 1916, §9444.

93. *Harrington v. Atlantic & Pacific Telegraph Co.*, 185 Fed. 493, 107 C. C. A. 595 (reversing 143 Fed. 329); *Kurtz v. Straus*, 106 Fed. 414, 45 C. C. A. 366.

94. *Cely v. Griffin*, 113 Fed. 981.

95. U. S.—*Wade v. Lawder*, 165 U. S. 624, 17 Sup. Ct. 425, 41 L. ed. 851; *Marsh v. Nichols, Shepard & Co.*, 140 U. S. 344, 11 Sup. Ct. 798, 35 L. ed. 413; *Felix v. Scharnweber*, 125 U. S. 54, 8 Sup. Ct. 759, 31 L. ed. 687; *Goodyear v. Day*, 1 Blatchf. 565, 10 Fed. Cas. No. 5568; *Blanchard v. Sprague*, 1 Cliff. 288, 3 Fed. Cas. No. 1,516. **Conn.**—*Peck v. Bacon*, 18 Conn. 377; *Bull v. Pratt*, 1 Conn. 342. **Ill.** *Rhodes v. Ashurst*, 176 Ill. 351, 52 N. E. 118; *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115, 35 N. E. 873; *Illinois Watch-Case Co. v. Ecaubert*, 75 Ill. App. 418. **Ia.**—*Hunt v. Hoover*, 24 Iowa 231. **Mass.**—*Binney v. Annan*, 107 Mass. 94, 9 Am. Rep. 10. **N. Y.** *Continental Store Service Co. v. Clark*, 100 N. Y. 365, 3 N. E. 335; *Snow v. Judson*, 38 Barb. 210. **Ohio.**—*Darst v. Brockway*, 11 Ohio 462; *Standard Combustion Co. v. Farr*, 9 Ohio Dec. (Reprint) 509, 14 Wkly. L. Bul. 201. **Pa.** *Hubbard v. Allen*, 123 Pa. 198, 16 Atl. 772.

[a] In case of infringement by a licensee, if the licensor waives the tort involved in the infringement and sues on the contract, the federal courts, in the absence of diversity of citizenship, have no jurisdiction. *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. ed. 645, Ann. Cas. 1913D, 880.

96. *Briggs v. United Shoe Mach. Co.*, 239 U. S. 48, 36 Sup. Ct. 6, 60 L. ed. 138; *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. ed. 295; *Washburn & Moen Mfg. Co. v. Freeman Wire Co.*, 41 Fed. 410 (appeal dismissed), 159 U. S. 269, 15 Sup. Ct. 1043,

a license contract,⁹⁷ to enforce the covenants of a license,⁹⁸ to restrain the violation of a license contract under a patent,⁹⁹ or to set it aside on the ground that the patent is void.¹

III. INFRINGEMENT.—A. REMEDIES.—1. **At Law.**—A patentee or owner of a patent has a remedy at law for damages for infringement of his patent.² If formal, the action may be on the case,³ or, where there is a wrongful sale⁴ or wrongful use,⁵ the patentee may waive the tort and sue in assumpsit.⁶

2. **In Equity.**—Equity will, where the circumstances warrant it, enjoin the infringement of a patent,⁷ but it will not undertake to declare an accounting in an infringement case,⁸ unless other grounds for equitable relief exist, such as circumstances which call for an injunction.⁹

40 L. ed. 141); *Kelly v. Porter*, 17 Fed. 519, 8 Sawy. 482. See *supra*, III, C, 4.

97. *Reliable Incubator & Brooder Co. v. Stahl*, 105 Fed. 663, 44 C. C. A. 657.

98. *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. ed. 645, Ann. Cas. 1913D, 880; *Indiana Mfg. Co. v. Nichols & Shepard Co.*, 190 Fed. 579; *Merserole v. Union Paper Collar Co.*, 6 Blatchf. 356, 17 Fed. Cas. No. 9,488; *Goodyear v. Union India Rubber Co.*, 4 Blatchf. 63, 10 Fed. Cas. No. 5,586.

99. *St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co.*, 161 Fed. 725, 88 C. C. A. 585.

1. *Merserole v. Union Paper Collar Co.*, 6 Blatchf. 356, 17 Fed. Cas. No. 9,488.

2. 16 U. S. St. at L. 207; U. S. Rev. St., §4919; 8 U. S. Comp. St., 1916, §9464; *Globe Knitting Works v. Segal*, 239 Fed. 322; *Panoulis v. National Equipment Co.*, 198 Fed. 493; *Bragg v. Stockton*, 27 Fed. 509; *Knight v. Baltimore & O. R. Co.*, Taney 106, 14 Fed. Cas. No. 7,882.

3. 16 U. S. St. at L. 207; U. S. Rev. St., §4919; 8 U. S. Comp. St., 1916, §9464; *Agawam Woolen Co. v. Jordan*, 7 Wall. (U. S.) 583, 19 L. ed. 177; *Moore v. Marsh*, 7 Wall. (U. S.) 515, 19 L. ed. 37; *Stein v. Goddard*, 22 Fed. Cas. No. 13,353.

[a] **Actual damage or injury** must result from the infringement, otherwise case will not lie. *Brown v. Lanyon*, 148 Fed. 838, 77 C. C. A. 528 (certiorari denied, 204 U. S. 672, 27 Sup. Ct. 787, 51 L. ed. 673); *Byam v. Bullard*, 1 Curt. 100, 4 Fed. Cas. No. 2,262.

4. *Steam Stone-Cutter Co. v. Sheldons*, 15 Fed. 608, 21 Blatchf. 260.

5. *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. ed. 645, Ann. Cas. 1913D, 880; *Wilson v. Sandford*, 10 How. (U. S.) 99, 13 L. ed. 344; *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; *Pope Mfg. Co. v. Owsley*, 27 Fed. 100.

6. *Steam Stone-Cutter Co. v. Sheldons*, 15 Fed. 608, 21 Blatchf. 260.

7. 29 U. S. St. at L. 694; U. S. Rev. St., §4921; 8 U. S. Comp. St., 1916, §9467; *Atlas Floor Co. v. Robbins Mfg. Co.*, 239 Fed. 135, 152 C. C. A. 177; *Globe Knitting Works v. Segal*, 239 Fed. 322; *Panoulis v. National Equipment Co.*, 198 Fed. 493; *Bragg v. Stockton*, 27 Fed. 509.

8. *Root v. Lake Shore & M. S. R. Co.*, 105 U. S. 189, 26 L. ed. 975; *Brown v. Lanyon*, 148 Fed. 838, 77 C. C. A. 528; *Russell v. Kern*, 69 Fed. 94, 16 C. C. A. 154 (*affirming* 64 Fed. 581); *Germain v. Wilgus*, 67 Fed. 597, 14 C. C. A. 561; *Globe Knitting Works v. Segal*, 239 Fed. 322.

9. *Root v. Lake Shore & M. S. R. Co.*, 105 U. S. 189, 26 L. ed. 975; *Hewitt v. Pennsylvania Steel Co.*, 24 Fed. 367; *McMillin v. St. Louis & M. Val. Transp. Co.*, 18 Fed. 260, 5 McCrary 561; *Perry v. Corning*, 6 Blatchf. 134, 19 Fed. Cas. No. 11,003; *Eclipse Bicycle Co. v. Farrow*, 16 App. Cas. (D. C.) 468.

[a] **Grounds for Equity Jurisdiction.**—"A bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the

A court of equity ordinarily has no jurisdiction of a suit brought upon a patent which has expired,¹⁰ unless the bill contains a statement of facts showing the remedy at law to be inadequate.¹¹ However, this rule does not effect a case based upon an expired patent and a live patent.¹² Jurisdiction of the court is not affected by the expiration of the patent *pendente lite*,¹³ but the suit will be dismissed if the circumstances indicate that the jurisdiction of equity is invoked because the patent is about to expire and no special ground for invoking such jurisdiction is shown.¹⁴

B. JURISDICTION AS BETWEEN STATE AND FEDERAL COURTS.—Pursuant to the general rule under the constitution and statutes of the United States vesting jurisdiction of all cases in law or equity arising under the patent laws, in the federal courts,¹⁵ the United States

patentee his standing in court; that the most general ground for equitable interposition is, to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but that grounds of equitable relief may arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such an equity may arise out of, and inhere in, the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exception from the general rule." *Root v. Lake Shore & M. S. Ry. Co.*, 105 U. S. 189, 215, 26 L. ed. 975.

[b] **Equity will retain jurisdiction** once obtained, and declare an accounting though the injunction is no longer desirable or obtainable. *International Curtis Marine Turbine Co. v. Wm. Cramp & Sons Ship & Engine Bldg. Co.*, 202 Fed. 932, 121 C. C. A. 290; *Carnegie Steel Co. v. Colorado Fuel, etc. Co.*, 165 Fed. 195, 91 C. C. A. 229; *Wagner v. Mt. Carmel Iron Wks.*, 244 Fed. 818.

10. *Root v. Lake Shore & M. S. R. Co.*, 105 U. S. 189, 26 L. ed. 975; *Tompkins v. St. Regis Paper Co.*, 236 Fed. 221, 149 C. C. A. 411; *Adams v. Bridgewater Iron Co.*, 26 Fed. 324;

Consolidated Safety-Valve Co. v. Ashton Valve Co., 26 Fed. 319.

Injunction and accounting in equity, see *supra*, V, A, 2.

11. *Tompkins v. St. Regis Paper Co.*, 236 Fed. 221, 149 C. C. A. 411.

12. *Huntington Dry-Pulverizer Co. v. Virginia-Carolina Chemical Co.*, 130 Fed. 558.

13. *Beedle v. Bennett*, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. ed. 1074; *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. ed. 392; *Carnegie Steel Co. v. Colorado Fuel, etc. Co.*, 165 Fed. 195, 91 C. C. A. 229; *United States Mitis Co. v. Detroit Steel & Spring Co.*, 122 Fed. 863, 59 C. C. A. 589; *Chinook v. Paterson, P. & S. Tel. Co.*, 112 Fed. 531, 50 C. C. A. 199 (*reversing* 110 Fed. 199); *Huntington Dry-Pulverizer Co. v. Virginia-Carolina Chemical Co.*, 130 Fed. 558; *Bradner Adjustable Hanger Co. v. Waterbury Button Co.*, 106 Fed. 735; *Kittle v. Schneider*, 30 Fed. 690; *Dick v. Struthers*, 25 Fed. 103; *Adams v. Howard*, 19 Fed. 317; *Jones v. Barker*, 11 Fed. 597; *Jordan v. Dobson*, 2 Abb. 398, 7 Phila. 533, 13 Fed. Cas. No. 7,519; *Busch v. Jones*, 16 App. Cas. (D. C.) 23.

[a] **Equitable Relief Not Dependent Upon Existence of Patent.**—*Toledo M. & R. Co. v. Johnston Harvester Co.*, 24 Fed. 739, 23 Blatchf. 332.

14. *Miller v. Schwarnar*, 130 Fed. 561; *Heap v. Borchers*, 108 Fed. 237; *McDonald v. Miller*, 84 Fed. 344; *American Cable R. Co. v. Chicago City R. Co.*, 41 Fed. 522; *Racine Seeder Co. v. Joliet Wire Check Rower Co.*, 27 Fed. 367; *Davis v. Smith*, 19 Fed. 823.

15. See the title "**United States Courts**," 17 STANDARD PROC. 825; and

district court has exclusive original jurisdiction over infringement suits,¹⁶ without regard to diversity of citizenship or amount of money involved.¹⁷ If the suit arises under the patent laws, the jurisdiction of the federal court is not affected by the presence of other and collateral issues,¹⁸ such as those invoking contracts of sale, assignment or license of the patent,¹⁹ or an issue of unfair competition.²⁰ But where the facts making up the unfair competition arise from acts independent of the infringement, the federal court is without jurisdiction in the absence

Act of March 3, 1911, ch. 231, §24, par. 7; 36 U. S. St. at L. 1092; 1 U. S. Comp. St., 1916, §991 (7).

Injunction and accounting, see *supra*, III, A, 2.

Actions arising out of sale assignment or license, see *supra*, II, B.

16. Boston Store of Chicago *v.* American Graphophone Co., 38 Sup. Ct. 257; Healy *v.* Sea Gull Specialty Co., 237 U. S. 479, 35 Sup. Ct. 658, 59 L. ed. 1056; Henry *v.* A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. ed. 645, Ann. Cas. 1913D, 880; Agawam Woolen Co. *v.* Jordan, 7 Wall. (U. S.) 583, 19 L. ed. 177; Moore *v.* Marsh, 7 Wall. (U. S.) 515, 19 L. ed. 37; American Graphophone Co. *v.* Pickard, 201 Fed. 546; Rauhe *v.* Justi, 196 Fed. 54; Cheatham Electric Switching D. Co. *v.* Transit Dev. Co., 191 Fed. 727; Indiana Mfg. Co. *v.* Nichols & Shepard Co., 190 Fed. 579; National Casket Co. *v.* New York & Brooklyn Casket Co., 185 Fed. 533; Vermont Farm Mach. Co. *v.* Gibson, 50 Fed. 423 (*affirmed*, 56 Fed. 143, 5 C. C. A. 451); Campbell *v.* James, 2 Fed. 338, 18 Blatchf. 92; Stanley Rule & Level Co. *v.* Bailey, 14 Blatchf. 510, 22 Fed. Cas. No. 13,287; Excelsior Steel Furnace Co. *v.* F. Meyer & Bro. Co., 182 Ill. App. 537.

[a] If it be found that no right of action for infringement will lie, the federal court can no longer entertain jurisdiction of the case, unless some other ground, such as diversity of citizenship, gives the court jurisdiction of the subject matter of the action, and it is the court's duty, when its jurisdiction is exhausted, to dismiss the action. Koenig *v.* Morris, 243 Fed. 619.

17. Doolan *v.* Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. ed. 844; Evans *v.* Eaton, 3 Wheat. (U. S.) 454, 4 L. ed. 433; United Shoe Mach. Co. *v.* Duplessis Independent Shoe Mach. Co., 133 Fed. 930.

18. Healy *v.* Sea Gull Specialty Co., 237 U. S. 479, 35 Sup. Ct. 658, 59 L.

ed. 1056; The Fair *v.* Kohler Die & Specialty Co., 228 U. S. 22, 33 Sup. Ct. 410, 57 L. ed. 716; Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. ed. 369; Swindell *v.* Youngstown Sheet & Tube Co., 230 Fed. 438, 144 C. C. A. 580; Cleveland Engineering Co. *v.* Galion Dynamic Motor Truck Co., 243 Fed. 405; Avery *v.* Wilson, 20 Fed. 856.

19. Geneva Furniture Mfg. Co. *v.* S. Karpen, 238 U. S. 254, 35 Sup. Ct. 788, 59 L. ed. 1295; Healy *v.* Sea Gull Specialty Co., 237 U. S. 479, 35 Sup. Ct. 658, 59 L. ed. 1056; Henry *v.* A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. ed. 645, Ann. Cas. 1913D, 880; Victor Talking Mach. Co. *v.* The Fair, 123 Fed. 424, 61 C. C. A. 58; Atherton Mach. Co. *v.* Atwood-Morrison Co., 102 Fed. 949, 43 C. C. A. 72; Bernardin *v.* Northall, 77 Fed. 849.

[a] That royalties are sought in an injunction suit, instead of damages, does not defeat the jurisdiction. Swindell *v.* Youngstown Sheet & Tube Co., 230 Fed. 438, 144 C. C. A. 580.

[b] A plea of license does not oust jurisdiction in an infringement suit. White *v.* Rankin, 144 U. S. 628, 12 Sup. Ct. 768, 36 L. ed. 569; Elgin Wind Power & Pump. Co. *v.* Nichols, 65 Fed. 215, 12 C. C. A. 578; Everett *v.* Haulenbeek, 68 Fed. 911.

[c] A plea of abandonment, forfeiture and revocation of the license in an infringement suit by the licensee against the licensor, does not deprive the court of jurisdiction. Excelsior Wooden-Pipe Co. *v.* Pacific Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. ed. 910.

20. K-W Ignition Co. *v.* Temco Electric Motor Co., 243 Fed. 588, 156 C. C. A. 286; Ludwigs *v.* Payson Mfg. Co., 206 Fed. 60, 124 C. C. A. 194; Shrauger *v.* Phillip Bernard Co., 240 Fed. 131; Onondaga Indian Wigwam Co. *v.* Ka-Noo-No Indian Mfg. Co., 182 Fed. 832;

of diversity of citizenship.²¹ And it has been held that even when the infringement and the unfair competition arise out of the same acts of the defendant, if the latter presents an independent cause of action it cannot be considered.²²

C. VENUE.²³—Infringement cases must be brought in the district of which the defendant is an inhabitant,²⁴ or in which the defendant, whether a person, partnership, or corporation, has committed the acts of infringement and has a regular and established place of business.²⁵

D. PARTIES.²⁶—1. **Plaintiff.**—a. *In General.*—Parties interested,²⁷ either as patentee²⁸ or assignee²⁹ may, by provision of the statute,³⁰ bring an action in his own name³¹ for infringement of a patent.

b. *By Patentee.*—A patentee, who continues the owner of the patent and the real party in interest, is the party to bring the action for infringement,³² or, if he be deceased, it may be brought by his per-

T. B. Woods Sons Co. v. Valley Iron Works, 166 Fed. 770.

21. W. F. Burns Co. v. Automatic Recording Safe Co., 241 Fed. 472, 154 C. C. A. 304; United States Expansion Bolt Co. v. H. G. Kronecke Hdw. Co., 234 Fed. 868, 148 C. C. A. 466; Mallinson v. Ryan, 242 Fed. 951; Unit Const. Co. v. Huskey Mfg. Co., 241 Fed. 129; Shrauger v. Phillip Bernard Co., 240 Fed. 131; Johnston v. Brass Goods Mfg. Co., 201 Fed. 368; Ross v. H. S. Geer Co., 188 Fed. 731.

22. Mecky v. Grabowski, 177 Fed. 591; Cushman v. Atlantic Fountain Pen Co., 164 Fed. 94; C. L. King & Co. v. Inlander, 133 Fed. 416.

23. See the title "Venue."

24. Fed. Judicial Code, §48; 36 U. S. St. at L. 1100; 2 U. S. Comp. St., 1916, §1030; Arbetter Felling Mach. Co. v. Lewis Blind Stitch Mach. Co., 230 Fed. 992, 145 C. C. A. 186.

25. Fed. Judicial Code, §48; 36 U. S. St. at L. 1100; 2 U. S. Comp. St., 1916, §1030; Westinghouse Air-Brake Co. v. Great Northern R. Co., 88 Fed. 258, 31 C. C. A. 525; Dicks Press Guard Mfg. Co. v. Bowen, 229 Fed. 193.

[a] **In suits for infringement against a nonresident corporation**, the court is without jurisdiction if the defendant has no established place of business in the district; it is insufficient that the acts of infringement were committed there. United States Envelope Co. v. Transco Paper Co., 229 Fed. 576 (objection not waived by appearance); Feder v. A. B. Fiedler, 116 Fed. 378.

[b] **In Case of Counterclaim.**—It is not a valid objection that the defendant's counterclaim could not have been

maintained as an original suit in the district where the suit for infringement is brought. United States Expansion Bolt Co. v. H. G. Kronecke Hdw. Co., 234 Fed. 868, 148 C. C. A. 466.

26. See the title "Parties."

27. Waterman v. Mackenzie, 29 Fed. 316.

[a] **Interest when infringement was committed** (1) is sufficient in an action at law (*Spring v. Domestic Sewing-Mach. Co.*, 13 Fed. 446), but (2) a suit in equity for injunction must be instituted by parties having a present interest in the patent. *Waterman v. Mackenzie*, 29 Fed. 316.

[b] **The Real Owner or Party in Interest.**—*Goldsmith v. American Paper Collar Co.*, 2 Fed. 239, 18 Blatchf. 82.

[c] **One who owns the legal title** to a patent and the exclusive right to use it. *Potter v. Wilson*, 19 Fed. Cas. No. 11,342.

28. See *infra*, III, D, 1, b.

29. See *infra*, III, D, 1, c.

30. 16 U. S. St. at L. 207; U. S. Rev. St., §4919; 8 U. S. Comp. St., 1916, §9464.

[a] **Statute cannot be extended** by state statutes. *Webb v. Goldsmith*, 127 Fed. 572.

31. *Goldsmith v. American Paper Collar Co.*, 2 Fed. 239, 18 Blatchf. 82; *Lorillard v. Standard Oil Co.*, 2 Fed. 902, 18 Blatchf. 199.

32. *Philadelphia, W. & B. R. Co. v. Trimble*, 10 Wall. (U. S.) 367, 19 L. ed. 948; *Ormsby v. Connors*, 133 Fed. 548; *Freese v. Swartchild*, 35 Fed. 141; *Park v. Little*, 3 Wash. C. C. 196, 18 Fed. Cas. No. 10,715.

sonal representative.³³ Where, however, at the time of the infringement the title to the patent has passed from the patentee by assignment,³⁴ or otherwise,³⁵ he cannot maintain the suit.

c. *By Assignee*.—An assignee may sue in his own name for infringement,³⁶ but he has no right to sue for a past infringement,³⁷ unless the assignment expressly or by necessary inference confers that right upon him.³⁸ The action, as a rule, will not lie in favor of the assignee of a part of a patent right,³⁹ unless the infringement occurs

33. *De la Vergne Refrig. Mach. Co. v. Featherstone*, 147 U. S. 209, 13 Sup. Ct. 283, 37 L. ed. 138; *Illinois Cent. R. Co. v. Turrill*, 110 U. S. 301, 4 Sup. Ct. 5, 28 L. ed. 154; *Providence Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 788, 19 L. ed. 566.

34. *Moore v. Marsh*, 7 Wall. (U. S.) 515, 19 L. ed. 37; *Ross v. Ft. Wayne*, 58 Fed. 404; *Herbert v. Adams*, 4 Mason 15, 12 Fed. Cas. No. 6,394. See *infra*, III, D, 1, c.

[a] Where the assignment is not effectuated, it does not prevent the patentee from suing. *Philadelphia, W. & B. R. Co. v. Trimble*, 10 Wall. (U. S.) 367, 19 L. ed. 948.

[b] *Assignment as Security for Debt*.—Where an assignment, though absolute in form, is by a collateral agreement made merely a security for payment of a debt, with a reservation of right to use and license under the patent, the assignor does not lose his right to sue for infringement. *Ormsby v. Connors*, 133 Fed. 548.

35. *Herbert v. Adams*, 4 Mason 15, 12 Fed. Cas. No. 6,394.

36. *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. ed. 923; *Wilson v. Rousseau*, 4 How. (U. S.) 646, 11 L. ed. 1141; *Seibert Cylinder Oil-Cup Co. v. Phillips Lubricator Co.*, 10 Fed. 677; *Herbert v. Adams*, 4 Mason 15, 12 Fed. Cas. No. 6,394.

[a] *Assignee of the Heirs of a Patentee*.—*Winkler v. Studebaker Bros. Mfg. Co.*, 105 Fed. 190.

[b] *Assignee of a Foreign Administrator*.—*Smith v. Mercer*, 3 Clark 444, 22 Fed. Cas. No. 13,078.

[c] *Limitations on Term "Assignee"*.—The word "assignee," as used by this section of the statute, means the assignee of a patent right, and not merely an assignee of a claim for infringement. *Webb v. Goldsmith*, 127 Fed. 572.

[d] *An assignment must be recorded in the patent office* before the assignee may maintain an action for infringe-

ment of the patent. *Wyeth v. Stone*, 1 Story 273, 30 Fed. Cas. No. 18,107. Compare *Ormsby v. Connors*, 133 Fed. 548.

[e] *Patent issued after assignment* and in name of assignor. *Gayler v. Wilder*, 10 How. (U. S.) 477, 13 L. ed. 504.

[f] *A Trustee*.—*Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. ed. 923; *Knight v. Gavit*, 14 Fed. Cas. No. 7,884; *Dibble v. Augur*, 7 Blatchf. 86, 7 Fed. Cas. No. 3,879; *Bryan v. Stevens*, 4 Fed. Cas. No. 2,066a.

[g] *A mortgagee* may sue for infringement upon filing or recording his mortgage in the patent office. *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. ed. 923.

[h] *The mere appointment of a receiver* is not enough to enable him to sue for infringement in his own name; there must be an actual assignment of the patent to him. *Ball v. Coker*, 168 Fed. 304.

37. *Moore v. Marsh*, 7 Wall. (U. S.) 515, 19 L. ed. 37; *Johnston v. Southern Well Works Co.*, 208 Fed. 145, 125 C. C. A. 361; *Auto Spring Repairer Co. v. Grinberg*, 196 Fed. 52; *Superior Drill Co. v. Ney Mfg. Co.*, 98 Fed. 734; *New York Grape Sugar Co. v. Buffalo Grape Sugar Co.*, 24 Fed. 604, 18 Fed. 638, 21 Blatchf. 519.

38. *May v. Saginaw*, 32 Fed. 629; *May v. Logan*, 30 Fed. 250; *Adams v. Bellaire Stamping Co.*, 25 Fed. 270; *Spring v. Domestic Sew. Mach. Co.*, 13 Fed. 446.

[a] *Mere intention* to include in an assignment of letters patent claims for past infringement will not suffice to invest the assignee with any equitable title to such claims. *Emerson v. Hubbard*, 34 Fed. 327.

39. *Tyler v. Tuel*, 6 Cranch (U. S.) 324, 3 L. ed. 237; *Whittemore v. Cutter*, 1 Gall. 429, 29 Fed. Cas. No. 17,600; *Suydam v. Day*, 2 Blatchf. 20, 23 Fed.

within a district in which he owns the exclusive right to the patent.⁴⁰

d. *By Licensee*.—A mere licensee of letters patent cannot recover for infringement, in his own name,⁴¹ unless, of course, the patentee is the infringer.⁴² But an exclusive licensee, whose interests are affected by the infringement, may sue, and join the patentee, in the event of a refusal of the latter to sue.⁴³

2. *Defendant*.⁴⁴—a. *In General*.—An action or suit for infringement will lie against anyone who participates in the infringement;⁴⁵

Cas. No. 13,654; *Blanchard v. Eldridge*, 1 Wall. Jr. 337, 3 Fed. Cas. No. 1,510.

40. *Wilson v. Rousseau*, 4 How. (U. S.) 646, 11 L. ed. 1141; *Washburn v. Gould*, 3 Story 122, 29 Fed. Cas. No. 17,214.

41. *U. S.*—*Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co.*, 144 U. S. 248, 12 Sup. Ct. 641, 36 L. ed. 423; *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. ed. 923; *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. ed. 768; *Gayler v. Wilder*, 10 How. 477, 13 L. ed. 504; *Southern Textile Mach. Co. v. Fay Stocking Co.*, 243 Fed. 917; *Consolidated Rubber Tire Co. v. B. F. Goodrich Co.*, 237 Fed. 893; *Bowers v. Atlantic, Gulf & Pacific Co.*, 162 Fed. 895. *Mass.*—*American Toy Mfg. Co. v. McLoughlin*, 221 Mass. 567, 109 N. E. 836. *Wis.*—*Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co.*, 141 Wis. 199, 124 N. W. 291.

[a] **The Rule Stated**.—"In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer, and cannot sue himself. Any rights of the licensee must be enforced through or in the name of the owner of the patent, and perhaps, if necessary to protect the rights of all parties, joining the licensee with him as a plaintiff." *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. ed. 923.

42. *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. ed. 923; *Southern Textile Mach. Co. v. Fay Stocking Co.*, 243 Fed. 917; *Bowers v. Atlantic, Gulf & Pacific Co.*, 162 Fed. 895; *Rapp v. Kelling*, 41 Fed. 792; *New York Phonograph Co. v. Davega*, 127 App. Div. 222, 111 N. Y. Supp. 363.

[a] **Exclusive right within a certain territory, invaded by the patentee.**

Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. ed. 1141; *Whitson v. Columbia Phonograph Co.*, 18 App. Cas. (D. C.) 565.

43. *Excelsior Wooden-Pipe Co. v. Seattle*, 117 Fed. 140, 55 C. C. A. 156; *Excelsior Wooden-Pipe Co. v. Allen*, 104 Fed. 553, 44 C. C. A. 30; *Brush Electric Co. v. California Elec. Light Co.*, 52 Fed. 945, 3 C. C. A. 368; *Brush Electric Co. v. Electric Imp. Co.*, 49 Fed. 73; *Brush-Swan Elec. Light Co. v. Thomson-Houston Elec. Co.*, 48 Fed. 224. See also *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. ed. 923.

44. **As to intervention by the owner of property in an infringement suit against a user**, see 14 STANDARD PROC. 306.

45. *Turner v. Quincy Market Cold Storage & Warehouse Co.*, 225 Fed. 41, 140 C. C. A. 367; *Brothers v. Lidgerwood Mfg. Co.*, 223 Fed. 359, 138 C. C. A. 460; *Goshen Rubber Works v. Single Tube Automobile & Bicycle Tire Co.*, 166 Fed. 431, 92 C. C. A. 183; *Graham v. Earl*, 82 Fed. 737; *Cramer v. Fry*, 68 Fed. 201; *National Car Brake Shoe Co. v. Terre Haute Car & Mfg. Co.*, 19 Fed. 514; *Campbell v. James*, 2 Fed. 338, 18 Blatchf. 92.

[a] **A joint owner who acts in relation to the patent without authority from his co-owner.** *Herring v. Gas Consumers' Assn.*, 9 Fed. 556, 3 McCrary 206; *Pitts v. Hall*, 3 Blatchf. 201, 19 Fed. Cas. No. 11,193.

[b] **A contributory infringer, i. e., one who aids and encourages infringement by another.** *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 80 Fed. 712, 26 C. C. A. 107; *Simplex Electric Heating Co. v. Leonard*, 148 Fed. 1023.

[c] **An agent who makes, uses or sells an infringing device may be made a defendant in an action or suit for the infringement.** *Featherstone v. Ormonde Cycle Co.*, 53 Fed. 110; *Steiger v. Heidelberg*, 4 Fed. 455, 18 Blatchf.

whether he be the patentee,⁴⁶ a licensee,⁴⁷ or the manufacturer⁴⁸ or user⁴⁹ of the infringing devise.

b. *Corporations and Their Agents.*—When the acts of infringement are committed by their agent acting within the scope of his authority, an action or suit for infringement may be brought against a private⁵⁰ or a municipal⁵¹ corporation. An officer of a corporation who is actively engaged in promoting the infringement may be restrained,⁵² or proceeded against for damages.⁵³

c. *The United States and Its Officers.*—An action for infringement cannot be maintained against the United States without its consent,⁵⁴ nor against one who makes under contract all or any part of a patented device for the use of the federal government,⁵⁵ but the owner of a patented invention may recover in the court of claims compensation

426; *Morse v. Davis*, 5 Blatchf. 40, 17 Fed. Cas. No. 9,855.

[d] **Not Against a Mere Purchaser.** *Blanchard's Gun Stock Turning Factory v. Jacobs*, 2 Blatchf. 69, 3 Fed. Cas. No. 1,520.

[e] **Not a mere workingman** or servant for using it. *Graham v. Earl*, 92 Fed. 155, 34 C. C. A. 267; *United Nickel Co. v. Worthington*, 13 Fed. 392.

46. *Excelsior Wooden-Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 22 Sup. Ct. 681, 46 L. ed. 910 (infringement of assigned patent by patentee); *Littlefield v. Perry*, 21 Wall. (U. S.) 205, 22 L. ed. 577; *Wilson v. Rousseau*, 4 How. (U. S.) 646, 11 L. ed. 1141.

47. *St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co.*, 178 Fed. 923, 103 C. C. A. 565; *Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co.*, 154 Fed. 365, 83 C. C. A. 343; *Indiana Mfg. Co. v. Nichols & Shepard Co.*, 190 Fed. 579; *National Cash Register Co. v. Grobet*, 148 Fed. 385; *Pope Mfg. Co. v. Owsley*, 27 Fed. 100.

48. *Cramer v. Fry*, 68 Fed. 201; *Bryce v. Dorr*, 3 McLean 582, 4 Fed. Cas. No. 2,070.

[a] **Manufacturer of Infringing Device.**—*Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. ed. 768; *Morgan Gardner Electric Co. v. Buettner & Shelburne Mach. Co.*, 203 Fed. 490, 121 C. C. A. 612.

49. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. ed. 768; *Wagner v. Meccano*, 239 Fed. 901, 153 C. C. A. 29; *Jefferson Electric Light, H. & P. Co. v. Westinghouse Electric, etc. Co.*, 134 Fed. 392, 67 C. C. A. 189; *Bresnahan v. Tripp Giant Leveller Co.*, 72 Fed. 920, 19 C. C. A. 237; *De Laski*

& *Thropp Circular Woven Wire Co. v. Empire Rubber & Tire Co.*, 239 Fed. 139; *Westinghouse Air Brake Co. v. Burton Stock-Car Co.*, 70 Fed. 619.

50. *Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126, 24 L. ed. 1000; *York & M. L. R. Co. v. Winans*, 17 How. (U. S.) 31, 15 L. ed. 27; *Harrington v. Atlantic & Pac. Tel. Co.*, 143 Fed. 329; *United Nickel Co. v. Worthington*, 13 Fed. 392.

51. *May v. Saginaw*, 32 Fed. 629; *May v. Ralls*, 31 Fed. 473; *May v. Logan*, 30 Fed. 250; *May v. Mercer*, 30 Fed. 246; *Ransom v. New York*, 20 Fed. Cas. No. 11,573.

[a] **Act of Contractor.**—Where a contractor, in building a jail, used a patented device without permission, and without the knowledge or authority of the county officials, an action for infringement against the county was dismissed. *May v. Juneau*, 30 Fed. 241.

52. *Cahoone Barnet Mfg. Co. v. Rubber & Celluloid Harness Co.*, 45 Fed. 582; *Iowa Barb Steel-Wire Co. v. Southern Barbed-Wire Co.*, 30 Fed. 123; *Poppenhusen v. Falke*, 4 Blatchf. 493, 19 Fed. Cas. No. 11,279.

53. *National Cash Register Co. v. Leland*, 94 Fed. 502, 37 C. C. A. 372; *Graham v. Earl*, 92 Fed. 155, 34 C. C. A. 267; *Harrington v. Atlantic & Pac. Tel. Co.*, 143 Fed. 329; *National Car Brake Shoe Co. v. Terre Haute Car & Mfg. Co.*, 19 Fed. 514.

54. *Beach v. United States*, 41 Ct. Cl. (U. S.) 110; 21 Op. Atty. Gen. 96. See the title "**United States.**"

55. *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. ed. 771 (*reversing* 32 App. Cas. [D. C.] 1); *Marconi Wireless Tel. Co. of America v. Simon*, 227 Fed. 906.

for such use.⁵⁶ On the other hand, officers of the United States, although acting within the scope of their authority, may be sued for damages for their acts of infringement⁵⁷ but cannot be enjoined.⁵⁸

3. Joinder of Parties. — a. *Plaintiff.* — Only those who have an interest in the patent should be joined as plaintiffs in an infringement case.⁵⁹ All legal owners must join in an action for infringement,⁶⁰ and all legal and equitable owners should join in a suit in equity.⁶¹ Thus all joint owners must be brought in.⁶² A simple licensee is not a necessary party plaintiff,⁶³ but he should be joined if his interests will be affected by the decree.⁶⁴ The patentee should be joined in an action by the assignee of a part of a patent right,⁶⁵ and the owner of the patent at the time of a prior infringement should be joined as plaintiff in a suit by an assignee.⁶⁶ The heirs need not join the administrator of a deceased patentee.⁶⁷

b. *Defendant.* — A corporation and an individual officer under whose authority the acts of infringement were committed or who actively participated therein may be joined,⁶⁸ or a stockholder who con-

56. Act of June 25, 1910, ch. 423; 36 U. S. St. at L. 851; 8 U. S. Comp. St. 1916, §9465; *Farnham v. United States*, 49 Ct. Cl. (U. S.) 19; *Knapp v. United States*, 46 Ct. Cl. (U. S.) 601.

[a] **The use of an invention prior to this act**, by the United States, could not be made the basis of a claim for compensation. Act of June 25, 1910, ch. 423; 36 U. S. St. at L. 851; 8 U. S. Comp. St. 1916, §9465.

57. *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. ed. 599; *Cammer v. Newton*, 94 U. S. 225, 24 L. ed. 72.

58. *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. ed. 599.

59. *Chisholm v. Johnson*, 106 Fed. 191.

60. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. ed. 664; *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 6 Sup. Ct. 934, 29 L. ed. 954; *Tyler v. Tuel*, 6 Cranch (U. S.) 324, 3 L. ed. 237; *Milwaukee Carving Co. v. Brunswick-Balke-Collender Co.*, 126 Fed. 171, 61 C. C. A. 175; *Postal Tel. Cable Co. v. Netter*, 102 Fed. 691; *Owatonna Mfg. Co. v. Fargo & Co.*, 94 Fed. 519; *Van Orden v. Nashville*, 67 Fed. 331.

61. *Chisholm v. Johnson*, 106 Fed. 191; *Clement Mfg. Co. v. Upson & Hart Co.*, 40 Fed. 471; *Otis Bros. Mfg. Co. v. Crane Bros. Mfg. Co.*, 27 Fed. 550, *affirmed*, 136 U. S. 646, 10 Sup. Ct. 1072, 34 L. ed. 553.

[a] **The licensor is a necessary party plaintiff in a suit to forfeit the li-**

cense brought by assignees holding the patent as collateral security. *Cook v. Bidwell*, 8 Fed. 452.

62. *Southern Textile Mach. Co. v. Fay Stocking Co.*, 243 Fed. 917; *Van Orden v. Nashville*, 67 Fed. 331; *Aspinwall Mfg. Co. v. Gill*, 32 Fed. 697, appeal *dismissed*, 140 U. S. 669, 11 Sup. Ct. 1015, 35 L. ed. 597.

[a] **Must all be made plaintiffs in an action at law.** *Van Orden v. Nashville*, 67 Fed. 331.

[b] **Where a co-owner files a counterclaim** charging infringement of another patent of which he is a co-owner he must join the other owner, on the principle that all parties who are interested in the controversy must be joined in a suit in equity. *Electric Boat Co. v. Lake Torpedo Boat Co.*, 215 Fed. 377.

63. *Gayler v. Wilder*, 10 How. (U. S.) 477, 13 L. ed. 504; *Shepherd v. Deutsch*, 138 Fed. 83; *Peters v. Union Biscuit Co.*, 120 Fed. 679.

64. *Bowers v. Atlantic, Gulf & Pacific Co.*, 162 Fed. 895.

65. *Whittemore v. Cutter*, 1 Gall. 429, 29 Fed. Cas. No. 17,600.

Joinder of patentee and exclusive licensee in an action by the latter, see *supra*, III, D, 1, d.

66. *Adams v. Bellaire Stamping Co.*, 25 Fed. 270.

67. *Haarmann v. Lueders*, 109 Fed. 325; *Hodge v. North Missouri R. R.*, 1 Dill. 104, 12 Fed. Cas. No. 6,561.

68. *Thomson-Houston Electric Co. v. Electrode Mfg. Co.*, 155 Fed. 543;

trols the corporation and plans the infringement may be made a defendant.⁶⁹ So, too, an agent and his principal may be sued jointly,⁷⁰ as well as a manufacturer of an infringing device and his lessee,⁷¹ and a private corporation and its receiver.⁷² But an agent or officer of a corporation who did not participate and is not interested in the infringement cannot be joined.⁷³

E. JOINDER OF CAUSES.⁷⁴ — Causes of action of the same nature or arising out of the same acts may be joined in one suit,⁷⁵ but it is not permissible to join independent causes of action for infringement against different defendants,⁷⁶ nor can a suit for the infringement of more than one patent be maintained, as a general rule, unless such patents are used, or are capable of being used, conjointly in a single device or process or in furtherance of a common purpose.⁷⁷

Animarium Co. v. Neiman, 98 Fed. 14; *Cleveland Forge & Bolt Co. v. United States Rolling-Stock Co.*, 41 Fed. 476; *Iowa Barb Steel-Wire Co. v. Southern Barbed-Wire Co.*, 30 Fed. 123; *Nichols v. Pearce*, 7 Blatchf. 5, 18 Fed. Cas. No. 10,246.

69. *Whiting Safety Catch Co. v. Western Wheeled Scraper Co.*, 148 Fed. 396.

70. *Lattimore Mfg. Co. v. Jones*, 133 Fed. 550.

71. *Wells v. Jacques*, 29 Fed. Cas. No. 17,398.

72. *Union Switch & Signal Co. v. Philadelphia & R. R. Co.*, 69 Fed. 833.

73. *Hutter v. DeQ. Bottle Stopper Co.*, 128 Fed. 283, 62 C. C. A. 652; *Matthews & Willard Mfg. Co. v. Trenton Lamp Co.*, 73 Fed. 212.

74. See generally the title "Joinder of Actions."

Multifariousness, see *infra*, III, F, 2, a, (VI).

75. *Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co.*, 193 Fed. 69; *Prest-O-Lite Co. v. Avery Portable Lighting Co.*, 164 Fed. 60; *Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co.*, 130 Fed. 558; *Atherton Mach. Co. v. Atwood-Morrison Co.*, 102 Fed. 949, 43 C. C. A. 72; *Dunham v. Bent*, 72 Fed. 60; *Stonemetz Printers' Mach. Co. v. Brown Folding Mach. Co.*, 46 Fed. 72.

[a] **Infringement and unfair competition** (1), when arising out of the same acts, may be joined in one suit (*Miller Rubber Co. v. Behrend*, 242 Fed. 515, 155 C. C. A. 291; *Sayre v. McGill Ticket Punch Co.*, 200 Fed. 771; *Climax Lock & Ventilator Co. v. Ajax Hdw. Mfg. Co.*, 192 Fed. 126; *Onondaga Indian Wigwam Co. v. Ka-*

Noo-No Indian Mfg. Co., 182 Fed. 832; *T. B. Woods Sons Co. v. Valley Iron Works*, 166 Fed. 770; *Weed v. Gay*, 160 Fed. 695; *Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co.*, 60 Fed. 622), but (2) not when they do not arise from the same acts. *Ball & Socket Fastener Co. v. Cohn*, 90 Fed. 664.

[b] **A demand to restrain the illegal use of a patented article** may be joined with one to restrain the use of the generic name of that article. *Adam v. Folger*, 120 Fed. 260, 56 C. C. A. 540.

[c] **An action for slander** growing out of circulars concerning the patent cannot be joined with an action for infringement. *Fougeres v. Murbarger*, 44 Fed. 292.

76. *Taggart v. Bremner*, 236 Fed. 544, 149 C. C. A. 596; *Jewell v. Philadelphia*, 186 Fed. 639; *Fichtel v. Barthel*, 173 Fed. 489.

77. *Rose v. Hirsch*, 77 Fed. 469, 23 C. C. A. 246 (*affirming* 71 Fed. 881); *Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co.*, 193 Fed. 69; *Louden Mach. Co. v. Montgomery Ward & Co.*, 96 Fed. 232; *Diamond Match Co. v. Ohio Match Co.*, 80 Fed. 117; *Union Switch & Signal Co. v. Philadelphia & R. R. Co.*, 68 Fed. 913; *Huber v. Myers Sanitary Depot*, 34 Fed. 752; *Griffith v. Segar*, 29 Fed. 707; *Deering v. Winona Harvester Wks.*, 24 Fed. 90; *Shickle v. South St. Louis Foundry Co.*, 22 Fed. 105; *Consolidated Electric Light Co. v. Brush-Swan Electric Light Co.*, 20 Fed. 502; *Lilliendahl v. Detwiller*, 18 Fed. 176; *Nellis v. Pennock Mfg. Co.*, 13 Fed. 451; *Hayes v. Dayton*, 8 Fed. 702, 18 Blatchf. 420.

[a] **A conjoint use is apparent**

F. PLEADING.⁷⁸ — 1. **In Actions at Law.** — a. *In General.* — The pleadings in an action for infringement as the pleadings in other civil actions must conform to the requirements of the statute.⁷⁹

b. *Declaration or Complaint.* — In accordance with the general rules of pleading, a declaration for infringement of a patent should embody the essentials of a valid cause of action.⁸⁰ Facts should be stated showing the patent,⁸¹ the interest of the complainant therein,⁸² the acts constituting the alleged infringement,⁸³ and that the defendant was notified of the infringement,⁸⁴ or that the article produced by the plaintiff was marked with notice of the patent.⁸⁵

where one of two patents appears to be an improvement on the invention of the other. *Moss v. McConway-Torley Co.*, 144 Fed. 128.

[b] **Distinct mechanical devices** which are capable of completely performing purposed functions independently of each other may be used conjointly. *Rose Mfg. Co. v. E. A. White-house Mfg. Co.*, 193 Fed. 69.

78. See generally the titles "Answers;" "Bills and Answers;" "Declaration and Complaint;" "Denials;" "Pleading;" and other related articles.

79. *Celluloid Mfg. Co. v. American Zylonite Co.*, 34 Fed. 744. See *Myers v. Cunningham*, 44 Fed. 346; *Cottier v. Stimson*, 20 Fed. 906; *Cottier v. Stimson*, 18 Fed. 689, 9 Sawy. 435.

80. *May v. Mercer*, 30 Fed. 246; *Wilder v. McCormick*, 2 Blatchf. 31, 29 Fed. Cas. No. 17,650.

[a] **The nature of the cause of action** whether for infringement of letters patent or to recover damages for breach of a contract relating to such patent, should appear. *Schrade v. Camillus Cutlery Co.*, 242 Fed. 523; *Cottier v. Stimson*, 18 Fed. 689, 9 Sawy. 435.

81. *Graham v. Earl*, 92 Fed. 155, 34 C. C. A. 267; *Wilder v. McCormick*, 2 Blatchf. 31, 29 Fed. Cas. No. 17,650.

[a] **A description of the patent in detail** as appearing in the specification is not required, the general description in the patent being sufficient. *Graham v. Earl*, 92 Fed. 155, 34 C. C. A. 267; *Tryon v. White*, Pet. C. C. 96, 24 Fed. Cas. No. 14,208; *Gray v. James*, Pet. C. C. 476, 10 Fed. Cas. No. 5,719.

[b] **That the required steps in the issuance of a patent**, were taken need not be alleged as they are presumed to have been taken. *Wilder v. McCormick*, 2 Blatchf. 31, 29 Fed. Cas.

No. 17,650; *Vanhook v. Wood*, 28 Fed. Cas. No. 16,854; *Cutting v. Myers*, 4 Wash. C. C. 220, 6 Fed. Cas. No. 3,520.

[c] **An allegation of the validity** of the patent, not necessary. *Vanhook v. Wood*, 28 Fed. Cas. No. 16,854.

[d] **Profert of letters patent** makes them a part of the declaration. *Wilder v. McCormick*, 2 Blatchf. 31, 29 Fed. Cas. No. 17,650; *Pitts v. Whitman*, 2 Story 609, 19 Fed. Fed. Cas. No. 11,196.

[e] **Oyer of letters patent** (1) is not demandable as a matter of right (*Smith v. Ely*, 5 McLean 76, 22 Fed. Cas. No. 13,043; *Singer v. Wilson*, 22 Fed. Cas. No. 12,901), (2) though the contrary has been held. *Cutting v. Myers*, 4 Wash. C. C. 220, 6 Fed. Cas. No. 3,520.

82. *Vanhook v. Wood*, 28 Fed. Cas. No. 16,854; *Gray v. James*, Pet. C. C. 476, 10 Fed. Cas. No. 5,719; *Cutting v. Myers*, 4 Wash. C. C. 220, 6 Fed. Cas. No. 3,520.

[a] **If brought by an assignee**, the instrument of assignment need not be set out. *Vanhook v. Wood*, 28 Fed. Cas. No. 16,854.

[b] **If by a licensee**, the license, its extent and limitations should be averred. *Schrade v. Camillus Cutlery Co.*, 242 Fed. 523.

83. *Schrade v. Camillus Cutlery Co.*, 242 Fed. 523.

[a] **Contra Formam Statuti.** — It need not be alleged in the complaint that the acts complained of are *contra formam statuti*. *Parker v. Haworth*, 4 McLean 370, 18 Fed. Cas. No. 10,738.

84. *Streat v. Finch*, 154 Fed. 378. See *Gibson v. American Graphophone Co.*, 234 Fed. 633, 148 C. C. A. 399.

85. *Streat v. Finch*, *Young & McConville*, 154 Fed. 378; *Sprague v. Bramhall-Deane Co.*, 133 Fed. 738.

c. *Answer or Plea.*—(I.) *In General.* — Want of patentability is available as a defense without being pleaded,⁸⁶ but there is no objection to it being pleaded specially.⁸⁷ The statute of limitations⁸⁸ being a condition on the right of recovery for an infringement, does not have to be specially pleaded.⁸⁹ Nor do other statutes relating to infringement,⁹⁰ or the defense of a paramount license in an action between assignees,⁹¹ or any irregularity in the proceedings in the patent office,⁹² unless otherwise required by statute.⁹³ The defendant cannot specially plead matter already pleaded under the general issue with notice,⁹⁴ but any other special defense not enumerated by the statute may be pleaded specially in the usual way,⁹⁵ irrespective of the plea of the general issue, with or without notice.⁹⁶ The defense of a bona fide purchase for value must state the amount of the consideration.⁹⁷

(II.) *The General Issue With or Without Notice.*—(A.) *IN GENERAL.*⁹⁸ In an action at law for infringement the defendant may plead the general issue.⁹⁹ But the statute provides that the general issue must be accompanied with notice as to certain specified defenses,¹ as that for the purpose of deceiving the public the description and specification filed by the patentee in the patent office was made to contain less than the whole truth relative to his invention or discovery, or more than

86. *May v. Juneau*, 137 U. S. 408, 11 Sup. Ct. 102, 34 L. ed. 729; *Hendy v. Golden State & Miners' Iron Wks.*, 127 U. S. 370, 8 Sup. Ct. 1275, 32 L. ed. 207; *Slawson v. Grand Street, etc. R. Co.*, 107 U. S. 649, 2 Sup. Ct. 663, 27 L. ed. 576; *Dunbar v. Myers*, 94 U. S. 187, 24 L. ed. 34.

87. *Brickill v. Hartford*, 57 Fed. 216.

88. 29 U. S. St. at L. 694; U. S. Rev. St., §4921 (as amended March 3, 1897, ch. 391, §6); 8 U. S. Comp. St., 1916, §9467.

89. *Peters v. Hanger*, 134 Fed. 586, 67 C. C. A. 386, *reversing* 127 Fed. 820, 62 C. C. A. 498.

90. *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 9, 14 Fed. Cas. No. 7,875.

91. *Day v. New England Car Co.*, 3 Blatchf. 179, 7 Fed. Cas. No. 3,687.

92. *Eagleton Mfg. Co. v. West, Bradley & Cary Mfg. Co.*, 111 U. S. 490, 4 Sup. Ct. 593, 28 L. ed. 493; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 9, 14 Fed. Cas. No. 7,875.

93. See 29 U. S. St. at L. 692; U. S. Rev. St. §4920 (amended March 3, 1897, c. 391, §2); 8 U. S. Comp. St. 1916, §9466.

94. *Read v. Miller*, 2 Biss. 12, 20 Fed. Cas. No. 11,610; *Latta v. Shawk*, 1 Bond 259, 14 Fed. Cas. No. 8,116.

95. *Cottier v. Stimson*, 18 Fed. 689, 9 Sawy. 435. See also *Grant v. Ray-*

mond, 6 Pet. (U. S.) 218, 8 L. ed. 376.

[a] **Fraud** in obtaining the patent must be specially pleaded. *Blake v. Stafford*, 6 Blatchf. 195, 3 Fed. Cas. No. 1,504.

96. *Cottier v. Stimson*, 18 Fed. 689, 9 Sawy. 435.

97. *Secombe v. Campbell*, 2 Fed. 357, 18 Blatchf. 108.

98. See the title "**Denials.**"

99. 29 U. S. St. at L. 692; U. S. Rev. St., §4920 (as amended March 3, 1897, ch. 391, §2); 8 U. S. Comp. St., 1916, §9466; *Grant v. Raymond*, 6 Pet. (U. S.) 218, 8 L. ed. 376; *Root v. Ball*, 4 McLean 177, 20 Fed. Cas. No. 12,035.

1. 29 U. S. St. at L. 692; U. S. Rev. St. §4920 (as amended March 3, 1897, c. 391, §2); 8 U. S. Comp. St., 1916, §9466; *Grant v. Raymond*, 6 Pet. (U. S.) 218, 8 L. ed. 376.

[a] **The notice must go to the whole patent**, and not merely to a special claim or feature of it. *Westlake v. Cartter*, 29 Fed. Cas. No. 17,451; *Kelleher v. Darling*, 4 Cliff. 424, 14 Fed. Cas. No. 7,653.

[b] **Suit in Equity for Infringement.**—The special defenses available to the defendant in actions at law for infringement under the general issue with notice are likewise available in a suit in equity for infringement when notice is given in the answer. See the

is necessary to produce the desired effect;² that he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same;³ that it has been patented or described in some printed publication prior to his supposed invention or discovery thereof, or more than two years prior to his application for a patent therefor;⁴ that he was not the original and first inventor or discoverer of any material and substantial part of the thing patented;⁵ that it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.⁶

(B.) CONTENTS OF NOTICE. — Notices as to proof of previous invention, knowledge, or use of the thing patented, must state the names⁷ of the

statute *supra*, and *Bates v. Coe*, 98 U. S. 31, 25 L. ed. 68.

2. *Celluloid Mfg. Co. v. Russell*, 37 Fed. 676; *Celluloid Mfg. Co. v. American Zylonite Co.*, 34 Fed. 744; *Eagleton Mfg. Co. v. West, Bradley & Cary Mfg. Co.*, 2 Fed. 774, 18 Blatchf. 218.

3. *Yates v. Huson*, 8 App. Cas. (D. C.) 93.

4. *Blanchard v. Putnam*, 8 Wall. (U. S.) 420, 19 L. ed. 433.

[a] It is insufficient to aver that the alleged invention had been previously patented, on certain dates, to other parties, it being necessary to follow the statute and aver that the patent had been patented or described in some printed publication prior to his supposed invention or discovery. *Brickill v. Hartford*, 57 Fed. 216.

5. *Teese v. Huntingdon*, 23 How. (U. S.) 2, 16 L. ed. 479; *Vacuum Cleaner Co. v. Dunn*, 189 Fed. 634; *Meyers v. Busby*, 32 Fed. 670, 13 Sawy. 33; *La Baw v. Hawkins*, 14 Fed. Cas. No. 7,960; *Geier v. Goetinger*, 10 Fed. Cas. No. 5,299.

[a] **Statute Must Be Followed.** If the statute is not complied with testimony cannot be introduced showing that the patentee is not the inventor of his machine. *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. (U. S.) 448, 10 L. ed. 535; *Vacuum Cleaner Co. v. Dunn*, 189 Fed. 634; *Foote v. Silsby*, 9 Fed. Cas. No. 4,916, *affirmed*, 14 How. 218, 14 L. ed. 394.

6. *Woodbury Patent Planing Mach. Co. v. Keith*, 101 U. S. 479, 25 L. ed. 939; *Bates v. Coe*, 98 U. S. 31, 25 L. ed. 68; *Roemer v. Simon*, 95 U. S. 214, 24 L. ed. 384; *Agawam Woolen Co. v. Jordan*, 7 Wall. (U. S.) 582, 19 L. ed. 177; *Teese v. Huntingdon*, 23 How. (U. S.) 2, 16 L. ed. 479; *Kennedy v.*

Solar Refining Co., 69 Fed. 715; *Meyers v. Busby*, 32 Fed. 670, 13 Sawy. 33.

[a] **The Statute Must Be Strictly Complied With.**—*Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. (U. S.) 448, 10 L. ed. 535.

[b] It is insufficient to aver that the alleged invention was in use and for sale before the application for a patent; it must also be averred that there was an abandonment, or that the sale or use was more than two years prior to the application. *Root v. Ball*, 4 McLean 177, 20 Fed. Cas. No. 12,035.

7. *Saunders v. Allen*, 60 Fed. 610, 9 C. C. A. 157; *Corrugated Metal Co. v. Pattison*, 197 Fed. 577; *Coleman v. Liesor*, 6 Fed. Cas. No. 2,984.

[a] **The aim or purpose of the notice** is to save the patentee from the necessity of making useless inquiries and researches, and to enable him to fix with precision the matters of defense relied on by the defendant, and the notice should be sufficiently full and particular as reasonably to answer or fulfill that purpose. *Silsby v. Foote*, 14 How. (U. S.) 218, 14 L. ed. 394 (*affirming* *Foote v. Silsby*, 1 Blatchf. 445, 9 Fed. Cas. No. 4,916); *Smith v. Frazer*, 22 Fed. Cas. No. 13,048; *Brown v. Hall*, 6 Blatchf. 401, 4 Fed. Cas. No. 2,008.

[b] **A drawing of the device** alleged to be in anticipation of the plaintiff's patent need not be attached to the notice, since if it be a concrete thing which may be made the subject of an exhibit the plaintiff may ask to have it submitted in advance for the inspection of his expert witnesses, thus preventing surprise. *Todd v. Whitaker*, 217 Fed. 319.

patentees, the dates of their patents,⁸ and when granted;⁹ the names and residences of the persons alleged to have invented,¹⁰ or to have had prior knowledge of the thing patented,¹¹ and where¹² and by whom it had been used.¹³ Notice of the names of witnesses intended to be called by defendant is not required.¹⁴ The time of the previous use does not have to be stated,¹⁵ nor is the use of such defense limited to any particular time.¹⁶

(C.) TIME OF SERVICE. — Notice of a special defense must be served on the plaintiff or his attorney at least thirty days before the trial.¹⁷

(D.) FORM OF NOTICE. — The notice of the defense of special mat-

8. *Phillips v. Page*, 24 How. (U. S.) 164, 16 L. ed. 639; *Saunders v. Allen*, 60 Fed. 610, 9 C. C. A. 157.

[a] **Prior publication** alleged to have contained a description of the plaintiff's patented device or process must be described sufficiently to be identified, or a copy filed with the notice, but a patent by the United States is sufficiently indicated by giving its number, date, and the name of the patentee. *Corrugated Metal Co. v. Pattison*, 197 Fed. 577.

9. *Phillips v. Page*, 24 How. (U. S.) 164, 16 L. ed. 639.

10. *Woodbury Patent Planing Mach. Co. v. Keith*, 101 U. S. 479, 25 L. ed. 939; *Meyers v. Busby*, 32 Fed. 670, 13 Sawy. 33; *Allis v. Buckstaff*, 13 Fed. 879; *Wilton v. Railroads*, 1 Wall. Jr. 192, 30 Fed. Cas. No. 17,857.

11. *Roemer v. Simon*, 95 U. S. 214, 24 L. ed. 384; *Philadelphia, W. & B. R. Co. v. Dubois*, 12 Wall. (U. S.) 47, 20 L. ed. 265; *Seymour v. Osborne*, 11 Wall. (U. S.) 516, 20 L. ed. 33; *Phillips v. Page*, 24 How. (U. S.) 164, 16 L. ed. 639; *Tatum v. Eby*, 60 Fed. 408.

12. *Agawam Woolen Co. v. Jordan*, 7 Wall. (U. S.) 583, 19 L. ed. 177; *Phillips v. Page*, 24 How. (U. S.) 164, 16 L. ed. 639; *Teese v. Huntingdon*, 23 How. (U. S.) 2, 16 L. ed. 479; *Silsby v. Foote*, 14 How. (U. S.) 218, 14 L. ed. 394 (*affirming* *Foote v. Silsby*, 1 Blatchf. 445, 9 Fed. Cas. No. 4,916); *Corrugated Metal Co. v. Pattison*, 197 Fed. 577; *Diamond Match Co. v. Schenck*, 71 Fed. 521, *affirmed*, 77 Fed. 208, 23 C. C. A. 122.

[a] **Reference to a county where a prior use occurred** is not sufficiently definite as to place. *Hays v. Sulsor*, 1 Bond 279, 11 Fed. Cas. No. 6,271.

13. *American Hide & Leather Splitting & Dressing Mach. Co. v. American*

Tool & Mach. Co., 1 Holmes 503, 1 Fed. Cas. No. 302.

[a] **Prior Use With Inventor's Consent.**—Where the prior use relied on is a use by the inventor, or by other persons with his consent, it is not necessary to notify him of the names of the persons using the invention, or of the places where used. *American Hide & Leather Splitting & Dressing Mach. Co. v. American Tool & Mach. Co.*, 1 Holmes 503, 1 Fed. Cas. No. 302.

[b] **On Issue of Patentability.** For the purpose of showing the invalidity of a patent it is not necessary to file the statutory notice containing the names of places and persons where and by whom the invention had been used or known. *Orr v. Merrill*, 1 Woodb. & M. 376, 18 Fed. Cas. No. 10,591.

14. *Woodbury Patent Planing Mach. Co. v. Keith*, 101 U. S. 479, 25 L. ed. 939; *Roemer v. Simon*, 95 U. S. 214, 24 L. ed. 384; *Allis v. Buckstaff*, 13 Fed. 879; *Wilton v. Railroads*, 1 Wall. Jr. 192, 30 Fed. Cas. No. 17,857.

15. *Phillips v. Page*, 24 How. (U. S.) 164, 16 L. ed. 639. *Compare* *Corrugated Metal Co. v. Pattison*, 197 Fed. 577, holding that time and place should be stated.

16. *Evans v. Eaton*, Pet. C. C. 322, 8 Fed. Cas. No. 4,559.

17. *Westlake v. Cartter*, 29 Fed. Cas. No. 17,451.

[a] **In Term Time.**—The notice may be filed in term time provided it is filed full thirty days before the trial. *Brunswick v. Holzalb*, 4 Fed. Cas. No. 2,057.

[b] **Where the day of trial is held to be the first day of the term**, the notice must be served thirty days before the first day of the term in order to be available. *Westlake v. Cartter*, 29 Fed. Cas. No. 17,451.

ter as required by the statute must be in writing.¹⁸

(E.) PERMISSION TO SERVE. — An order of court for leave to serve notice of special matter to be set up as a defense is unnecessary,¹⁹ and a second notice may also be served without leave if accomplished before the expiration of the time limited for such service.²⁰

(F.) VERIFICATION. — The notice of defenses of special matter required by the statute does not have to be verified.²¹

(G.) WAIVER OF NOTICE. — Failure to file the required notice may be waived by failing to object to the evidence offered to prove the defense in question.²²

2. In Suits in Equity. — a. *The Bill.* — (I.) In General. — A bill for the infringement of a patent should be drawn in accordance with the rules governing bills in equity generally,²³ and as in other cases the averments in the bill should justify a resort to equity,²⁴ and excuse any apparent delay in bringing the suit.²⁵

(II.) Particular Averments. — The pleader should set forth facts sufficient to show the existence of his patent,²⁶ the nature²⁷ of his inven-

18. 29 U. S. St. at L. 692; U. S. Rev. St., §4920; 8 U. S. Comp. St., 1916, §9466.

19. Teese v. Huntingdon, 23 How. (U. S.) 2, 16 L. ed. 479.

20. Teese v. Huntingdon, 23 How. (U. S.) 2, 16 L. ed. 479.

21. Campbell v. New York, 45 Fed. 243.

22. Zane v. Soffe, 110 U. S. 200, 3 Sup. Ct. 562, 28 L. ed. 119; Loom Co. v. Higgins, 105 U. S. 580, 26 L. ed. 1177; Roemer v. Simon, 95 U. S. 214, 24 L. ed. 384 (affirming 20 Fed. Cas. No. 11,997); Monroe v. Bresee, 239 Fed. 727, 152 C. C. A. 561; Campbell v. Skinner, 236 Fed. 359; Crouch v. Speer, 6 Fed. Cas. No. 3,438.

23. See the title "Bills and Answers."

24. American Cable R. Co. v. Chicago City R. Co., 41 Fed. 522; Germain v. Wilgus, 67 Fed. 597, 14 C. C. A. 561; Campbell v. Ward, 12 Fed. 150; Vaughan v. Central Pac. R. Co., 4 Sawy. 280, 28 Fed. Cas. No. 16,897.

25. American Thermos Bottle Co. v. Semple, 222 Fed. 942; Edison Electric Light Co. v. Equitable Life Assur. Soc., 55 Fed. 478. See Kaolatype Engraving Co. v. Hoke, 30 Fed. 444, and the title "Laches."

[a] But diligence need not be alleged when the suit is commenced within the period limited for beginning infringement suits. Thomson-Houston Electric Co. v. Electrore Mfg. Co., 155 Fed. 542.

26. Zenith Carbureter Co. v. Strom-

berg Motor Devices Co., 205 Fed. 158; Bowers v. Bucyrus Co., 132 Fed. 39.

27. Acme Steel Goods Co. v. American Metal Fasteners Co., 206 Fed. 478; Stirrat v. Excelsior Mfg. Co. 44 Fed. 142.

[a] When the state of the prior art, such as (1) the actual industrial conditions and progress, are material to plaintiff's cause, as in the case of a patented improvement, it should be pleaded. American Fibre-Chamois Co. v. Buckskin-Fibre Co., 72 Fed. 508, 18 C. C. A. 662; Acme Steel Goods Co. v. American Metal Fasteners Co., 206 Fed. 478; Adrian Wire Fence Co. v. Jackson Fence Co., 190 Fed. 195; Stillwell v. McPherson, 172 Fed. 151; Neidich v. Fosbenner, 108 Fed. 266; Krick v. Jansen, 52 Fed. 823; Bottle Seal Co. v. DeLa Vergne Bottle & Seal Co., 47 Fed. 59. (2) Reference to prior patents to the same inventor is proper in showing the state of the art and history of the invention. Steam-Gauge & Lantern Co. v. McRoberts, 26 Fed. 765.

[b] Either by way of averments or as an exhibit, a substantial description of the invention, should be given. Welsbach Light Co. v. Rex Incandescent Light Co., 87 Fed. 477; Stirrat v. Excelsior Mfg. Co., 44 Fed. 142; Wise v. Grand Ave. R. Co., 33 Fed. 277; Post v. T. C. Richards Hdw. Co., 25 Fed. 905.

[c] A mere reference to a patent, giving only its date, not mentioning its number or record by book and page

tion, or improvement,²⁸ and that the letters patent were validly issued²⁹ to the first inventor, or in other words the pleader must aver facts to show the originality of the invention,³⁰ and negative the existence of those facts which if existing would defeat its patentability.³¹

in the patent office, is insufficient. *Electrolibration Co. v. Jackson*, 52 Fed. 773.

[d] **The particular claims of the patent** need not be specified. *Morton Trust Co. v. American Car & Foundry Co.*, 129 Fed. 916, 64 C. C. A. 367 (*reversed* in 121 Fed. 132); *Johnson v. Columbia Phonograph Co.*, 106 Fed. 319.

[e] **Specifying the particular patent** relied on, see *Coulston v. H. Franke Steel Range Co.*, 221 Fed. 669; *General Elec. Co. v. American Brass & Copper Co.*, 209 Fed. 237; *Luten v. Sharp*, 200 Fed. 151; *Foundation Co. v. O'Rourke Engineering Const. Co.*, 171 Fed. 425; *Eastwood v. Cutler-Hammer Mfg. Co.*, 148 Fed. 718.

[f] **When certain parts of the invention** are alleged to have been infringed, it must appear that they are material parts. *Moss v. McConway-Torley Co.*, 144 Fed. 128.

[g] **If a plan or photograph is filed, a specific description of a design patent is unnecessary.** *National Casket Co. v. New York & Brooklyn Casket Co.*, 185 Fed. 533; *Cheney Bros. v. Weinreb*, 185 Fed. 531.

Profert, see *infra*, III, F, 2, a, (V).

28. *Peterson v. Wooden*, 3 McLean 248, 19 Fed. Cas. No. 11,038.

29. *Bonney Supply Co. v. Heltzel*, 243 Fed. 399; *Brayley v. Braunstein Bros. Co.*, 237 Fed. 671; *Maxwell Steel Vault Co. v. National Casket Co.*, 205 Fed. 515; *Fichtel v. Barthel*, 173 Fed. 489; *Moss v. McConway-Torley Co.*, 144 Fed. 128; *American Graphophone Co. v. National Phonograph Co.*, 127 Fed. 349; *Elliott & Hatch Book-Type-writer Co. v. Fisher Typewriter Co.*, 109 Fed. 330.

[a] **Rule twenty-five does not change** the previously settled requirement of distinct allegations of compliance with the statute. Such allegations were previously held necessary because they were of facts essential to the validity of the patent sued on, and therefore to the relief sought. If essential to this extent they must be statements of ultimate facts, as distinguished from statements of mere

evidence. *Schaum v. Copley-Plaza Operating Co.*, 243 Fed. 924; *Maxwell Steel Vault Co. v. National Casket Co.*, 205 Fed. 515.

[b] **That the steps necessary to the issuance of the patent** were taken (1) is presumed, and they need not be alleged (*Bowers v. Bucyrus Co.*, 132 Fed. 39); thus (2) it is not necessary to allege that an application was duly made (*Bowers v. Bucyrus Co.*, 132 Fed. 39), or (3) that the patent was recorded in the patent office. *Luten v. Dover Const. Co.*, 189 Fed. 405.

[c] **Issuance in name of the United States** and under the seal of the patent office and the signature of the commissioner, must be averred. *Eastwood v. Cutler-Hammer Mfg. Co.*, 148 Fed. 718.

[d] **Grounds for obtaining a reissue** need not be stated. *Spaeth v. Barney*, 22 Fed. 828.

[e] **Averments on information and belief**, insufficient. *Rubber Tire Wheel Co. v. Davie*, 100 Fed. 85.

30. *Schaum v. Copley-Plaza Operating Co.*, 243 Fed. 924; *Brayley v. Braunstein Bros. Co.*, 237 Fed. 671; *Maxwell Steel Vault Co. v. National Casket Co.*, 205 Fed. 515; *Miller v. Smith*, 5 Fed. 359; *Young v. Lippman*, 9 Blatchf. 277, 30 Fed. Cas. No. 18,160; *Sullivan v. Redfield*, 1 Paine 441, 23 Fed. Cas. No. 13,595.

[a] **The date** (1) of the invention need not be pleaded. *Todd v. Whitaker*, 217 Fed. 319. *Compare* *Rubber-Tire Wheel Co. v. Davie*, 100 Fed. 85. (2) But the original date of the application, when different from that on which a patent was issued, should be pleaded if material to meet a defense of prior use. *Corrington v. Westinghouse Air Brake Co.*, 178 Fed. 711, 103 C. C. A. 479.

[b] **A sufficient allegation** that the plaintiff was the "original and first inventor or discoverer" is the averment that plaintiff was, "within the meaning of the statutes of the United States then in force, the inventor" of the patented process. *Schaum v. Copley-Plaza Operating Co.*, 243 Fed. 924.

31. *Bayley v. Braunstein Bros. Co.*,

The bill should also aver facts to show complainant's title or ownership³² at the time the bill is filed,³³ and if there is a prior adjudication establishing the patentee's title, the facts of such adjudication should be set forth.³⁴

237 Fed. 671; Maxwell Steel Vault Co. v. National Casket Co., 205 Fed. 515; Elliott & Hatch Book-Typewriter Co. v. Fisher Typewriter Co., 109 Fed. 330; Rubber Tire Wheel Co. v. Davie, 100 Fed. 85; Diamond Match Co. v. Ohio Match Co., 80 Fed. 117; Hutton v. Star Slide Seat Co., 60 Fed. 747; Ross v. Ft. Wayne, 58 Fed. 404; Hanlon v. Primrose, 56 Fed. 600; Goebel v. American Ry. Supply Co., 55 Fed. 828; Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co., 47 Fed. 894; Coop v. Dr. Savage Physical D. Inst., 47 Fed. 899; Blessing v. John Trageser Steam Copper Works, 34 Fed. 753. *Contra*, Moss v. McConway-Torley Co., 144 Fed. 128.

[a] That the patent sued on has not been patented or described (1) in any printed publication before his invention or discovery thereof or more than two years prior to his application, should be averred (Electric Goods Mfg. Co. v. Benjamin Electric Mfg. Co., 169 Fed. 832; Victor Talking Mach. Co. v. Leeds & Catlin Co., 165 Fed. 931; Moss v. McConway-Torley Co., 144 Fed. 128; Rubber Tire Wheel Co. v. Davie, 100 Fed. 85; Diamond Match Co. v. Ohio Match Co., 80 Fed. 117; Hutton v. Star Slide Seat Co., 60 Fed. 747; Hanlon v. Primrose, 56 Fed. 600; Goebel v. American Ry. Supply Co., 55 Fed. 825; Overman Wheel Co. v. Elliott Hickory Cycle Co., 49 Fed. 859. *Contra*, American Cereal Co. v. Oriental Food Co., 145 Fed. 649), or (2) that it had not been in public use or on sale in this country for more than two years prior to his application for a patent. Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 130 Fed. 900 (*affirmed* in 137 Fed. 80, 70 C. C. A. 1); American Graphophone Co. v. National Phonograph Co., 127 Fed. 349; Elliott & Hatch Book-Typewriter Co. v. Fisher Typewriter Co., 109 Fed. 330; Rubber-Tire Wheel Co. v. Davie, 100 Fed. 85; Ross v. Ft. Wayne, 58 Fed. 404; Krick v. Jansen, 52 Fed. 823; Coop v. Dr. Savage Physical D. Inst., 47 Fed. 899; Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co., 47 Fed. 894; Nathan Mfg.

Co. v. Craig, 47 Fed. 522; Blessing v. John Trageser Steam Copper Works, 34 Fed. 753.

32. Schaum v. Copley-Plaza Operating Co., 243 Fed. 924; Southern Textile Mach. Co. v. Fay Stocking Co., 243 Fed. 917; Maxwell Steel Vault Co. v. National Casket Co., 205 Fed. 515; Zenith Carbureter Co. v. Stromberg Motor Devices Co., 205 Fed. 158; Nourse v. Allen, 4 Blatchf. 376, 18 Fed. Cas. No. 10,367.

[a] General averment of title, sufficient. Arrott v. Standard Mfg. Co., 113 Fed. 1014.

[b] Attaching a copy of the patent to the bill without any averment or showing as to ownership is not sufficient. American Graphophone Co. v. National Phonograph Co., 127 Fed. 349.

[c] The various links in a chain of title need not be shown. Sirocco Engineering Co. v. Monarch Ventilator Co., 184 Fed. 84; American Graphophone Co. v. National Phonograph Co., 127 Fed. 349; Atherton Mach. Co. v. Atwood-Morrison Co., 102 Fed. 949, 43 C. C. A. 72; Edison Electric Light Co. v. Packard Electric Co., 61 Fed. 1002.

[d] A sufficient showing of plaintiff's interest is illustrated by the allegations, coupled with proffer and exhibit, that by mesne assignment and grant prior to the suit the plaintiff became and now is the party interested in said letters patent, all of which will more fully appear from said assignment and grant, now produced and shown in court. Clement Mfg. Co. v. Upson & Hart Co., 40 Fed. 471.

33. Lettelier v. Mann, 79 Fed. 81; Krick v. Jansen, 52 Fed. 823.

34. Peters v. Chicago Biscuit Co., 142 Fed. 779; American Bell Tel. Co. v. Southern Tel. Co., 34 Fed. 803; Steam-Gauge & Lantern Co. v. McRoberts, 26 Fed. 765; Parker v. Brant, 1 Fish. Pat. Cas. 58, 18 Fed. Cas. No. 10,727.

Pleading former adjudication, see the title "Judgments."

[a] Where a preliminary injunction is sought, the right thereto may depend on a prior adjudication establish-

The acts of infringement must be alleged,³⁵ and in certain cases also facts showing notice to the defendants.³⁶ But it is not necessary to allege the extent of the plaintiff's loss or damage.³⁷

(III.) **Prayer.** — The bill should as a rule contain a prayer for process.³⁸ Damages need not be prayed for *eo nomine*, but may be granted under a general prayer for relief.³⁹

(IV.) **Verification.** — The bill need not be verified,⁴⁰ unless special relief pending the suit is desired.⁴¹

(V.) **Profert of Patent.** — A patent may be made part of a bill for its infringement, by profert,⁴² a general description of the invention

ing title to the patent. *Peters v. Chicago Biscuit Co.*, 142 Fed. 779. See *Wirt v. Hicks*, 46 Fed. 71.

35. *Ashcroft v. Boston & L. R. R. Co.*, 97 U. S. 189, 24 L. ed. 982; *Zenith Carburetor Co. v. Stromberg Motor Devices Co.*, 205 Fed. 158; *Tucker v. Tucker Mfg. Co.*, 4 Cliff. 397, 24 Fed. Cas. No. 14,227.

[a] **A general allegation** to the effect that the defendant has infringed, without specifying in what particulars, is sufficient. *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. 803; *Miller v. Smith*, 5 Fed. 359; *Turrell v. Cammerrer*, 24 Fed. Cas. No. 14,266; *Thatcher Heating Co. v. Carbon Stove Co.*, 23 Fed. Cas. No. 13,864; *Haven v. Brown*, 11 Fed. Cas. No. 6,228.

[b] **That it was during the life of patent** that the infringement occurred must be shown. *American Diamond Rock-Boring Co. v. Rutland Marble Co.*, 2 Fed. 355, 18 Blatchf. 147.

[c] **The extent of the infringement** need not be averred. *Luten v. Dover Const. Co.*, 189 Fed. 405; *Fischer v. Hayes*, 6 Fed. 76, 19 Blatchf. 26.

[d] **When the plaintiff is a licensor** the bill must affirmatively show that the defendant is not using the invention under authority of the licensee. *Still v. Reading*, 9 Fed. 40, 4 Woods 345.

[e] **Averments Must Be Positive.** *Fichtel v. Barthel*, 173 Fed. 489; *Murray Co. v. Continental Gin Co.*, 126 Fed. 533; *Elliott & Hatch Book-Typewriter Co. v. Fisher Typewriter Co.*, 109 Fed. 330; *Wyckoff v. Wagner Typewriter Co.*, 88 Fed. 515.

36. *Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co.*, 159 Fed. 154.

[a] **Notice to the defendant of the infringement** must be averred, unless it appears from the bill that the article was marked as patented. *Westing-*

house Electric & Mfg. Co. v. Condit Electrical Mfg. Co., 159 Fed. 154.

37. *American Graphophone Co. v. National Phonograph Co.*, 127 Fed. 349; *Wirt v. Hicks*, 46 Fed. 71.

38. *Goebel v. American Ry. Supply Co.*, 55 Fed. 825.

39. *Emerson v. Simm*, 8 Fed. Cas. No. 4,443.

40. *United States Mitis Co. v. Detroit Steel & Spring Co.*, 122 Fed. 863, 59 C. C. A. 589.

41. Rule 25.

[a] **Where injunction** is sought verification is necessary. *Scheuerle v. Onepiece Bifocal Lens Co.*, 241 Fed. 270.

[b] **An assignee** may make affidavit of the fact that the patentee was the first and original inventor of the thing patented. *Thompson v. Jewett*, 23 Fed. Cas. No. 13,961.

[c] **Verification by the equitable owner** of the patent, who, being immediately injured by the infringement, is joined in a suit for infringement with the holder of the legal title. *Goodyear v. Allyn*, 6 Blatchf. 33, 10 Fed. Cas. No. 5,555; *Bowers v. Bucyrus Co.*, 132 Fed. 39; *Edison v. American Mutoscope & Biograph Co.*, 127 Fed. 361;

42. *Fowler v. City of New York*, 121 Fed. 747, 58 C. C. A. 113 (*affirming* 110 Fed. 749); *Dickerson v. Greene*, 53 Fed. 247; *Bogart v. Hinds*, 25 Fed. 484.

[a] **That "the patent and specification are ready to be produced in court,"** is equivalent to a formal profert. *Wilder v. McCormick*, 2 Blatchf. 31, 29 Fed. Cas. No. 17,650.

[b] **The mere mention in the bill** of prior patents issued the same patentee is not a profert of them. *Bowers v. Bucyrus Co.*, 132 Fed. 39.

[c] **But a profert of a reissue**, the original being referred to by date and number, is also a profert of the lat-

in the bill being sufficient in such case.⁴³

(VI.) **Multifariousness.**⁴⁴ — To avoid multifariousness in a bill for the infringement of two or more patents, there should be an allegation of conjoint use by the defendant in a single device or process or in furtherance of a common purpose.⁴⁵ But it is not necessary to allege that two infringing devices used in one apparatus are used conjointly or connected together.⁴⁶ When a suit for infringement is against two or more defendants the bill must show joint conduct or allege a joint liability.⁴⁷

(VII.) **Discovery.** — The general rules relating to the doctrine of discovery apply to suits for infringement.⁴⁸ Whether or not the defendant will be ordered to permit an inspection of his alleged infringing machine depends largely upon the circumstances of each case,

ter. *Edison v. American Mutoscope & Biograph Co.*, 127 Fed. 361.

43. *Fichtel v. Barthel*, 173 Fed. 489; *Hildreth v. Bee Candy Mfg. Co.*, 162 Fed. 40; *Enterprise Mfg. Co. v. Snow*, 67 Fed. 235; *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. 803; *McMillin v. St. Louis & M. Val. Transp. Co.*, 18 Fed. 260, 5 McCrary 561; *Pitts v. Whitman*, 2 Story 609, 19 Fed. Cas. No. 11,196.

[a] An insufficient description of the invention is cured by profert of the patent. *Germain v. Wilgus*, 67 Fed. 597, 14 C. C. A. 561.

44. See the title "Multifariousness."

45. *Vrooman v. Penhollow*, 179 Fed. 296, 102 C. C. A. 484; *Robinson v. Chicago Rys. Co.*, 174 Fed. 40, 98 C. C. A. 26; *Kansas City Hay-Press Co. v. Devo*, 81 Fed. 726, 26 C. C. A. 578 (reversing 72 Fed. 717, rehearing denied, 84 Fed. 463, 28 C. C. A. 464); *Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co.*, 193 Fed. 69; *Adrian Wire Fence Co. v. Jackson Fence Co.*, 190 Fed. 195; *Luten v. Dover Const. Co.*, 189 Fed. 405; *Southern Plow Co. v. Atlanta Agricultural Works*, 165 Fed. 214; *American Graphophone Co. v. Leeds & Catlin Co.*, 131 Fed. 281; *Edison Phonograph Co. v. Victor Talking Mach. Co.*, 120 Fed. 305; *Continental Gin Co. v. F. H. Lummus Sons' Co.*, 110 Fed. 390; *Elliott & Hatch Book-Typewriter Co. v. Fisher Typewriter Co.*, 109 Fed. 330; *Chisholm v. Johnson*, 106 Fed. 191; *Russell v. Winchester Repeating Arms*, 97 Fed. 634.

[a] Use in the same device may be inferred from the allegation that the inventions covered by the patents sued on were "conjointly used."

Foundation Co. v. O'Rourke Engineering Const. Co., 171 Fed. 425.

46. *Horman Patent Mfg. Co. v. Brooklyn City R. Co.*, 15 Blatchf. 444, 12 Fed. Cas. No. 6,703.

47. *Swift v. Inland Nav. Co.*, 234 Fed. 375. See *Indurated Fibre Industries Co. v. Grace*, 52 Fed. 124.

48. See generally the title "Discovery."

[a] **Discovery of Documents.** — A bill for discovery in aid of an action at law will be allowed where it is shown that in order to ascertain how many and how often plaintiff's patents were used by defendants in the manufacture of cars, a great many drawings would have to be examined which if called for in the action at law would entail an interminable taking of evidence on such matters. *Pressed Steel Car Co. v. Union Pac. R. Co.*, 240 Fed. 135. As to discovery of documents generally, see 7 *STANDARD PROC.* 527.

[b] **Interrogatories** which, if answered, will disclose facts or documents material and pertinent to the support or defense of the cause, are proper, but the court is not warranted in requiring answers which would give no more than an opinion or disclose evidence intended to be relied on at the trial of the case. Thus it is proper to ask where the device is located upon which the plaintiff will rely in proof of infringement, but not to designate the particular part or parts of defendant's machine which correspond with certain specified claims in plaintiff's patent. *Batdorf v. Sattley Coin Handling Mach. Co.*, 238 Fed. 925.

the application being granted in exceptional cases,⁴⁹ or when the court is satisfied with the showing made.⁵⁰

b. *Demurrer or Motion To Dismiss.*—The general rules relating to demurrers, or, in the federal equity practice, motions to dismiss, should be followed in suits for the infringement of patents.⁵¹ A motion to dismiss is grounded on matters apparent from the face of the bill,⁵² or of which the court takes judicial notice.⁵³ The bill will be dismissed on motion, for example, where upon its face it shows that the patent is invalid,⁵⁴ provided the question of invalidity is free from

49. *Eibel Process Co. v. Remington-Martin Co.*, 197 Fed. 760.

50. *Rowell v. Wm. Koehl Co.*, 194 Fed. 446.

[a] **When Inspection Preferred.** Interrogatories are improper which seek information which may easily be obtained by an inspection of the apparatus and its use. *Window Glass Mach. Co. v. Brookville Glass & Tile Co.*, 229 Fed. 833.

51. See generally the title "*Demurrer*," and *infra*, this section.

[a] **The purpose of a motion to dismiss** is to test the law arising upon the facts stated in the bill, and it cannot be used to raise questions which may to some extent depend upon the construction put upon the claims of the complainant's patent, such as may have to be construed narrowly or broadly according to the prior art, perhaps with the assistance of expert testimony, and which cannot be fairly disposed of on the pleading and argument. *Star Ball Retainer Co. v. Klahn*, 145 Fed. 834.

[b] **Motions to dismiss are favored** or encouraged in the case of simple design patents, where the mere inspection of the patent is all that would be necessary on final hearing. *Mallinson v. Ryan*, 242 Fed. 951.

52. *International Mausoleum Co. v. Sievert*, 213 Fed. 225, 129 C. C. A. 569 (*reversing* 197 Fed. 936); *Matteawan Mfg. Co. v. Emmons Bros. Co.*, 185 Fed. 814, 108 C. C. A. 46; *Lange v. McGuin*, 177 Fed. 219, 101 C. C. A. 389; *Havens v. W. R. Ostrander & Co.*, 190 Fed. 199; *Dade v. Boorum & Pease Co.*, 121 Fed. 135; *Warner Bros. Co. v. Warren-Featherbone Co.*, 97 Fed. 604; *Bragg Mfg. Co. v. Hartford*, 56 Fed. 292.

[a] **Laches** in a suit for infringement cannot be raised by motion unless it affirmatively appears on the face of the bill. *Marconi Wireless Tel.*

Co. v. New England Navigation Co., 191 Fed. 194; *Fichtel v. Barthel*, 173 Fed. 489.

[b] **Misjoinder** of parties may be taken advantage of by a motion to dismiss. *Swift v. Inland Nav. Co.*, 234 Fed. 375.

[c] **Omission of Material Averment.**—A bill will not be dismissed in the absence of an averment of conjoint use when it is apparent that no injustice will result to the defendant. *United States Mineral Wool Co. v. Manville Covering Co.*, 101 Fed. 145.

[d] **Invention** is a question of fact and when raised by motion must be determined by an examination of the patent, if a part of the record, aided by matters of which the court may take judicial notice. *Ferro Concrete Const. Co. v. Concrete Steel Co.*, 206 Fed. 666, 124 C. C. A. 466.

53. *Ferro Concrete Const. Co. v. Concrete Steel Co.*, 206 Fed. 666, 124 C. C. A. 466; *Caldwell v. Powell*, 71 Fed. 970; *Kaolatype Engraving Co. v. Hoke*, 30 Fed. 444.

54. *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. ed. 991.

[a] **Patent embodied in bill**, void. *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. ed. 991; *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200; *American Safety Device Co. v. Liebel-Binney Const. Co.*, 243 Fed. 575, 156 C. C. A. 273; *Charles Boldt Co. v. Nivison-Weiskopf Co.*, 194 Fed. 871, 114 C. C. A. 617; *Kuhn v. Lock-Stub Check Co.*, 165 Fed. 445, 91 C. C. A. 389 (*affirming* 157 Fed. 235); *Fowler v. City of New York*, 121 Fed. 747, 58 C. C. A. 113, (*affirming* 110 Fed. 749); *Victor Talking Machine Co. v. Hawthorne & Sheble Mfg. Co.*, 168 Fed. 554; *Hogan v. Westmoreland Specialty Co.*, 145 Fed. 199.

[b] **Though the pleadings do not**

doubt,⁵⁵ for when the question involves an examination of the prior art or prior patents it cannot, as a rule, be disposed of by motion.⁵⁶ Failure to negative facts as required by the statute,⁵⁷ or to allege or show a joint infringement when there is more than one defendant,⁵⁸ render a bill subject to a motion to dismiss.

c. *Answer.*—(I.) *In General.*—In accordance with the general rules of equity pleading in the federal courts, all defenses to a suit for infringement should be made in the answer, pleas in bar and abatement having been abolished;⁵⁹ and as the general issue is no longer used, each claim asserted in the bill must be answered,⁶⁰ the general rules of pleading being followed.⁶¹ The defendant may set

raise the question of validity. *Slawson v. Grand Street, etc. R. R. Co.*, 107 U. S. 649, 2 Sup. Ct. 663, 27 L. ed. 576.

55. *American Safety Device Co. v. Liebel-Binney Const. Co.*, 243 Fed. 575, 156 C. C. A. 273; *Hogan v. Westmoreland Specialty Co.*, 154 Fed. 66, 83 C. C. A. 178; *Wills v. Seranton Cold Storage & Warehouse Co.*, 153 Fed. 181, 82 C. C. A. 355; *American Fibre-Chamois Co. v. Buckskin-Fibre Co.*, 72 Fed. 508, 18 C. C. A. 662; *Card v. Standard Coal & Coke Co.*, 202 Fed. 351; *Rose Mfg. Co. v. E. A. White-house Mfg. Co.*, 193 Fed. 69; *Burrowes v. Carrom Archarena Co.*, 190 Fed. 204; *Luten v. Dover Const. Co.*, 189 Fed. 405; *Voigtman v. Seely*, 176 Fed. 371; *Neidich v. Edwards*, 169 Fed. 424; *Peters v. Chicago Biscuit Co.*, 142 Fed. 779; *Neidrich v. Fosbenner*, 108 Fed. 266.

[a] *Every doubt should be resolved against the motion.* *International Mausoleum Co. v. Sievert*, 213 Fed. 225, 129 C. C. A. 569 (*reversing* 197 Fed. 936); *Towne Steering Wheel Co. v. Lee*, 199 Fed. 777, 120 C. C. A. 463; *Covert v. Travers Bros. Co.*, 70 Fed. 788; *Drainage Const. Co. v. Englewood Sewer Co.*, 67 Fed. 141.

56. *New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.*, 137 U. S. 445, 11 Sup. Ct. 193, 24 L. ed. 741; *Voigtman v. Seely*, 176 Fed. 371; *Southern Plow Co. v. Atlanta Agricultural Works*, 165 Fed. 214; *Fabric Coloring Co. v. Alexander Smith & Sons Carpet Co.*, 109 Fed. 328; *Rowe v. Blodgett & Clapp Co.*, 87 Fed. 868.

[a] *The question of patentability is ordinarily a mixed question of law and fact and should not be disposed of on demurrer.* *Teese v. Phelps*, 23 Fed. Cas. No. 13,818.

[b] *Judicial Notice of Prior Art.* A motion to dismiss on the ground of invalidity in view of the prior art, where the bill states a *prima facie* case of infringement of a patent valid on its face, should be granted only when the facts upon which invalidity are predicated are so widely and commonly known that courts will take judicial notice of them. *Wright v. Wisconsin Lime & Cement Co.*, 239 Fed. 534, 152 C. C. A. 412. See also *Bronk v. Charles H. Scott Co.*, 211 Fed. 338, 128 C. C. A. 17; *Lange v. McGuin*, 177 Fed. 219, 101 C. C. A. 389.

57. *Hutton v. Star Slide Seat Co.*, 60 Fed. 747; *Hanlon v. Primrose*, 56 Fed. 600; *Coop v. Dr. Savage Physical D. Inst.*, 47 Fed. 899.

58. *Fischer v. O'Shaughnessey*, 6 Fed. 92.

59. See Rule 29.

60. Rule 30.

61. See generally the titles "*Bills and Answers*;" "*Equity Jurisdiction and Procedure*."

[a] *Inconsistent Defenses.*—Under equity rule 30 relating to alternative defenses, the defendant in a suit for infringement of a patent may deny the plaintiff's title, allege title in himself, and also aver the invalidity of the patent. *Cleveland Engineering Co. v. Galion Dynamic Motor Truck Co.*, 243 Fed. 405.

[b] *Hypothetical Denial.*—An answer by the defendant that if he sold the patented article he did so as the agent of another is bad as being hypothetical, and also for not stating the principal's name. *Morse v. Davis*, 5 Blatchf. 40, 17 Fed. Cas. No. 9,855.

[c] *Disclaimer.*—Where the defendant asserts a right to make the devices complained of, a general averment that he does not intend to use the patented device or to interfere

up as many defenses in his answer as he may have, including any counterclaim or set-off.⁶² Allegations of fraud must be specific.⁶³

(II.) **Answer With Notice.** — The special defenses available to the defendant in actions at law for infringement under the general issue with notice, are likewise available upon notice given in the answer in suits in equity for infringement.⁶⁴ But if such notice is not given in the original answer it may be given in an amended answer.⁶⁵

(III.) **Set-off or Counterclaim.**⁶⁶ — The courts are at variance in the interpretation of the rule permitting a set-off or counterclaim,⁶⁷ some adopting the broad interpretation that it means all cross-claims upon which the defendant might sue the plaintiff in equity, even if having no connection whatever with plaintiff's cause of action,⁶⁸ others holding that it applies only to such counterclaims as arise out of the transaction which is the subject matter of the suit.⁶⁹ So the defendant may plead in his answer as a counterclaim a cause of action for infringement of another patent relating to the same subject matter,⁷⁰ but not for the infringement of another unrelated patent,⁷¹ although the contrary has been held, that an unrelated patent may be made

with the rights of the plaintiff cannot be construed to be a disclaimer and justifies the presumption that further infringement may be expected. *Deere & Webber Co. v. Dowagiac Mfg. Co.*, 153 Fed. 177, 82 C. C. A. 351; *Johnson v. Foos Mfg. Co.*, 141 Fed. 73, 72 C. C. A. 105.

62. *United States Expansion Bolt Co. v. H. G. Kronecke Hdw. Co.*, 216 Fed. 186; *Vacuum Cleaner Co. v. American Rotary Valve Co.*, 208 Fed. 419; *Salt's Textile Mfg. Co. v. Tingue Mfg. Co.*, 208 Fed. 156; *Marconi Wireless Tel. Co. v. National Electric Signaling Co.*, 206 Fed. 295. See Rule 30.

63. *Coffield Motor Washer Co. v. A. D. Howe Co.*, 172 Fed. 668; *American Sulphite Pulp Co. v. Howland Falls Pulp Co.*, 70 Fed. 986; *Gear v. Grosvenor*, Holmes 215, 10 Fed. Cas. No. 5,291; *Doughty v. West*, 7 Fed. Cas. No. 4,029; *Clark v. Scott*, 9 Blatchf. 301, 5 Fed. Cas. No. 2,833.

[a] **The words of the statute alone are too general**; it is not enough to allege that the specification of the patent sued on was made to contain less than the whole truth relative to the invention, and more than was necessary to produce the desired effect which the law assigns to specifications; the details of the fraud or subterfuge relied on should be set out. *American Sulphite Pulp Co. v. Howland Falls Pulp Co.*, 70 Fed. 986.

64. 29 U. S. St. at L. 692; U. S. Rev. St., §4920 (amended March 3,

1897, ch. 391, §2); 8 U. S. Comp. St., 1916, §9466; *Bates v. Coe*, 98 U. S. 31, 25 L. ed. 68. See *supra*, III, F, 1, c, (II).

65. *Bates v. Coe*, 98 U. S. 31, 25 L. ed. 68.

66. See generally the title "**Set-off, Counterclaim and Recoupment.**"

67. Rule 30.

68. *Electric Boat Co. v. Lake Torpedo Boat Co.*, 215 Fed. 377; *Vacuum Cleaner Co. v. American Rotary Valve Co.*, 208 Fed. 419; *Marconi Wireless Tel. Co. v. National Electric Signaling Co.*, 206 Fed. 295.

69. *Christensen v. Westinghouse Traction Brake Co.*, 235 Fed. 898. See *United States Expansion Bolt Co. v. H. G. Kronecke Hdw. Co.*, 234 Fed. 868, 148 C. C. A. 466; *Sydney v. Muggford Printing & Engraving Co.*, 214 Fed. 841; *Klauder-Weldon Dyeing Mach. Co. v. Giles*, 212 Fed. 452; *Atlas Underwear Co. v. Cooper Underwear Co.*, 210 Fed. 347; *Adamson v. Shaler*, 208 Fed. 566; *Terry Steam Turbine Co. v. B. F. Sturtevant Co.*, 204 Fed. 103.

70. *United States Expansion Bolt Co. v. H. G. Kronecke Hdw. Co.*, 216 Fed. 186; *Marconi Wireless Tel. Co. v. National Electric Signaling Co.*, 206 Fed. 295.

71. *Klauder-Weldon Dyeing Mach. Co. v. Giles*, 212 Fed. 452; *Adamson v. Shaler*, 208 Fed. 566; *Terry Steam Turbine Co. v. B. F. Sturtevant Co.*, 204 Fed. 103.

the basis of defendant's counterclaim.⁷² Unfair competition involving the patents in the controversy may also be urged as a counterclaim, providing it arises out of the alleged infringement,⁷³ as well as threats to sue the defendant's customers,⁷⁴ and false statements concerning his business.⁷⁵

d. *Supplemental Pleadings.*—The general rules relating to supplemental pleadings apply to pleadings in suits for infringement,⁷⁶ and as in other cases it is within the discretion of the court to allow a supplemental bill where necessary and proper.⁷⁷

e. *Amendments.*—The general rules of equity pleading apply to amendment of pleadings in infringement suits.⁷⁸ Thus an amendment

72. *Electric Boat Co. v. Lake Torpedo Boat Co.*, 215 Fed. 377.

73. *United States Expansion Bolt Co. v. H. G. Kroncke Hdw. Co.*, 234 Fed. 868, 148 C. C. A. 466; *Williams Patent Crusher & P. Co. v. Kinsey Mfg. Co.*, 205 Fed. 375.

74. *Vacuum Cleaner Co. v. American Rotary Valve Co.*, 208 Fed. 419.

75. *Vacuum Cleaner Co. v. American Rotary Valve Co.*, 208 Fed. 419.

76. See the title "*Supplemental Pleading.*"

77. *Brookfield v. Novelty Glass Mfg. Co.*, 170 Fed. 960, 96 C. C. A. 127, *affirming* 170 Fed. 830. See rule 34.

[a] **To state new evidence** concerning the patent, arising since the beginning of the suit. *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602.

[b] **To add a claim** to his cause of action, accruing to him since the suit was begun. *Emerson v. Hubbard*, 34 Fed. 327.

[c] **If the infringing structure is modified** a supplemental bill is not necessary, as relief may be had under the original bill. *Westinghouse Air Brake Co. v. Christensen Engineering Co.*, 126 Fed. 764.

[d] **Infringement by another device** may be set up in a supplemental bill after the validity of the patent has been adjudged by the appellate court and an interlocutory decree has been entered for an injunction and accounting. *Houghton v. Whitin Mach. Wks.*, 161 Fed. 581.

78. See generally the titles "*Amendments and Joinders*;" "*Bills and Answers*;" "*New Cause of Action or Defense*;" and Rule 28.

[a] **Authority to make a patented article under an exclusive license** may be added by amendment, in a suit

for infringement by an exclusive licensee, where it is shown that this is permitted by the license. *Fox v. Knickerbocker Engraving Co.*, 140 Fed. 714.

[b] **An amendment of defendant's notice claiming prior knowledge** will be permitted to add the name of a party who had such prior knowledge, even after the filing of a replication, when it appears that the application is not made for the purpose of delay and is in furtherance of justice. *Standard Elevator Interlock Co. v. Ramsey*, 130 Fed. 151. See also *Roemer v. Simon*, 95 U. S. 214, 24 L. ed. 384.

[c] **To cure multifariousness**, an averment of conjoint use by the defendant of the subject matter of the patents infringed in one device or structure should be permitted. *Union Switch & Signal Co. v. Philadelphia & R. R. Co.*, 68 Fed. 914.

[d] **To Comply With the Statute.** A bill should be permitted to be amended to comply with the statute when it fails to negative the things which, if existing, would invalidate the patent, such as that it had not been patented or described in any printed publication, etc. *Ross v. Ft. Wayne*, 58 Fed. 404.

[e] **The omission of material allegations**, such as that the patent was issued in the name of the United States, under seal of the patent office, and that it was signed by the commissioner, in connection with the fact that no copy of the patent is annexed and no profert of it made, leaves the bill defective, but the defect may be cured by amendment. *Schaum v. Copley-Plaza Operating Co.*, 243 Fed. 924.

[f] **An immaterial amendment** will not be permitted. *Lowell Mfg. Co. v.*

should be permitted to cover a reissue of the patent sued on,⁷⁹ to conform to the proof,⁸⁰ or to assert the defense of invalidity on facts discovered after filing the original answer.⁸¹ Where the statement of ultimate facts in a bill for infringement of a patent is general it may be ordered, on motion by defendant, to be made more specific as to the claim or claims of the patent in suit,⁸² but not to make a comparison between the elements of the claims of the plaintiff's patent and those of the defendant's device.⁸³

3. Bills of Particulars.⁸⁴ — When anticipation is pleaded as a defense, the plaintiff, upon stating the approximate date of his own invention, is entitled to a bill of particulars stating the prior patents, or publications, or prior use to be relied on by the defendant.⁸⁵ Where the defendant pleads a number of patents as indicating the state of the prior art, he may be required on motion to specify which one or more he intends to rely on at the hearing,⁸⁶ and in what respects they disclose any of the elements described in plaintiff's letters patent,⁸⁷ and wherein they negative the novelty and invention of the plaintiff's device.⁸⁸

G. ISSUES, PROOF AND VARIANCE.⁸⁹ — In actions and suits for the infringement of patents, as in other civil cases, the proof and pleadings must correspond.⁹⁰ The defendant is limited to proof of special

Hogg, 70 Fed. 787; *Tyler v. Galloway*, 13 Fed. 477, 21 Blatchf. 66; *Richardson v. Croft*, 11 Fed. 800.

[g] **Laches.**—When the application is coupled with unexcused laches, an amendment will be denied. *Walker v. Giles*, 207 Fed. 825; *Dederick v. Farquhar*, 39 Fed. 346; *India Rubber Comb Co. v. Phelps*, 8 Blatchf. 85, 13 Fed. Cas. No. 7,025.

[h] **When estopped** from making the defense to be added by the amendment, the application will be denied. *Ruggles v. Eddy*, 11 Blatchf. 524, 20 Fed. Cas. No. 12,118; *Pentlarge v. Beeston*, 15 Blatchf. 347, 19 Fed. Cas. No. 10,964.

79. *Reay v. Raynor*, 19 Fed. 308.

80. *Babcock & Wilcox Co. v. Pioneer Iron Works*, 34 Fed. 338; *New York Grape Sugar Co. v. Buffalo Grape Sugar Co.*, 20 Fed. 505.

[a] **When an assignment of the patent is filed** subsequent to the original answer, it is proper to permit the answer to be amended to conform to the new aspect of the case. *Patent Button Co. v. Pilcher*, 95 Fed. 479.

81. *Morehead v. Jones*, 3 Wall. Jr. 306, 17 Fed. Cas. No. 9,791.

82. *Bonney Supply Co. v. Heltzel*, 243 Fed. 399; *Marconi Wireless Telegraph Co. v. New England Nav. Co.*, 191 Fed. 194; *Foundation Co. v.*

O'Rourke Engineering Const. Co., 171 Fed. 425.

83. *Morton Trust Co. v. American Car & Foundry Co.*, 129 Fed. 916, 64 C. C. A. 367; *Bonney Supply Co. v. Heltzel*, 243 Fed. 399.

84. See generally the title "**Bills of Particulars.**"

85. *A. B. Dick Co. v. Underwood Typewriter Co.*, 233 Fed. 300.

86. *Window Glass Mach. Co. v. Brookville Glass & Tile Co.*, 229 Fed. 833; *Grand Rapids Show Case Co. v. Straus*, 229 Fed. 199; *Coulston v. H. Franke Steel Range Co.*, 221 Fed. 669.

87. *Coulston v. H. Franke Steel Range Co.*, 221 Fed. 669.

88. *Coulston v. H. Franke Steel Range Co.*, 221 Fed. 669.

89. See the titles "**Issues in Pleading and Practice;**" and "**Variance and Failure of Proof.**"

90. *New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.*, 48 Fed. 556; *Allis v. Buckstaff*, 13 Fed. 879.

[a] **Evidence of Prior Infringement Case.**—The duty of the court to confine itself to the evidence of the case at issue does not warrant a resort to the testimony of expert witnesses in a prior infringement suit embodied in another record. *Safety Car Heating & Lighting Co. v. Gould Coupler Co.*, 245 Fed. 755.

matter specified in his notice,⁹¹ and cannot show a prior knowledge,⁹² or use,⁹³ not indicated. But it is not necessary to prove an allegation of prior knowledge by the individual indicated as possessing that knowledge.⁹⁴

H. TRIAL IN ACTIONS AT LAW.—1. In General.—The general rules of practice in civil actions apply to infringement cases.⁹⁵ Thus objections and exceptions must be seasonably made;⁹⁶ the production of records and exhibits may be ordered by the court;⁹⁷ experiments will not be ordered conducted in the presence of plaintiff's witnesses.⁹⁸

2. Questions of Law and Fact.⁹⁹—The construction of the language of a patent, in the absence of conflicting evidence thereon, is for the court,¹ as is also the question whether the invention is within one of the classes of things which are patentable under the statute;²

[b] **The patentee is limited by the terms of his claim** in his patent and cannot show that his invention is broader. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. ed. 344.

[c] **A specification, if pleaded in detail, must be proved as alleged.** *Tryon v. White*, Pet. C. C. 96, 24 Fed. Cas. No. 14,208.

91. *Philadelphia, W. & B. R. Co. v. Dubois*, 12 Wall. (U. S.) 47, 20 L. ed. 265; *Dixon v. Moyer*, 4 Wash. C. C. 68, 7 Fed. Cas. No. 3,931.

[a] **Actual fraud and theft of the idea** (1) is not necessary in proving the defense that the patentee surreptitiously or unjustly obtained the patent (*Yates v. Huson*, 8 App. Cas. [D. C.] 93), but (2) where the specification is shown to contain less than the whole truth, it must also be shown that the omission was with fraudulent intent. *Celluloid Mfg. Co. v. Russell*, 37 Fed. 676.

92. *Philadelphia, W. & B. R. Co. v. Dubois*, 12 Wall. (U. S.) 47, 20 L. ed. 265. See *Treadwell v. Bladen*, 4 Wash. C. C. 703, 24 Fed. Cas. No. 14,154, holding that the words "and others" in the notice permitted proof of knowledge by others than those named.

93. *Dixon v. Moyer*, 4 Wash. C. C. 68, 7 Fed. Cas. No. 3,931.

94. *Many v. Jagger*, 1 Blatchf. 372, 16 Fed. Cas. No. 9,055; *Lock v. Pennsylvania R. Co.*, 1 N. J. L. J. 227, 15 Fed. Cas. No. 8,438.

95. See the title "Trial," and cross-references there made.

96. *Pettibone, Muliken & Co. v. Pennsylvania Steel Co.*, 134 Fed. 889.

[a] **Objection to Special Defense.** Where a special defense is not pleaded

as required by the statute, that is, by general issue with notice, an objection to such defense must be made at the time it is introduced; it is too late after the case has been submitted. *Campbell v. Skinner*, 236 Fed. 359.

97. *Diamond Match Co. v. Oshkosh Match Wks.*, 63 Fed. 984.

98. *Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.*, 83 Fed. 490.

As to experiments, see *ENCYCLOPEDIA OF EVIDENCE*, title "Experiments."

99. See generally the title "Providence of Judge and Jury."

1. *Brothers v. Lidgerwood Mfg. Co.*, 223 Fed. 359, 138 C. C. A. 460; *Western Electric Co. v. Robertson*, 142 Fed. 471, 73 C. C. A. 587; *Marsh v. Quick-Meal Stove Co.*, 51 Fed. 203; *National Car Brake Shoe Co. v. Terre Haute Car & Mfg. Co.*, 19 Fed. 514; *Vance v. Campbell*, 28 Fed. Cas. No. 16,837 (*reversed* on other grounds, 1 Black [U. S.] 427, 17 L. ed. 168); *Teese v. Phelps*, 23 Fed. Cas. No. 13,819; *Serrell v. Collins*, 21 Fed. Cas. No. 12,672; *Ransom v. New York*, 20 Fed. Cas. No. 11,573; *Parker v. Hulme*, 18 Fed. Cas. No. 10,740; *Emerson v. Hogg*, 2 Blatchf. 1, 8 Fed. Cas. No. 4,440; *Davoll v. Brown*, 1 Woodb. & M. 53, 7 Fed. Cas. No. 3,662; *Davis v. Palmer*, 2 Broek. 298, 7 Fed. Cas. No. 3,645; *Canover v. Roach*, 6 Fed. Cas. No. 3,125; *Clark Patent Steam & Fire Regulator Co. v. Copeland*, 5 Fed. Cas. No. 2,866; *Cahoon v. Ring*, 1 Cliff. 592, 4 Fed. Cas. No. 2,292; *Batten v. Clayton*, 2 Fed. Cas. No. 1,105.

2. *Prepayment Car Sales Co. v. Orange County Traction Co.*, 221 Fed. 939, 137 C. C. A. 509; *American Dis-*

as well as what constitutes novelty,³ and utility.⁴

The extent of a patented combination, together with its effect and operation, is a mixed question of law and fact for the jury under proper instructions by the court.⁵ It is for the jury, under conflicting evidence, to determine the sufficiency of the specifications,⁶ novelty,⁷ and identity⁸ of the invention, fraud in procuring the patent,⁹ abandonment,¹⁰ and infringement.¹¹

3. Instructions.—The instructions of the court should follow the general rules on that subject,¹² care being exercised not to trespass upon the province of the jury,¹³ by instructing, *e. g.*, on the identity of two inventions when priority is an issue,¹⁴ and by conforming to the law applicable to the case.¹⁵

appearing *Bed Co. v. Arnaelsteen*, 182 Fed. 324, 105 C. C. A. 40.

3. *Parker v. Stiles*, 5 McLean 44, 18 Fed. Cas. No. 10,749.

4. *Parker v. Stiles*, 5 McLean 44, 18 Fed. Cas. No. 10,749.

5. *Washburn v. Gould*, 3 Story 122, 29 Fed. Cas. No. 17,214; *Foote v. Silsby*, 9 Fed. Cas. No. 4,916, *affirmed*, 14 How. 218, 14 L. ed. 394.

6. *Battin v. Taggart*, 17 How. (U. S.) 74, 15 L. ed. 37; *Wood v. Underhill*, 5 How. (U. S.) 1, 12 L. ed. 23; *Carver v. Braintree Mfg. Co.*, 2 Story 432, 5 Fed. Cas. No. 2,485.

7. *Battin v. Taggart*, 17 How. (U. S.) 74, 15 L. ed. 37; *Trustees of Masonic Hall & Asylum Fund v. Fountain Electrical Floor Box Corp.*, 218 Fed. 642, 134 C. C. A. 663 (*affirming* 210 Fed. 169); *Transit Development Co. v. Cheatham Electric Switching Device Co.*, 194 Fed. 963, 114 C. C. A. 599; *Heide v. Panoulis*, 188 Fed. 914, 110 C. C. A. 656; *Willis v. Miller*, 121 Fed. 985, 58 C. C. A. 286; *San Francisco Bridge Co. v. Keating*, 68 Fed. 351, 15 C. C. A. 476; *Hunt Bros. Fruit-Packing Co. v. Cassidy*, 53 Fed. 257, 3 C. C. A. 525; *Washburn v. Gould*, 3 Story 122, 29 Fed. Cas. No. 17,214; *Reutgen v. Kanowrs*, 1 Wash. C. C. 168, 20 Fed. Cas. No. 11,710; *Carver v. Braintree Mfg. Co.*, 2 Story 432, 5 Fed. Cas. No. 2,485.

8. *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. ed. 263 (*reversing* 29 Fed. 358); *Keyes v. Grant*, 118 U. S. 25, 6 Sup. Ct. 974, 30 L. ed. 54; *Tucker v. Spalding*, 13 Wall. (U. S.) 453, 20 L. ed. 515; *Tyler v. Boston*, 7 Wall. (U. S.) 327, 19 L. ed. 93; *Battin v. Taggart*, 17 How. (U. S.) 74, 15 L. ed. 37; *May v. Fond du Lac*, 27 Fed. 691; *Tatham v. LeRoy*, 23 Fed. Cas. No. 13,761; *Smith v. Pearce*, 2

McLean 176, 22 Fed. Cas. No. 13,089; *Smith v. Higgins*, 22 Fed. Cas. No. 13,058; *Poppenhusen v. Falke*, 4 Blatchf. 493, 19 Fed. Cas. No. 11,279; *Pennock v. Dialogue*, 4 Wash. C. C. 538, 19 Fed. Cas. No. 10,941 (*affirmed*, 2 Pet. [U. S.] 1, 7 L. ed. 327); *Parker v. Stiles*, 5 McLean 44, 18 Fed. Cas. No. 10,749; *Carver v. Braintree Mfg. Co.*, 2 Story 432, 5 Fed. Cas. No. 2,485; *Tillotson v. Ramsay*, 51 Vt. 309.

9. *Carver v. Braintree Mfg. Co.*, 2 Story 432, 5 Fed. Cas. No. 2,485.

10. *Kendall v. Winsor*, 21 How. (U. S.) 322, 16 L. ed. 165; *Battin v. Taggart*, 17 How. (U. S.) 74, 15 L. ed. 37.

11. *Royer v. Schultz Belting Co.*, 135 U. S. 319, 10 Sup. Ct. 833, 34 L. ed. 214; *Trustees of Masonic Hall & Asylum Fund v. Fountain Electrical Floor Box Corp.*, 218 Fed. 642, 134 C. C. A. 663 (*affirming* 210 Fed. 169); *Heide v. Panoulis*, 188 Fed. 914, 110 C. C. A. 656; *Singer Mfg. Co. v. Brill*, 54 Fed. 380, 4 C. C. A. 374; *Washburn v. Gould*, 3 Story 122, 29 Fed. Cas. No. 17,214; *Jackson v. Allen*, 120 Mass. 64.

12. See the title "Instructions."

13. See generally the title "Province of Judge and Jury."

[a] An expression of opinion by the judge on a question of fact in an infringement case may be permissible in a clear case, although the question is for the jury's determination. *Bollmans v. Parry*, 5 Clark 29, 3 Fed. Cas. No. 1,612.

14. *Bischoff v. Wethered*, 9 Wall. (U. S.) 812, 19 L. ed. 829.

15. *Adams v. Bellaire Stamping Co.*, 141 U. S. 539, 12 Sup. Ct. 66, 35 L. ed. 849, *affirming* 28 Fed. 360, 25 Fed. 270.

[a] Novelty and Patentability.

4. Verdict.¹⁶ — The court should direct a verdict when the plaintiff in a case of infringement fails to make a prima facie case,¹⁷ or when the patent is void on its face,¹⁸ or is shown to have been anticipated by prior patents,¹⁹ or when it appears to the court to be clearly invalid for want of invention,²⁰ or any other fact of which the court may take judicial notice.²¹

I. HEARING IN EQUITY. — The general rules relating to hearings of suits in equity obtain in suits for infringement.²²

Jury Trial. — The court, in its discretion, may permit a jury trial.²³

Reference to a master will, when necessary, be made in accordance with the rules governing such procedure.²⁴

Dismissal may be made pursuant to the general rules elsewhere treated.²⁵ When the defendant has established substantial rights during the progress of the case, a suit for infringement cannot be dismissed without prejudice.²⁶

(1) When patentability is an issue, it is erroneous to instruct the jury that the way in which the invention has superseded all others is strong evidence of its novelty. *Adams v. Belaire Stamping Co.*, 141 U. S. 539, 12 Sup. Ct. 66, 35 L. ed. 849, *affirming* 28 Fed. 360, 25 Fed. 270. But (2) it is proper to instruct that the issuance of a patent is a prima facie presumption of a patentable difference from other patented inventions. *Ransome v. Hyatt*, 69 Fed. 148, 16 C. C. A. 185.

[b] **Priority.** — An instruction that if the patent described anything new and useful it was valid is erroneous, in an action on a note for a patent right where the defense was that the patentee was not the original inventor. *Holliday v. Rheem*, 18 Pa. 465, 57 Am. Dec. 628.

¹⁶ See generally the title "**Verdict.**"

¹⁷ *Royer v. Schutz Belting Co.*, 28 Fed. 850.

¹⁸ *Roberts v. Bennett*, 136 Fed. 193, 69 C. C. A. 533.

¹⁹ *Roberts v. Bennett*, 136 Fed. 193, 69 C. C. A. 533.

²⁰ *Market St. Cable R. Co. v. Rowley*, 155 U. S. 621, 15 Sup. Ct. 224, 39 L. ed. 284; *Connors v. Ormsby*, 148 Fed. 13, 78 C. C. A. 181.

²¹ *Roberts v. Bennett*, 136 Fed. 193, 69 C. C. A. 533.

[a] **A useless thing,** constituting an imposition on the public. *Langdon v. De Groot*, 1 Paine 203, 14 Fed. Cas. No. 8,059.

²² See generally the title "**Hearing.**"

²³ 18 U. S. St. at L. 316; 3 U. S. Comp. St., 1916, §1586; *Watt v. Starke*, 101 U. S. 247, 25 L. ed. 826; *Cochran v. Deener*, 94 U. S. 780, 24 L. ed. 139; *Keyes v. Pueblo Smelting & R. Co.*, 31 Fed. 560.

As to submission of issues to jury in an equity case, see the title "**Issues in Pleading and Practice.**"

²⁴ See the title "**References.**"

[a] **Where a patent has been sustained,** and the case referred to a master to determine the amount of damages and profits, the questions of infringement and general scope and extent of the patent are not open for consideration or determination, the examination of the master being limited to the extent of the infringement. *F. Speidel Co. v. N. Barstow Co.*, 232 Fed. 617.

²⁵ See the title "**Dismissal, Discontinuance and Nonsuit.**"

[a] **Dismissal as to one claim of infringement** will be permitted in the absence of prejudice to defendant, even after argument of counsel. *Barber v. Reo Motor Car Sales Co.*, 245 Fed. 938.

[b] **As to Part of Defendants.** Where several independent causes of action for infringement against several defendants are joined, the bill may be dismissed as to all of the defendants save one. *Taggart v. Bremner*, 236 Fed. 544, 149 C. C. A. 596.

²⁶ *Georgia Pine Turpentine Co. v. Bilfinger*, 129 Fed. 131.

[a] **After infringement has been disproved,** an application for dismissal without prejudice as to one defendant will be denied. *Archer v. Arnd*, 31

J. JUDGMENT OR DECREE.—1. In General.—In actions at law and suits in equity for infringement the judgment or decree is controlled by the general rules elsewhere treated.²⁷ The parties are entitled to an adjudication on all the claims of a patent embraced within the issues,²⁸ and where two patents are involved the validity of each, as a general rule, must be separately determined on its own merits.²⁹ If any one of the special defenses alleged under the general issue with notice be found for the defendant judgment must be rendered for him.³⁰

Damages are adjudged the successful plaintiff in a sum sufficient to compensate his actual loss,³¹ but both at law and in equity the court may, in its discretion, increase the damages ascertained by the verdict to any sum not exceeding three times the amount thereof.³²

2. Costs.—*a. In Actions at Law.*³³—Whenever the plaintiff in an action for infringement recovers a verdict for damages he is entitled to costs,³⁴ and he is not limited to those cases wherein the amount of

Fed. 475, *affirmed*, 140 U. S. 668, 11 Sup. Ct. 1015, 35 L. ed. 599.

[b] **Where no substantial rights have accrued** to the defendant, an infringement suit may be dismissed by the plaintiff without prejudice at any time before the hearing on the merits upon payment of substantial indemnity to the defendant, covering expenses incurred. *E. G. Staude Mfg. Co. v. La-bombarde*, 229 Fed. 1004.

27. See generally the titles "**Decrees**;" "**Judgments**."

[a] **Several Judgment.**—In an action for infringement against two defendants, a recovery may be had against one and the other acquitted. *Reutgen v. Kanows*, 1 Wash. C. C. 168, 20 Fed. Cas. No. 11,710.

28. *National Malleable Castings Co. v. T. H. Symington Co.*, 234 Fed. 343, 148 C. C. A. 245.

29. *Alvey-Ferguson Co. v. Peter Schoenhofen Brewing Co.*, 245 Fed. 762.

30. 29 U. S. St. at L. 692; U. S. Rev. St., §4920 (amended March 3, 1897, ch. 391, §2); 8 U. S. Comp. St., 1916, §9466. See *Vacuum Cleaner Co. v. Dunn*, 189 Fed. 634.

31. *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. ed. 599; *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. ed. 263 (*reversing* 29 Fed. 358); *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. ed. 664; *Brown v. Lanyon*, 148 Fed. 838, 77 C. C. A. 528 (*certiorari denied*, 204 U. S. 672, 27 Sup. Ct. 787, 51 L. ed. 673); *Boston v. Allen*, 91 Fed. 248, 33 C. C. A. 485; *Seattle v. McNamara*,

81 Fed. 863, 26 C. C. A. 652; *Houston, E. & W. T. Ry. Co. v. Stern*, 74 Fed. 636, 20 C. C. A. 568.

[a] **Profits** to be accounted for by the defendant, recoverable in equity. 29 U. S. St. at L. 694; U. S. Rev. St. §4921 (amended March 3, 1897, ch. 391, §6); 8 U. S. Comp. St., 1916, §9467.

32. **At Law.**—16 U. S. St. at L. 207; U. S. Rev. St. §4919; 8 U. S. Comp. St., 1916, §9464.

[a] **In Equity.**—29 U. S. St. at L. 694; U. S. Rev. St. § 4921 (amended March 3, 1897, ch. 391, §6); 8 U. S. Comp. St., 1916, §9467; *Birdsall v. Coolidge*, 93 U. S. 64, 23 L. ed. 802; *Whittemore v. Cutter*, 1 Gall. 478, 29 Fed. Cas. No. 17,601; *Gray v. James*, Pet. C. C. 394, 10 Fed. Cas. No. 5,718.

[b] **When necessary to protect plaintiffs**, only, will the court exercise its discretion. *Schwarzal v. Holenshade*, 2 Bond 29, 21 Fed. Cas. No. 12,506; *Carlock v. Tappan*, 5 Fed. Cas. No. 2,412; *Brodie v. Ophir Silver Min. Co.*, 5 Sawy. 608, 4 Fed. Cas. No. 1,919; *Bell v. McCullough*, 1 Bond 194, 3 Fed. Cas. No. 1,256; *Allen v. Blunt*, 2 Woodb. & M. 121, 1 Fed. Cas. No. 217.

33. See generally the title "**Costs**."

34. 16 U. S. St. at L. 207; U. S. Rev. St. §4919; 8 U. S. Comp. St., 1916, §9464.

[a] **On Verdict for Nominal Damages.**—*Merchant v. Lewis*, 1 Bond 172, 17 Fed. Cas. No. 9,437.

[b] **Disclaimer** (1) as to one or more claims of a patent, does not defeat his right to costs (*Pressed Prism Glass Co. v. Continuous Glass*

the verdict is trebled by the court.³⁵

The defendant is entitled to costs on a judgment rendered in his favor on any of the special defenses pleaded under the general issue with notice.³⁶

Counsel fees as a rule, are not allowable as an element of costs or damages in actions for infringement,³⁷ though they have been allowed in some cases.³⁸

b. *In Suits in Equity*.³⁹ — In suits for infringement, while the general rules as to what are taxable costs apply,⁴⁰ costs generally are awarded to the successful party,⁴¹ unless in the discretion of the court the circumstances of the case justify a different rule.⁴² So costs may be divided in the discretion of the court,⁴³ or denied when nominal damages only are recovered.⁴⁴

K. REHEARING. — The rules relating to rehearings generally, apply to applications for rehearings in suits for infringement.⁴⁵ Thus the granting or refusal of an application as a rule depends upon the facts

Prism Co., 181 Fed. 151; *Peek v. Frame*, 19 Fed. Cas. No. 10,904, but (2) they may be reduced if by such disclaimer the defendant is put to any additional expense which otherwise would not have occurred. See *Pressed Prism Glass Co. v. Continuous Glass Prism Co.*, 181 Fed. 151.

35. *Merchant v. Lewis*, 1 Bond 172, 17 Fed. Cas. No. 9,437.

36. 29 U. S. St. at L. 692; U. S. Rev. St. §4920 (amended March 3, 1897, ch. 391, §2); 8 U. S. Comp. St., 1916, §9466.

37. *Teese v. Huntingdon*, 23 How. (U. S.) 2, 16 L. ed. 479; *Whittemore v. Cutter*, 1 Gall. 429, 29 Fed. Cas. No. 17,600; *Stimpson v. Railroads*, 23 Fed. Cas. No. 13,456; *Blanchard's Gun-Stock Turning Factory v. Warner*, 1 Blatchf. 258, 3 Fed. Cas. No. 1,521.

38. *Boston Mfg. Co. v. Fiske*, 2 Mason 119, 3 Fed. Cas. No. 1,681; *Allen v. Blunt*, 2 Woodb. & M. 121, 1 Fed. Cas. No. 217.

39. See generally the title "Costs."

40. *Parks v. Booth*, 102 U. S. 96, 26 L. ed. 54.

[a] **Costs Accruing on Reference.** *Kansas City Hay-Press Co. v. Devol*, 127 Fed. 363.

[b] **Copies of patents** cannot be included. *Ryan v. Gould*, 32 Fed. 754.

[c] **Unnecessary costs** will not be allowed. *Brunswick-Balke-Collender Co. v. Klump*, 131 Fed. 93.

41. See 5 STANDARD PROC. 808.

[a] **Expiration of patent pendente lite** will not defeat costs though it prevents the relief by injunction to

which plaintiff was entitled at the outset. *American Caramel Co. v. White*, 234 Fed. 328, 148 C. C. A. 230.

[b] **Where dismissal** is warranted through defendant's acts, he is chargeable with costs. *Parker v. Stebler*, 241 Fed. 589, 154 C. C. A. 365.

42. See *Green v. Lynn*, 81 Fed. 387; *Consolidated Brake-Shoe Co. v. Chicago, P. & St. L. R. Co.*, 69 Fed. 412; *Hayes v. Bickelhaupt*, 23 Fed. 183; *Prime v. Brandon Mfg. Co.*, 16 Blatchf. 453, 19 Fed. Cas. No. 11,421.

43. *Dobson v. Bigelow Carpet Co.*, 114 U. S. 439, 5 Sup. Ct. 945, 29 L. ed. 177 (*reversing* 10 Fed. 385); *Brill v. Delaware County & P. E. R. Co.*, 109 Fed. 901; *Tesla Electric Co. v. Scott*, 101 Fed. 524; *Troy Iron & Nail Factory v. Corning*, 10 Blatchf. 223, 24 Fed. Cas. No. 14,198.

44. *Kansas City Hay-Press Co. v. Devol*, 127 Fed. 363; *Hill v. Smith*, 32 Fed. 753; *Kirby v. Armstrong*, 5 Fed. 801, 10 Biss. 135.

45. See the title "Rehearing."

[a] **Newly Discovered Evidence.** *Barber v. Otis, etc. Co.*, 245 Fed. 945; *American Sulphite Pulp Co. v. Hinkley Fibre Co.*, 241 Fed. 590; *Corrugated Paper Patents Co. v. Paper Working Mach. Co.*, 237 Fed. 380; *Brill v. North Jersey St. Ry. Co.*, 125 Fed. 526; *Sacks v. Brooks*, 85 Fed. 970.

[b] **Unreasonable delay** will defeat the right. *Turner v. Lauter Piano Co.*, 239 Fed. 560.

[c] **Payment of costs** as prerequisite, see *Underwood v. Gerber*, 37 Fed. 796, 2 L. R. A. 357.

of each case,⁴⁶ and may be permitted by the appellate court after its mandate has been issued to the lower court.⁴⁷

L. OPERATION AND EFFECT OF JUDGMENT OR DECREE.—Satisfaction of a judgment of infringement does not authorize the continued use of the infringing device.⁴⁸

The doctrine of res judicata is fully applicable to cases of patent infringement.⁴⁹ But while a decision on the same facts but between different parties by the appellate court of another circuit on the question of validity of a patent is not *res judicata*,⁵⁰ in cases of doubt it is substantially so and will be followed.⁵¹

M. APPEAL.—**1. In General.**—An appeal in accordance with the general rules⁵² lies to review infringement proceedings at law.⁵³

46. *Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co.*, 121 Fed. 556.

47. *Sundh Electric Co. v. Cutler-Hammer Mfg. Co.*, 244 Fed. 163, 156 C. C. A. 591.

[a] **Newly discovered evidence** cannot be introduced on the argument before the appellate court. *Barber v. Otis Motor Sales Co.*, 240 Fed. 723, 153 C. C. A. 521.

48. *Van Epps v. International Paper Co.*, 124 Fed. 542; *Hayden v. Suffolk Mfg. Co.*, 11 Fed. Cas. No. 6,261, *affirmed*, 3 Wall. (U. S.) 315, 18 L. ed. 76.

49. *Hart Steel Co. v. Railroad Supply Co.*, 244 U. S. 294, 37 Sup. Ct. 506, 61 L. ed. 1148; *Van Epps v. International Paper Co.*, 124 Fed. 542; *Newton Mfg. Co. v. Wilgus*, 90 Fed. 483; *Dubois v. Philadelphia, W. & B. R. Co.*, 7 Fed. Cas. No. 4,109. See generally the titles "**Judgments**," "**Res Judicata**."

[a] **One who accepts a judgment for profits** cannot maintain another action for damages arising out of the same acts of infringement. *Child v. Boston & F. Iron Works*, 19 Fed. 258.

[b] **Record parties nominally different** but the real parties in interest the same. *Hart Steel Co. v. Railroad Supply Co.*, 244 U. S. 294, 37 Sup. Ct. 506, 61 L. ed. 1148, *reversing* 222 Fed. 261, 138 C. C. A. 23.

50. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. ed. 856; *Irving-Pitt Mfg. Co. v. Blackwell-Wielandy Book & Stationery Co.*, 238 Fed. 177, 151 C. C. A. 253; *Baldwin v. Abercrombie & Fitch Co.*, 228 Fed. 895, 143 C. C. A. 293; *National Electric Signaling Co. v. Telefunken W. T. Co.*, 221 Fed. 629, 137 C. C. A. 353; *Doelger v. German-Ameri-*

can Filter Co., 204 Fed. 274, 122 C. C. A. 472; *Hildreth v. Auerbach*, 223 Fed. 545, *affirmed*, 223 Fed. 651, 139 C. C. A. 205.

[a] **Stare Decisis.**—Prior decisions on the validity of a patent, by appellate courts in other circuits and different cases, will be followed, unless in the instant case the facts are different, when the court will exercise its independent judgment. *Thacher v. Inhabitants of Falmouth*, 241 Fed. 869, 154 C. C. A. 571.

51. *Doelger v. German-American Filter Co.*, 204 Fed. 274, 122 C. C. A. 472; *Voigtmann v. Seely*, 198 Fed. 485, 119 C. C. A. 386; *Hildreth v. Auerbach*, 223 Fed. 545, *affirmed* 223 Fed. 651, 139 C. C. A. 205.

52. See generally the title "**Appeals**."

53. *Philp v. Noek*, 13 Wall. (U. S.) 185, 20 L. ed. 567; *Blanchard v. Putnam*, 8 Wall. (U. S.) 420, 19 L. ed. 433.

[a] **Discretionary Rulings.**—The allowance of increased damages lies in the discretion of the trial court, and in the absence of abuse will not be disturbed on appeal. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. ed. 658.

[b] **Verdict Sustained on Other Grounds.**—Thus where want of patentability is pleaded as a defense, a directed verdict for the defendant may be sustained on that ground although based on other grounds. *May v. Ju-neau*, 137 U. S. 408, 11 Sup. Ct. 102, 34 L. ed. 729, *affirming* 30 Fed. 241.

[c] **Review of Questions of Fact.** (1) The appellate court will not review the finding of the jury on the question of infringement submitted upon competent evidence. *Graham v. Earl*, 92 Fed. 155, 34 C. C. A. 267;

The same is true of such proceedings in equity.⁵⁴

2. Subsequent Proceedings in Lower Court.⁵⁵—While the lower court cannot modify an interlocutory decree granting a perpetual injunction against infringement which has been affirmed by the appellate court,⁵⁶ it may, before the case goes to final decree, consider and determine whether a modified device not previously submitted does or does not infringe.⁵⁷

N. INJUNCTIONS.—1. In General.—Federal courts vested with jurisdiction in infringement suits have power to grant injunctions to prevent the violation of any right secured by a patent,⁵⁸ and the same general rules control as are applied to the issuance of injunctions in other cases.⁵⁹ The infringement may be real or anticipated,⁶⁰ and an injunction may issue even though the defendant disclaims any intention of further infringement,⁶¹ although there are decisions re-

Singer Mfg. Co. v. Brill, 54 Fed. 380, 4 C. C. A. 374. (2) The same applies to novelty. *Graham v. Earl*, 92 Fed. 155, 34 C. C. A. 267.

[d] **Objections and Exceptions Below.**—An objection to the validity of a patent must be raised below. It will not be considered if raised for the first time on appeal. *Heide v. Panoulas*, 188 Fed. 914, 110 C. C. A. 656.

[e] **Same Theory.**—So where defendant treated as a question of fact at the trial the question as to what constituted a combination as patented, he cannot assert on appeal that it should have been determined as a question of law. *Foot v. Silsby*, 1 Blatchf. 445, 9 Fed. Cas. No. 4,916, *affirmed*, 14 How. 218, 14 L. ed. 394.

54. *Lederer v. Garage Equipment Mfg. Co.*, 235 Fed. 527, 149 C. C. A. 73.

[a] **Interlocutory decree of injunction**, (1) appealable. *Lederer v. Garage Equipment Mfg. Co.*, 235 Fed. 527, 149 C. C. A. 73; *Racine Engine & Mach. Co. v. Confectioners' Mach. & Mfg. Co.*, 235 Fed. 527, 149 C. C. A. 73. 474. (2) Appeal must be taken within thirty days where decree interlocutory (*Stromberg Motor Devices Co. v. Arnson*, 239 Fed. 891, 153 C. C. A. 19), but (3) not where it is partly final and partly interlocutory. *Historical Publishing Co. v. Jones Bros. Pub. Co.*, 231 Fed. 784, 145 C. C. A. 655 (a copyright infringement case); *Scriven v. North*, 134 Fed. 366, 67 C. C. A. 348.

[b] **Dismissal of appeal** where new and material evidence discovered, see *Firestone Tire & Rubber Co. v. Seiberling*, 245 Fed. 937, 158 C. C. A. 225.

55. See generally the title "Man-

date and Proceedings Thereafter."

56. *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.*, 72 Fed. 545, 19 C. C. A. 25.

57. *Kalamazoo Loose-Leaf Binder Co. v. Proudfit Loose-Leaf Co.*, 243 Fed. 895, 156 C. C. A. 407.

58. 29 U. S. St. at L. 694; U. S. Rev. St., §4921 (amended March 3, 1897, ch. 391, §6); 8 U. S. Comp. St., 1916, §9467; *Parks v. Booth*, 102 U. S. 96, 26 L. ed. 54; *American Graphophone Co. v. Pickard*, 201 Fed. 546; *Brooks v. Stolley*, 3 McLean 523, 4 Fed. Cas. No. 1,962.

59. See generally the title "Injunctions," and *Gillette Safety Razor Co. v. Durham Duplex Safety Razor Co.*, 197 Fed. 574; *Westinghouse Air Brake Co. v. Carpenter*, 32 Fed. 484; *Keyes v. Pueblo Smelting & R. Co.*, 31 Fed. 560; *Brick v. Staten Island R. Co.*, 25 Fed. 553; *Merriam v. Smith*, 11 Fed. 588; *Sargent v. Larned*, 2 Curt. 340, 21 Fed. Cas. No. 12,364.

60. *Goshen Mfg. Co. v. Myers Mfg. Co.*, 242 U. S. 202, 37 Sup. Ct. 105, 61 L. ed. 248; *Westinghouse Mach. Co. v. Press Pub. Co.*, 127 Fed. 822; *National Meter Co. v. Thomson Meter Co.*, 106 Fed. 531.

61. *Johnson v. Foos Mfg. Co.*, 141 Fed. 73, 72 C. C. A. 105; *Braddock Glass Co. v. Macbeth*, 64 Fed. 118, 12 C. C. A. 70; *Van Kannel Revolving Door Co. v. Uhrich*, 247 Fed. 344; *General Electric Co. v. Bullock Electric Mfg. Co.*, 138 Fed. 412; *Brookfield v. Elmer Glassworks*, 132 Fed. 312; *Consolidated Fastener Co. v. Toppen*, 113 Fed. 697; *New York Filter Mfg. Co. v. Chemical Bldg. Co.*, 93 Fed. 827; *New York Belting & Packing Co. v.*

fusing an injunction under such circumstances.⁶² The fact that the patentee has never used the invention is not material.⁶³

2. Preliminary Injunction.—a. *In General.*—The general rules of practice govern the application for a preliminary injunction and proceedings thereon.⁶⁴ Where the right to and necessity for a preliminary injunction is clearly shown,⁶⁵ it will be granted to prevent

Gutta Percha & Rubber Mfg. Co., 56 Fed. 264; Sawyer Spindle Co. v. Turner, 55 Fed. 979; Celluloid Mfg. Co. v. Arlington Mfg. Co., 34 Fed. 324; Sickels v. Mitchell, 3 Blatchf. 548, 22 Fed. Cas. No. 12,835; Rumford Chemical Works v. Vice, 14 Blatchf. 179, 20 Fed. Cas. No. 12,136; Potter v. Crowell, 1 Abb. 89, 19 Fed. Cas. No. 11,323; Jenkins v. Greenwald, 1 Bond 126, 13 Fed. Cas. No. 7,270; Goodyear v. Berry, 2 Bond 189, 10 Fed. Cas. No. 5,556.

62. General Electric Co. v. Pittsburg-Buffalo Co., 144 Fed. 439; Silver & Co. v. J. P. Eustis Mfg. Co., 130 Fed. 348; General Electric Co. v. New England Electric Mfg. Co., 123 Fed. 310; Edison General Electric Co. v. New England Electric Mfg. Co., 121 Fed. 125; National Cash Register Co. v. Boston Cash Indicator & Rec. Co., 41 Fed. 144; Brammer v. Jones, 2 Bond 100, 4 Fed. Cas. No. 1,806.

63. Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72; Campbell Printing Press & Mfg. Co. v. Manhattan R. Co., 49 Fed. 930; American Bell Tel. Co. v. Cushman Tel. & S. Co., 36 Fed. 488, 1 L. R. A. 799.

64. As to preliminary injunctions generally, see 13 STANDARD PROC. 128, 146 *et seq.*

[a] **Affidavits** (1) supporting the motion for a preliminary injunction, must be filed by the plaintiff. Palmer Pneumatic Tire Co. v. Newton Rubber Wks., 73 Fed. 218; Young v. Lippman, 9 Blatchf. 277, 30 Fed. Cas. No. 18,160; American Diamond Rock-Baring Co. v. Sullivan Mach. Co., 14 Blatchf. 119, 1 Fed. Cas. No. 298. (2) The defendant may file counter affidavits. Brill v. Peckham Motor Truck & Wheel Co., 189 U. S. 57, 23 Sup. Ct. 562, 47 L. ed. 706; Young v. Lippman, 9 Blatchf. 277, 30 Fed. Cas. No. 18,160; Robinson v. Randolph, 2 N. J. L. J. 170, 20 Fed. Cas. No. 11,962. (3) But in a close case a preliminary injunction will not be granted on affidavits alone. Safety Car Heating &

Lighting Co. v. Gould Coupler Co., 230 Fed. 848.

[b] **Consideration of pertinent facts alone** (1) is proper on the hearing of the motion. Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co., 117 Fed. 309; Union Paper Bag Mach. Co. v. Binney, 24 Fed. Cas. No. 14,387. (2) The court will not pass upon the credibility of witnesses (Sessions v. Gould, 48 Fed. 855 [*affirmed*, 63 Fed. 1001, 11 C. C. A. 546]; Cooper v. Mattheys, 3 Clark 178, 6 Fed. Cas. No. 3,200), (3) nor determine disputed questions of law and fact. Motion Picture Patents Co. v. New York Motion Picture Co., 174 Fed. 51; National Phonograph Co. v. Walker, 169 Fed. 146; Seal v. Beach, 113 Fed. 831; Consolidated Fastener Co. v. Columbian Fastener Co., 73 Fed. 828; Sickels v. Youngs, 3 Blatchf. 293, 22 Fed. Cas. No. 12,838; Bailey Wringing Mach. Co. v. Adams, 2 Fed. Cas. No. 752.

[c] **An indemnity bond** (1) is required of the plaintiff in all cases as a condition to the issuance of a preliminary injunction. Act of Oct. 15, 1914, ch. 323, §18; 38 U. S. St. at L. 730. (2) Formerly it was a matter entirely within the court's discretion (Columbia Wire Co. v. Freeman Wire Co., 71 Fed. 302; Accumulator Co. v. Consolidated Elec. Storage Co., 53 Fed. 796, 800; Tobey Furniture Co. v. Colby, 35 Fed. 592), and (3) was generally required in cases where serious injury would result to the defendant by the issuance of a preliminary injunction. Orr v. Littlefield, 1 Woodb. & M. 13, 18 Fed. Cas. No. 10,590; Consolidated Fruit Jar Co. v. Whitney, 1 Bann. & A. 356, 361, 6 Fed. Cas. No. 3,132.

65. International Tooth-Crown Co. v. Mills, 22 Fed. 659; Sickels v. Youngs, 3 Blatchf. 293, 22 Fed. Cas. No. 12,838; Parker v. Sears, 4 Clark 443, 18 Fed. Cas. No. 10,748; Cooper v. Mattheys, 3 Clark 178, 6 Fed. Cas. No. 3,200.

[a] **Acquiescence in defendant's use of the device** will defeat the in-

irreparable injury.⁶⁶ But the right to grant a preliminary injunction is discretionary with the court,⁶⁷ and in cases of doubt the application will be refused,⁶⁸ especially when it is shown that the defendant is financially able to reimburse the plaintiff,⁶⁹ or when the plaintiff has been guilty of laches without sufficient explanation;⁷⁰ or the patent has expired,⁷¹ or expires pending the motion,⁷² or is about to expire,⁷³ or in a case of an alleged interference,⁷⁴ or when it appears that a

junction. *Aeolian Co. v. Cunningham Piano Co.*, 244 Fed. 478.

[b] **Not Before Issuance of Patent.** *Gayler v. Wilder*, 10 How. (U. S.) 477, 13 L. ed. 504; *Standard Scale, etc. Co. v. McDonald*, 127 Fed. 709; *Hoeltge v. Hoeller*, 2 Bond 386, 12 Fed. Cas. No. 6,574.

66. *Todd Protectograph Co. v. New Era Mfg. Co.*, 236 Fed. 768; *Bowers Dredging Co. v. New York Dredging Co.*, 77 Fed. 980; *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 302; *Norton v. Eagle Automatic Can Co.*, 57 Fed. 929; *New York Grape Sugar Co. v. American Grape Sugar Co.*, 10 Fed. 835, 20 Blatchf. 386; *Parker v. Sears*, 4 Clark 443, 18 Fed. Cas. No. 10,748; *North v. Kershaw*, 4 Blatchf. 70, 18 Fed. Cas. No. 10,311; *Morris v. Lowell Mfg. Co.*, 3 Fish. Pat. Cas. 67, 17 Fed. Cas. No. 9,833; *Dorsey Revolving Harvester Rake Co. v. Bradley Mfg. Co.*, 12 Blatchf. 202, 7 Fed. Cas. No. 4,015; *Batten v. Silliman*, 2 Fed. Cas. No. 1,106.

67. *Winchester Repeating Arms Co. v. Olmsted*, 203 Fed. 493, 121 C. C. A. 615; *Hartford v. Western Mfg. Co.*, 172 Fed. 676; *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 117 Fed. 623; *Union Paper-Bag Mach. Co. v. Binney*, 24 Fed. Cas. No. 14,387; *Potter v. Whitney*, 1 Low. 87, 19 Fed. Cas. No. 11,341; *Irwin v. Dane*, 2 Biss. 442, 13 Fed. Cas. No. 7,081; *Earth Closet Co. v. Fenner*, 8 Fed. Cas. No. 4,249; *American Nicholson Pavement Co. v. Elizabeth*, 1 Fed. Cas. No. 312.

68. *Armat Moving Picture Co. v. Edison Mfg. Co.*, 125 Fed. 939, 60 C. C. A. 380; *Stearns-Roger Mfg. Co. v. Brown*, 114 Fed. 939, 52 C. C. A. 559; *American Pneumatic Tool Co. v. Bigelow Co.*, 77 Fed. 988, 23 C. C. A. 603; *Motion Picture Patents Co. v. New York Motion Picture Co.*, 174 Fed. 51; *Brookfield v. Elmer Glass Works*, 132 Fed. 312; *Thomson-Houston Electric Co. v. Wagner Electric Mfg. Co.*, 130 Fed. 902; *Welsbach Light Co. v. Cosmopolitan Incandescent Gaslight Co.*,

100 Fed. 648; *National Folding Box & Paper Co. v. Munson & Co.*, 99 Fed. 86; *Consolidated Fastener Co. v. American Fastener Co.*, 94 Fed. 523; *Brush Electric Co. v. Electric Storage Battery Co.*, 64 Fed. 775; *Hammond Buckle Co. v. Goodyear Rubber Co.*, 49 Fed. 274; *Thompson v. Rand-Avery Supply Co.*, 38 Fed. 112; *Steam-Gauge, etc., Co. v. St. Louis R. Supplies Mfg. Co.*, 25 Fed. 491; *Pullman v. Baltimore & O. R. Co.*, 5 Fed. 72, 4 Hughes 236.

69. *Thompson-Houston Elec. Co. v. Wagner Electric Mfg. Co.*, 130 Fed. 902; *Diamond Match Co. v. Union Match Co.*, 129 Fed. 602; *Hallock v. Babcock Mfg. Co.*, 124 Fed. 226; *Bradley v. Eccles*, 120 Fed. 947; *Seoville Mfg. Co. v. Patent Button Co.*, 99 Fed. 743; *Huntington Dry-Pulverizer Co. v. Alpha Portland Cement Co.*, 91 Fed. 534.

70. *Brush Electric Co. v. Electric Storage Battery Co.*, 64 Fed. 775; *Price v. Joliet Steel Co.*, 46 Fed. 107; *Waite v. Chichester Chair Co.*, 45 Fed. 258; *Keyes v. Pueblo Smelting & R. Co.*, 31 Fed. 560.

[a] **Mere forbearance** for a reasonable time, after notice, will not in a plain case affect the plaintiff's case. *Loring v. Booth*, 52 Fed. 150; *Collignon v. Hayes*, 8 Fed. 912.

71. *Tompkins v. St. Regis Paper Co.*, 236 Fed. 221, 149 C. C. A. 411.

72. *Huntington Dry-Pulverizer Co. v. Virginia-Carolina Chemical Co.*, 121 Fed. 136.

73. *Keyes v. Eureka Consol. Min. Co.*, 158 U. S. 150, 15 Sup. Ct. 772, 39 L. ed. 929; *Parker v. Sears*, 4 Clark 443, 18 Fed. Cas. No. 10,748.

[a] **Not an absolute ground for refusal**, for when the circumstances justify it a preliminary injunction may be granted even though the patent is about to expire. *Westinghouse Air-Brake Co. v. Carpenter*, 32 Fed. 484.

74. *Blakey v. National Mfg. Co.*, 95 Fed. 136, 37 C. C. A. 27; *Welsbach Light Co. v. Cosmopolitan Incandescent Co.*, 100 Fed. 648; *Ney Mfg. Co.*

refusal would injure plaintiff much less than the defendant,⁷⁵ or the public.⁷⁶ But a preliminary injunction will not be refused merely because it would work a hardship on the defendant,⁷⁷ or be an inconvenience to the public.⁷⁸

b. *Validity of Patent Must Be Established.* — The mere fact of the issuance of letters patent does not entitle the patentee to a preliminary injunction, its validity must first be established;⁷⁹ as, for example, by an adjudication of a federal court,⁸⁰ by a decision of

v. Superior Drill Co., 56 Fed. 152; *Williams v. McNeely*, 56 Fed. 265; *Sargent Mfg. Co. v. Woodruff*, 5 Biss. 444, 21 Fed. Cas. No. 12,368; *Sargent v. Carter*, 21 Fed. Cas. No. 12,362.

[a] **As between two improvers** where no prior invention is involved, each basing his claim upon a result obtained by a different combination, a preliminary injunction will not issue. *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. ed. 723. See also *Aeolian Co. v. Cunningham Piano Co.*, 244 Fed. 478.

75. *Bowers Dredging Co. v. New York Dredging Co.*, 77 Fed. 980; *Root v. Mt. Adams & E. Park Inclined R. Co.*, 40 Fed. 760; *Potter v. Whitney*, 1 Lowell 87, 19 Fed. Cas. No. 11,341; *Morris v. Lowell Mfg. Co.*, 3 Fish. Pat. Cas. 67, 17 Fed. Cas. No. 9,833; *Hockholzer v. Eager*, 2 Sawy. 361, 12 Fed. Cas. No. 6,556; *Day v. Candee*, 7 Fed. Cas. No. 3,676.

76. *American Ordnance Co. v. Driggs-Seabury Co.*, 87 Fed. 947; *Campbell Printing Press & Mfg. Co. v. Manhattan R. Co.*, 47 Fed. 663; *Southwestern Brush Electric Light, etc. Co. v. La. Electric Light Co.*, 45 Fed. 893; *Guidet v. Palmer*, 10 Blatchf. 217, 11 Fed. Cas. No. 5,859.

77. *Thomson-Houston Electric Co. v. Jeffrey Mfg. Co.*, 144 Fed. 130; *United Indurated Fibre Co. v. Whippary Mfg. Co.*, 83 Fed. 485; *Norton v. Eagle Automatic Can Co.*, 57 Fed. 929; *Hodge v. Hudson River R. Co.*, 6 Blatchf. 165, 12 Fed. Cas. No. 6,560.

78. *Lanyon Zinc Co. v. Brown*, 115 Fed. 150, 53 C. C. A. 354; *Pelzer v. Binghamton*, 95 Fed. 823, 37 C. C. A. 288; *Westinghouse Air Brake Co. v. Great Northern R. Co.*, 86 Fed. 132; *New York Filter Mfg. Co. v. Niagara Falls Water Works Co.*, 80 Fed. 924, 26 C. C. A. 252; *Thomson-Houston Electric Co. v. Union R. Co.*, 78 Fed. 365.

79. *Standard Elev. Co. v. Crane Elev. Co.*, 56 Fed. 718, 6 C. C. A. 100;

Aeolian Co. v. Cunningham Piano Co., 244 Fed. 478; *Brunswick-Balke-Collender Co. v. Koehler*, 115 Fed. 648; *Planters' Compress Co. v. Moore & Son's Co.*, 106 Fed. 500; *Smith v. Meriden Britannia Co.*, 92 Fed. 1003; *Societe Anonyme v. Allen*, 84 Fed. 812; *Palmer Pneumatic Tire Co. v. Newton Rubber Works*, 73 Fed. 218; *Dickerson v. De La Vergne Refrigerating Mach. Co.*, 35 Fed. 143; *Foster v. Crossin*, 23 Fed. 400.

[a] **In a clear case**, where the patent's validity is unassailed, or there is no evidence to support a charge of invalidity, and its novelty and usefulness are apparent, and the evidence as to the prior art is inconclusive, the presumption of validity attaching to a patent by reason of its grant is sufficient to support the issuance of a preliminary injunction, without a prior adjudication, long acquiescence by the public, or other fact establishing its validity. *Fuller v. Gilmore*, 121 Fed. 129; *Wilson v. Consolidated Store-Service Co.*, 88 Fed. 286, 31 C. C. A. 533 (*reversing* 83 Fed. 201); *Hussey Mfg. Co. v. Deering*, 20 Fed. 795.

80. *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U. S. 301, 29 Sup. Ct. 495, 53 L. ed. 805; *Adam v. Folger*, 120 Fed. 260, 56 C. C. A. 540; *Aeolian Co. v. Cunningham Piano Co.*, 244 Fed. 478; *Societe Anonyme v. Allen*, 84 Fed. 812, 823; *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 78 Fed. 142; *Edison Electric Light Co. v. Beacon Vacuum & Electrical Co.*, 54 Fed. 678. See *infra*, III, P, 2, c.

[a] **But not** (1) a consent decree (*Wilson v. Consolidated Store-Service Co.*, 88 Fed. 286, 31 C. C. A. 533 [*reversing* 83 Fed. 201]); *American Graphophone Co. v. Gimbel Bros.*, 234 Fed. 344; *New York Button Works v. Crescent Button Co.*, 185 Fed. 820; *Earl v. Rochester, S. & E. R. Co.*, 157 Fed. 241; *National Enameling Co. v. New England Enameling Co.*, 123 Fed. 436;

the patent office or appellate court in an interference proceeding,⁸¹ unless the parties are different,⁸² or by long continued acquiescence by the public.⁸³ However, the presumption of validity which attaches to every patent valid on its face, is sufficient when the defendant does not deny such validity,⁸⁴ or is estopped from doing so.⁸⁵

c. *Prior Adjudication of Validity.*—An adjudication of the validity of a patent by the federal supreme court or appellate court of the

Bowers Dredging Co. v. New York Dredging Co., 77 Fed. 980), or (2) decree entered without a hearing upon an abandonment of the defense. *Diamond Match Co. v. Union Match Co.*, 129 Fed. 602; *Western Electric Co. v. Anthracite Tel. Co.*, 113 Fed. 834; *American Electrical Novelty Co. v. Newgold*, 99 Fed. 567; *Societe Anonyme v. Allen*, 84 Fed. 812 (*affirmed*, 90 Fed. 815, 33 C. C. A. 282); *Hayes v. Leton*, 5 Fed. 521.

81. *Automatic Weighing Mach. Co. v. Pneumatic Scale Corp.*, 166 Fed. 288, 92 C. C. A. 206 (*reversing* 158 Fed. 415); *Perfection Cooler Co. v. Rose Mfg. Co.*, 175 Fed. 120; *Dickerson v. De La Vergne Refrigerating Mach. Co.*, 35 Fed. 143; *Minneapolis Harvester Wks. v. McCormick Harvesting Mach. Co.*, 28 Fed. 565; *Consolidated Bunting Apparatus Co. v. Peter Schoenhofen Brew. Co.*, 28 Fed. 428; *Celluloid Mfg. Co. v. Chrolithian Collar & Cuff Co.*, 24 Fed. 275; *Smith v. Halkyard*, 16 Fed. 414; *Pentlarge v. Beeston*, 14 Blatch. 352, 19 Fed. Cas. No. 10,963.

[a] **Priority Determined.**—The determination of the patent office in an interference proceeding establishes the validity of the patent as between the parties only so far as it concerns the question of priority. *Elliott & Co. v. Youngstown Car Mfg. Co.*, 181 Fed. 345, 104 C. C. A. 175, *reversing* 173 Fed. 315.

82. *Reed Mfg. Co. v. Smith & Winchester Co.*, 107 Fed. 719, 46 C. C. A. 601; *Wilson v. Consolidated Store-Service Co.*, 88 Fed. 286, 31 C. C. A. 533 (*reversing* 83 Fed. 201); *Empire State Nail Co. v. American Solid Leather Button Co.*, 61 Fed. 650; *Dickerson v. De La Vergne Refrigerating Mach. Co.*, 35 Fed. 143; *Potter v. Stevens*, 19 Fed. Cas. No. 11,338.

83. *Crescent Specialty Co. v. National Fireworks Distributing Co.*, 219 Fed. 130, 135 C. C. A. 28; *Silver & Co. v. J. P. Eustis Mfg. Co.*, 130 Fed. 348; *Corser v. Brattleboro Overall Co.*, 59

Fed. 781; *Palmer v. Mills*, 57 Fed. 221; *Sessions v. Gould*, 49 Fed. 855; *White v. Hunter*, 47 Fed. 819; *White v. Surdam*, 41 Fed. 790.

[a] **There is no fixed rule** as to the length of time the possession and enjoyment of the right under the patent shall have continued to justify a preliminary injunction. *Sargent v. Seagrave*, 2 Curt. 553, 21 Fed. Cas. No. 12,365; *Potter v. Muller*, 19 Fed. Cas. No. 11,334; *Orr v. Littlefield*, 1 Woodb. & M. 13, 18 Fed. Cas. No. 10,590.

[b] **What constitutes acquiescence** depends upon the facts of each case. *Consolidated Fastener Co. v. American Fastener Co.*, 94 Fed. 523; *Nilsson v. Jefferson*, 78 Fed. 366; *Sargent v. Seagrave*, 2 Curt. 553, 21 Fed. Cas. No. 12,365; *Potter v. Muller*, 19 Fed. Cas. No. 11,334; *Mitchell v. Barelay*, 17 Fed. Cas. No. 9,659.

[c] **The fact that the patent has been unquestioned for several years** is sufficient to raise the presumption of validity, though there has been no adjudication thereon. *McDowell v. Kurtz*, 77 Fed. 206, 23 C. C. A. 119; *Peck, Stow & Wilcox Co. v. Fray*, 88 Fed. 784; *White v. Hunter*, 47 Fed. 819; *National Typographic Co. v. New York Typograph Co.*, 46 Fed. 114.

[d] **A patent only a year old** or less is too recent to have received sufficient acquiescence to warrant a preliminary injunction. *Nilsson v. Jefferson*, 78 Fed. 366; *National Cash Register Co. v. Boston Cash Indicator & Rec. Co.*, 41 Fed. 144; *Johnston Ruffler Co. v. Avery Mach. Co.*, 28 Fed. 193.

84. *New York Grape Sugar Co. v. American Grape Sugar Co.*, 10 Fed. 835, 20 Blatchf. 386; *Sickels v. Mitchell*, 3 Blatchf. 548, 22 Fed. Cas. No. 12,835.

85. *Burr v. Kimbark*, 28 Fed. 574; *Time Telegraph Co. v. Himmer*, 19 Fed. 322; *Onderdonk v. Fanning*, 4 Fed. 148; *American Shoe-Tip Co. v. National Shoe-Toe Protector Co.*, 1 Fed. Cas. No. 317.

same circuit on the same facts is conclusive;⁸⁶ and such decision by any other court, district or appellate, while not conclusive as to third parties, will generally be followed as a matter of comity,⁸⁷ unless in the sound discretion of the court the evidence produced is sufficient to justify a different decision.⁸⁸ Therefore a preliminary injunction will ordinarily be granted when the prior decision holds the patent valid,⁸⁹ but if invalid it will be denied.⁹⁰ Such decision will be dis-

86. Grinnell Washing Mach. Co. v. Clarinda Lawn Mower Co., 237 Fed. 98; Minerals Separation v. Butte & Superior Copper Co., 237 Fed. 401; Todd Protectograph Co. v. New Era Mfg. Co., 236 Fed. 768; Safety Car Heating & Lighting Co. v. Gould Coupler Co., 230 Fed. 848; Motion Picture Patents Co. v. Laemmle, 178 Fed. 104; Westinghouse Air Brake Co. v. Christensen Engineering Co., 113 Fed. 594; American Sulphite Pulp Co. v. Burgess Sulphite Fibre Co., 103 Fed. 975; Bowers Dredging Co. v. New York Dredging Co., 80 Fed. 119; American Bell Tel. Co. v. McKeesport Tel. Co., 57 Fed. 661; Richardson v. Lockwood, 4 Cliff. 128, 20 Fed. Cas. No. 11,786; American Middlings Purifier Co. v. Christian, 4 Dill. 448, 1 Fed. Cas. No. 307.

[a] **Certiorari by the supreme court** does not affect the action of the lower court, and until a decision is rendered by the highest court the district court must follow the decision on the question of the patent's validity by the circuit court of appeals. Minerals Separation v. Butte & Superior Copper Co., 237 Fed. 401.

87. Cincinnati Butchers' Supply Co. v. Walker Bin Co., 230 Fed. 453, 144 C. C. A. 595; Welsbach Light Co. v. Cosmopolitan Incandescent Light Co., 104 Fed. 83, 43 C. C. A. 418; Kawneer Mfg. Co. v. Toledo Plate & Window Glass Co., 232 Fed. 362; Diamond Match Co. v. Union Match Co., 129 Fed. 602; Western Electric Co. v. Keystone Tel. Co., 115 Fed. 809; Brunswick-Balke-Collender Co. v. Koehler, 115 Fed. 648; Western Electric Co. v. Anthracite Tel. Co., 100 Fed. 301; Edison Electric Light Co. v. Columbia Incandescent Lamp Co., 56 Fed. 496; Lockwood v. Faber, 27 Fed. 63.

[a] **An adjudication by the circuit court of appeals of another circuit**, determining the validity of a patent, though not absolutely controlling, is substantially so in case of doubt. Consolidated Rubber Tire Co. v. Diamond

Rubber Co., 157 Fed. 677, 85 C. C. A. 349; New York Filter Mfg. Co. v. Niagara Falls Water Works Co., 80 Fed. 924, 26 C. C. A. 252 (*affirming* 77 Fed. 900); Hildreth v. Auerbach, 223 Fed. 545 (*affirmed*, 223 Fed. 651, 139 C. C. A. 205); Walker Patent Pivoted Bin Co. v. Bernard Gloekler Co., 188 Fed. 435; Calculagraph Co. v. Automatic Time Stamp Co., 149 Fed. 436.

88. Cincinnati Butchers' Supply Co. v. Walker Bin Co., 230 Fed. 453, 144 C. C. A. 595; Wayman v. Louis Lipp Co., 222 Fed. 679; General Electric Co. v. Condit Electrical Mfg. Co., 191 Fed. 511; Thomson-Houston Electric Co. v. Sterling-Meaker Co., 140 Fed. 554; Brill v. Peckham Mfg. Co., 129 Fed. 139; George Frost Co. v. Crandall Wedge Co., 123 Fed. 104 (*affirmed*, 125 Fed. 942, 60 C. C. A. 180); Westinghouse Electric & Mfg. Co. v. Royal Weaving Co., 115 Fed. 733; American Sulphite Pulp Co. v. Burgess Sulphite Fibre Co., 103 Fed. 975; Welsbach Light Co. v. Rex Incandescent Light Co., 94 Fed. 1006; Duff Mfg. Co. v. Kalamazoo R. Velocipede & Car Co., 94 Fed. 154; Doig v. Morgan Mach. Co., 89 Fed. 489, *affirmed*, 91 Fed. 1001, 33 C. C. A. 683.

89. Scott v. Laas, 150 Fed. 764, 80 C. C. A. 500; Elite Pottery Co. v. Dececo Co., 150 Fed. 581, 80 C. C. A. 567; Timolat v. Philadelphia Pneumatic Tool Co., 123 Fed. 899; Diehl Mfg. Co. v. Dayton Fan & Motor Co., 109 Fed. 566; Duff Mfg. Co. v. Norton, 92 Fed. 921; Carroll v. Goldschmidt, 80 Fed. 520; Woodward v. Ellwood Gas Stove & Stamping Co., 68 Fed. 717; S. S. White Dental Mfg. Co. v. Johnson, 56 Fed. 262; Carter & Co. v. Wollschlaeger, 53 Fed. 573; Schneider v. Missouri Glass Co., 36 Fed. 582; Mallory Mfg. Co. v. Hickok, 20 Fed. 116; Coburn v. Clark, 15 Fed. 804, 5 McCrary 99.

90. American Graphophone Co. v. National Gramophone Co., 92 Fed. 364, 34 C. C. A. 412; Calculagraph Co. v.

regarded, however, in case of collusion,⁹¹ or when the validity of the patent is clearly apparent,⁹² or was not seriously contested,⁹³ or in issue.⁹⁴ In the event of conflicting decisions, a preliminary injunction is sometimes denied,⁹⁵ but the rule has been stated that the more recent decision should be followed,⁹⁶ or the one which appeals to the court as being the more correct,⁹⁷ unless the court decides the matter upon the facts before it.⁹⁸

3. Permanent Injunction.—a. *In General.*—The plaintiff in an infringement suit is generally entitled to a permanent injunction upon a determination of the case in his favor,⁹⁹ irrespective of the amount of damages recovered,¹ the age of the patent,² solvency of the defendant,³ hardship to the defendant,⁴ or the discontinuance of the infringement.⁵ But it may, in exceptional cases, within the discretion of the court, be withheld,⁶ as when it is not necessary to protect the plaintiff's rights and its allowance would injure the public.⁷

Automatic Time Stamp Co., 149 Fed. 436; Edison Electric Light Co. v. Citizens' Electric Light, H. & P. Co., 64 Fed. 491; Hicks v. Beardsley, 32 Fed. 281; Keyes v. Pueblo Smelting & R. Co., 31 Fed. 560; Concord v. Norton, 16 Fed. 477; Onderdonk v. Fanning, 18 Fed. Cas. No. 10,510a.

91. Western Electric Co. v. Anthracite Tel. Co., 113 Fed. 834. See also Doig v. Morgan Mach. Co., 89 Fed. 489, *affirmed*, 91 Fed. 1001, 33 C. C. A. 683.

92. Wyckoff v. Wagner Typewriter Co., 88 Fed. 515; Foster v. Crossin, 23 Fed. 400.

93. American Coat Pad Co. v. Phoenix Pad Co., 113 Fed. 629, 51 C. C. A. 339; Wilson v. Consolidated Store Service Co., 88 Fed. 286, 31 C. C. A. 533; Silver & Co. v. J. P. Eustis Mfg. Co., 130 Fed. 348; Diamond Match Co. v. Union Match Co., 129 Fed. 602; National Enameling Co. v. New England Enameling Co., 123 Fed. 436; American Electrical Novelty Co. v. Newgold, 99 Fed. 567; Bowers Dredging Co. v. New York Dredging Co., 77 Fed. 980.

94. Southern Pac. Co. v. Earl, 82 Fed. 690, 27 C. C. A. 185; American Graphophone Co. v. Leeds, 77 Fed. 193; National Hat Pouncing Mach. Co. v. Hedden, 29 Fed. 147; Page v. Holmes Burglar Alarm Tel. Co., 2 Fed. 330, 18 Blatchf. 118; Wells v. Gill, 29 Fed. Cas. No. 17,394; Parker v. Sears, 4 Clark 443, 18 Fed. Cas. No. 10,748; Grover & Baker Sew. Mach. Co. v. Williams, 11 Fed. Cas. No. 5,847.

95. Wilgus v. Van Sickle, 99 Fed. 443.

96. Pelzer v. Geise, 87 Fed. 869.

97. Pelzer v. Newhall, 93 Fed. 684.

98. Maitland v. Graham, 96 Fed. 247.

99. Horton v. New York Cent. & H. R. R. Co., 63 Fed. 897; Roemer v. Neumann, 26 Fed. 332; Avery v. Wilson, 20 Fed. 856; Rumford Chemical Works v. Hecker, 20 Fed. Cas. No. 12,134; Potter v. Mack, 19 Fed. Cas. No. 11,331.

1. Dubois v. Kirk, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. ed. 895, *affirming* 33 Fed. 252.

2. American Bell Tel. Co. v. Western Tel. Const. Co., 58 Fed. 410; American Bell Tel. Co. v. Brown Tel. & T. Co., 58 Fed. 409.

3. Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. ed. 1058; Grant v. Raymond, 6 Pet. (U. S.) 218, 8 L. ed. 376; General Electric Co. v. Wise, 119 Fed. 922.

4. Edison Electric Light Co. v. Mt. Morris Electric Light Co., 58 Fed. 572, 7 C. C. A. 375, *affirming* 57 Fed. 642.

5. Western Electric Co. v. Capital Tel. & Tel. Co., 86 Fed. 769; Matthews & Willard Mfg. Co. v. National Brass & Iron Works, 71 Fed. 518; Kane v. Huggins Cracker & C. Co., 44 Fed. 287; Facer v. Midvale Steel-Work Co., 38 Fed. 231; Bullock Printing Press Co. v. Jones, 4 Fed. Cas. No. 2,132.

Disclaimer of intention to further infringement, see *supra*, III, N, 1.

6. Marden v. Campbell Printing Press & Mfg. Co., 79 Fed. 653, 25 C. C. A. 142; Many v. Sizer, 16 Fed. Cas. No. 9,057.

7. Campbell Printing Press & Mfg. Co. v. Manhattan R. Co., 49 Fed. 930; Ballard v. Pittsburg, 12 Fed. 783; Bliss

b. *Suspending or Dissolving*.—After a final decree establishing an exclusive right to the use of a patent and awarding an injunction to protect it, the injunction will not be suspended while the decree stands,⁸ unless some extraordinary cause, such as the public necessity, be shown.⁹ But after the patent expires the injunction may be dissolved,¹⁰ notwithstanding there may be infringing articles extant made during the life of the patent, since the patentee may recover damages for such infringement.¹¹

4. *Violation of Injunction*.¹²—Violation of an injunction issued in an infringement case is punishable by proceedings in contempt,¹³

v. Brooklyn, 8 Blatchf. 533, 3 Fed. Cas. No. 1,544.

8. Consolidated Roller-Mill Co. *v.* Coombs, 39 Fed. 803.

[a] *In Case of Full Satisfaction*. When one recovers satisfaction for an infringement of a patent caused by the sale of a device, no further damages can accrue to him from a continued use of that property, and the defendants are prima facie entitled to a dissolution of the injunction. *Steam Stone-Cutter Co. v. Sheldons*, 15 Fed. 608, 21 Blatchf. 260.

9. *Munson v. New York*, 19 Fed. 313.

10. *Westinghouse v. Carpenter*, 43 Fed. 894.

11. *Westinghouse v. Carpenter*, 43 Fed. 894. *Contra*, *American Diamond Rock-Boring Co. v. Rutland Marble Co.*, 2 Fed. 356, 18 Blatchf. 146.

12. See generally 13 STANDARD PROC. 284.

13. *Gordon v. Turco-Halvah Co. (C. C. A.)*, 247 Fed. 487; *Chas. Green Co. v. Henry P. Adams Co. (C. C. A.)*, 247 Fed. 485; *Frank F. Smith Metal Window Hdw. Co. v. Yates*, 244 Fed. 793, 157 C. C. A. 241; *National Metal Mold. Co. v. Tubular Woven Fabric Co.*, 239 Fed. 907, 153 C. C. A. 35; *Hamilton v. Diamond Drill, etc. Co.*, 137 Fed. 417, 69 C. C. A. 532; *Diamond Drill & Mach. Co. v. Kelley*, 132 Fed. 978; *Diamond Drill & Mach. Co. v. Kelley*, 130 Fed. 893; *Janney v. Pancoast International Ventilator Co.*, 124 Fed. 972; *Westinghouse Air Brake Co. v. Christensen Engineering Co.*, 121 Fed. 562; *Welsbach Light Co. v. Daylight Incandescent Gaslight Co.*, 97 Fed. 950; *Stahl v. Ertel*, 62 Fed. 920; *Mundy v. Lidgerwood Mfg. Co.*, 34 Fed. 541; *Bate Refrigerating Co. v. Gillett*, 30 Fed. 683; *Iowa Barb Steel-Wire Co. v. Southern Barbed-Wire Co.*, 30 Fed. 123; *Wetherill v. New Jersey Zinc Co.*, 29

Fed. Cas. No. 17,463; *Potter v. Muller*, 1 Bond 601, 19 Fed. Cas. No. 11,333; *Poppenhusen v. Falke*, 4 Blatchf. 493, 19 Fed. Cas. No. 11,279; *Phillips v. Detroit*, 2 Flip. 92, 19 Fed. Cas. No. 11,101; *Goodyear v. Mullee*, 5 Blatchf. 429, 10 Fed. Cas. No. 5,577.

Contempt proceedings generally, see the title "Contempt."

[a] *Notice of contempt proceedings* necessary. *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 135 Fed. 774, 68 C. C. A. 476.

[b] *A portion or all of the fine*, if any, imposed upon the defendant in contempt may be awarded the plaintiff. *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 135 Fed. 774, 68 C. C. A. 476; *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 124 Fed. 735, 61 C. C. A. 57; *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 108 Fed. 873, 48 C. C. A. 118; *United States Envelope Co. v. Transo Paper Co.*, 221 Fed. 79; *Macaulay v. White Sew. Mach. Co.*, 9 Fed. 698.

[c] *Mitigating circumstances* (1) may be shown. *In re De Forest Wireless Tel. Co.*, 154 Fed. 81; *Norton v. Eagle Automatic Can Co.*, 59 Fed. 137; *Iowa Barb Steel-Wire Co. v. Southern Barbed-Wire Co.*, 30 Fed. 615; *Phillips v. Detroit*, 2 Flip. 92, 19 Fed. Cas. No. 11,101. (2) Likewise, if the injunction was issued by mistake, it will be considered in the defendant's favor. *Westinghouse Air Brake Co. v. Christensen Engineering Co.*, 128 Fed. 749.

[d] *A new patent case* will not be tried in the contempt proceeding. *Chas. Green Co. v. Henry P. Adams Co. (C. C. A.)*, 247 Fed. 485; *Individual Drinking Cup Co. v. Public Service Cup Co.*, 234 Fed. 653; *Gordon v. Turco-Halvah Co.*, 233 Fed. 430.

[e] *Change to criminal prosecution* not warranted. *Turner v. United States*, 238 Fed. 194, 151 C. C. A. 270.

and in case of a colorable evasion of the decree, the court may, in its discretion, proceed either by contempt or by supplemental bill for injunction.¹⁴ But if a substantial change is made,¹⁵ or the violation of the injunction by any means is rendered doubtful,¹⁶ the plaintiff should bring a new suit, though in some jurisdictions with the court's permission he may file a supplemental bill in the original suit requesting a decree extending the injunction to the new structure.¹⁷

IV. INFRINGEMENT OF PART OF PATENT.—Where a patentee unintentionally files specifications which are too broad, he may, upon entering a disclaimer, maintain a suit for infringement of the part of the patent which is bona fide his own.¹⁸

V. INJUNCTION AGAINST THREATENED INFRINGEMENT SUITS.—A patentee may be restrained,¹⁹ and also damages recov-

14. *Gordon v. Turco-Halvah Co.* (C. C. A.), 247 Fed. 487; *Chas. Green Co. v. Henry P. Adams Co.* (C. C. A.), 247 Fed. 485.

15. *Chas. Green Co. v. Henry P. Adams Co.* (C. C. A.), 247 Fed. 485; *Frank F. Smith Metal Window Hdw. Co. v. Yates*, 244 Fed. 793, 157 C. C. A. 241; *Gordon v. Turco-Halvah Co.*, 233 Fed. 430.

16. *United States Playing Card Co. v. Spalding*, 93 Fed. 822; *Enterprise Mfg. Co. v. Sargent*, 48 Fed. 453; *Truax v. Detweiler*, 46 Fed. 117; *Pennsylvania Diamond Drill Co. v. Simpson*, 39 Fed. 284; *Temple Pump Co. v. Goss Pump, etc., Co.*, 31 Fed. 292; *Wirt v. Brown*, 30 Fed. 187; *Allis v. Stowell*, 15 Fed. 242; *Bate Refrigerating Co. v. Eastman*, 11 Fed. 902; *Putnam v. Hollender*, 11 Fed. 75; *Liddle v. Cory*, 7 Blatchf. 1, 15 Fed. Cas. No. 8,338.

17. *Frank F. Smith Metal Window Hdw. Co. v. Yates*, 244 Fed. 793, 157 C. C. A. 241; *Riverside Heights Orange Growers' Assn. v. Stebler*, 240 Fed. 703, 153 C. C. A. 501; *National Metal Mold. Co. v. Tubular Woven Fabric Co.*, 239 Fed. 907, 153 C. C. A. 35; *Crown Cork & Seal Co. v. American Cork Specialty Co.*, 211 Fed. 650, 128 C. C. A. 154; *Sundh Electric Co. v. General Electric Co.*, 217 Fed. 583; *Enterprise Mfg. Co. v. Sargent*, 48 Fed. 453; *Allis v. Stowell*, 15 Fed. 242.

18. 16 U. S. St. at L. 207; U. S. Rev. St., §4922; 8 U. S. Comp. St., 1916, §9468.

[a] **Disclaimer Necessary.**—No one is entitled to the benefits of this section of the statute who unreasonably neglects or delays to enter a disclaimer at the patent office. See the statute, *supra*, and *Hailes v. Albany Stove Co.*,

123 U. S. 582, 8 Sup. Ct. 262, 31 L. ed. 284.

[b] **Disclaimer must be entered (1) before commencement** of the suit, to entitle plaintiff to costs. See the statute *supra*, and *Seymour v. McCormick*, 19 How. (U. S.) 96, 15 L. ed. 557; *O'Reilly v. Morse*, 15 How. (U. S.) 62, 14 L. ed. 601; *Houser v. Starr*, 203 Fed. 264, 121 C. C. A. 462. (2) It may be filed after the commencement of the suit only upon such terms and conditions as the court may require. *Smith v. Nichols*, 21 Wall. (U. S.) 112, 22 L. ed. 566. (3) But to be effective for all purposes it should be filed before suit is brought. *Wyeth v. Stone*, 1 Story 273, 30 Fed. Cas. No. 18,107; *Reed v. Cutter*, 1 Story 590, 20 Fed. Cas. No. 11,645.

[c] **A Patent Cannot Be Amended by Means of a Disclaimer.**—*Hailes v. Albany Stove Co.*, 123 U. S. 582, 8 Sup. Ct. 262, 31 L. ed. 284, *affirming* 16 Fed. 240, 21 Blatchf. 271.

[d] **An adjudication of invalidity** of some of the claims of a patent, necessitates the filing of a disclaimer as to such claims before the patentee may recover for infringement of the others. *F. D. Cummer & Son Co. v. Atlas Dryer Co.*, 193 Fed. 993, 113 C. C. A. 611; *Herman v. Youngstown Car Mfg. Co.*, 191 Fed. 579, 112 C. C. A. 185; *Guarantee Trust & Safe Deposit Co. v. New Haven Gas-Light Co.*, 39 Fed. 268.

19. **U. S.**—*Rollman Mfg. Co. v. Universal Hdw. Wks.*, 238 Fed. 568, 151 C. C. A. 504, 229 Fed. 579; *A. B. Farquhar Co. v. National Harrow Co.*, 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755; *Murjahn v. Hall*, 119 Fed. 186; *Computing Scale Co. v. National*

ered,²⁰ in a state court,²¹ for making baseless threats of infringement suits against the customers of a manufacturer, especially when instigated by malice,²² but not when he acts in good faith and there is a doubt as to the propriety of his action.²³

VI. RECOVERY OF PENALTIES.—A. **WRONGFUL MARKING OF UNPATENTED ARTICLE.**—Under the statute²⁴ an action for a penalty may be maintained against any one who falsely marks or labels articles as patented for the purpose of deceiving the public.²⁵ The statute applies to a corporation as well as to an individual,²⁶ and to any article whether patentable or not.²⁷ Only one penalty is recoverable when the marking is a continuous act, although a number of separate unpatented articles are marked.²⁸ The action should be brought in the name of the informer, and not in the name of the United States,²⁹ in the federal district court where the offense is committed.³⁰

B. **UNAUTHORIZED USE OF PATENTED DESIGN.**—Likewise it is provided by statute that the owner of any patented design may recover, either by action at law or upon a bill in equity for an injunction, for the unauthorized use of such patent or colorable imitation thereof, in any federal district court having jurisdiction of the parties, a penalty of two hundred and fifty dollars and as much in excess thereof as the

Computing Scale Co., 79 Fed. 962; National Cash Register Co. v. Boston Cash Indicator & Rec. Co., 41 Fed. 51; Emack v. Kane, 34 Fed. 46; Ide v. Ball Engine Co., 31 Fed. 901; Allis v. Stowell, 16 Fed. 783; Motte v. Bennett, 17 Fed. Cas. No. 9,884. **D. C.** Columbia National Sand Dredging Co. v. Miller, 20 App. Cas. 245. **Mass.** Aronson v. Orlov, 116 N. E. 951.

20. Aronson v. Orlov (Mass.), 116 N. E. 951.

21. Aronson v. Orlov (Mass.), 116 N. E. 951.

22. Kelley v. Ypsilanti Dress-Stay Mfg. Co., 44 Fed. 19, 10 L. R. A. 686.

23. **U. S.**—National Metal Molding Co. v. Tubular Woven Fabric Co., 236 Fed. 745, 150 C. C. A. 77; Adriance, Platt & Co. v. National Harrow Co., 121 Fed. 827, 58 C. C. A. 163; Davison v. National Harrow Co., 103 Fed. 360; New York Filter Co. v. Schwarzwald, 58 Fed. 577. **Mass.**—Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310. **N. Y.**—Hovey v. Rubber Tip Pencil Co., 1 Jones & S. 522, affirmed, 50 N. Y. 335.

24. 16 U. S. St. at L. 203; U. S. Rev. St., §4901; 8 U. S. Comp. St., 1916, §9447.

25. Gandy v. Main Belting Co., 143 U. S. 587, 12 Sup. Ct. 598, 36 L. ed. 272; London v. Everett H. Dunbar Corp., 179 Fed. 506, 103 C. C. A. 130;

135; Hotchkiss v. Samuel Cupples Dade v. Boorum & Pease Co., 121 Fed. Wooden-Ware Co., 53 Fed. 1018.

[a] **Patent Applied for.**—The statute does not apply to the marking of articles with the words, "Patent Applied For." Schwebel v. Bothe, 40 Fed. 478.

26. London v. Everett H. Dunbar Corp., 179 Fed. 506, 103 C. C. A. 130.

27. Oliphant v. Salem Flouring Mills Co., 5 Sawy. 128, 18 Fed. Cas. No. 10,486.

28. Hotchkiss v. Samuel Cupples Wooden-Ware Co., 53 Fed. 1018.

29. United States v. Morris, 2 Bond 23, 26 Fed. Cas. No. 15,814.

[a] **Government Not a Party.**—An action by an informer for his own benefit and that of the United States, for a penalty under this statute, is an action qui tam, in which the plaintiff may properly describe himself as bringing the action for the benefit of himself and of the United States. In such cases the United States is not regarded as a party to the action. Winne v. Snow, 19 Fed. 507.

30. Hotchkiss v. Samuel Cupples Wooden-Ware Co., 53 Fed. 1018; Winne v. Snow, 19 Fed. 507; Pentlarge v. Kirby, 19 Fed. 501.

[a] **Residence of Parties.**—The jurisdiction of the court does not de-

profits of the offender exceed that sum.³¹ This act is not exclusive of any other existing remedy at law or in equity, but the owner of the design cannot recover twice the profit made from an infringement.³²

VII. ACTIONS FOR REFUSAL TO FURNISH COPIES OF PATENT.—Any one, upon making a proper demand and paying the customary fees, is entitled to authenticated copies of letters patent and other records of the patent office,³³ and may maintain an action for damages against the commissioner of patents for refusal of such demand.³⁴ But not if the demand be for copies of pending applications for patents or for papers connected therewith.³⁵

VIII. CANCELLATION OF PATENT.—A. BY THE GOVERNMENT.—The United States may maintain a bill in equity to set aside, annul, or cancel a patent for an invention obtained through a fraud.³⁶ Such a suit cannot be brought by an individual,³⁷ except in cases where two patents have been issued for the same thing,³⁸ but must be in the name of the government by the authority or permission of the attorney general.³⁹ It may be in the name of the government in behalf of an individual,⁴⁰ but the jurisdiction of equity cannot be thus invoked if the individual has an adequate remedy at law.⁴¹

pend on the residence of the parties. *Pentlurge v. Kirby*, 19 Fed. 501.

31. 24 U. S. St. at L. 387; 8 U. S. Comp. St., 1916, §9476; *Crier v. Innes*, 170 Fed. 324, 95 C. C. A. 508; *Frank v. Geiger*, 121 Fed. 126; *Lowell Mfg. Co. v. Whittall*, 71 Fed. 515; *Ripley v. Elson Glass Co.*, 49 Fed. 927.

[a] Notice to the defendant that the design was patented must be shown. *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. ed. 426; *Lichtenstein v. Straus*, 166 Fed. 319; *Lichtenstein v. Phipps*, 161 Fed. 578.

[b] Wilful Infringement.—The statute does not apply to the unintentional infringement of the patentee's rights. *Fuller v. Field*, 82 Fed. 813, 27 C. C. A. 165; *Gimbel v. Hogg*, 97 Fed. 791, 38 C. C. A. 419, reversing 94 Fed. 518.

[c] No Profits Necessary.—While the statute provides for the recovery of profits in excess of the sum of \$250, it is not necessary that there be profits in order to recover the penalty named. *Pirkil v. Smith*, 42 Fed. 410.

32. 24 U. S. St. at L. 388; 8 U. S. Comp. St., 1916, §9477.

33. U. S. Rev. St., §892; U. S. Comp. St., 1916, §1505.

34. *Boyd v. Burke*, 14 How. (U. S.) 575, 14 L. ed. 548.

35. *United States ex rel. U. S. Electric L. Co. v. Commissioner of Patents*, 8 Mackey (D. C.) 223.

36. *United States v. American Bell Tel. Co.*, 128 U. S. 315, 9 Sup. Ct. 90, 32 L. ed. 450 (reversing 32 Fed. 591); *United States v. Gunning*, 18 Fed. 511, 21 Blatchf. 516.

37. *Mowry v. Whitney*, 14 Wall. (U. S.) 434, 20 L. ed. 860.

[a] The attorney general of the United States has no power to maintain in his own name a bill in equity to repeal letters patent for an invention. *Attorney General v. Rumford Chemical Works*, 32 Fed. 608, 1 Fed. Cas. No. 638a.

38. *Mowry v. Whitney*, 14 Wall. (U. S.) 434, 20 L. ed. 860. See *infra*, VIII, B.

39. *Mowry v. Whitney*, 14 Wall. (U. S.) 434, 20 L. ed. 860; *New York & B. Coffee Polishing Co. v. New York Coffee Polishing Co.*, 9 Fed. 578, 20 Blatchf. 174, 62 How. Pr. 485.

40. *United States v. American Bell Tel. Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. ed. 144.

41. *United States v. American Bell Tel. Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. ed. 144; *United States v. Frazer*, 22 Fed. 106.

[a] General Rules Control.—The government has a standing in court to procure the cancellation of a patent, either in the discharge of its obligation to protect the public against a monopoly it has wrongfully created, or because it owes a duty to other pat-

B. BY INDIVIDUALS.—1. In General.—Anyone interested in a patent, or in the working of the invention claimed under it, may maintain a suit in equity for relief against the owner of an interfering patent.⁴² Such patents must be conflicting,⁴³ that is, they must claim, in whole or in part, the same invention,⁴⁴ and the court cannot declare a patent invalid where such conflict does not exist.⁴⁵ But a suit for cancellation is not the only remedy available, since the interested party may sue for infringement.⁴⁶ This proceeding is available to one who has successfully maintained a bill in equity to obtain a patent.⁴⁷

entees to secure to them the full enjoyment of the rights which it has conferred by its patents to them. In so far as the latter ground is concerned, the suit is brought in the name of the government, simply to help individuals, and in that respect is subject to the same rules that govern like suits between private litigants; and hence the government will not be permitted to invoke the equity jurisdiction to cancel a patent against which the individual has a perfect legal defense available in any action by or against him. *United States v. American Bell Telephone Co.*, 167 U. S. 224, 17 Sup. Ct. 809, 42 L. ed. 144, *affirming* *American Bell Tel. Co. v. United States*, 68 Fed. 542, 15 C. C. A. 569.

[b] **Fraud Shown by Records.**—A bill in chancery to annul a patent, on the ground that the patentee falsely and fraudulently made oath that the alleged improvements had not been before known or used, when in fact the process described in the patent had been fully described in a patent issued to him previously, and since expired, will not lie in the name of the United States when the suit is really in the interest of private parties who have given bond to indemnify the government from all costs of suit, and who could themselves set up such matters as a defense in a suit against them by the patentee. *United States v. Frazer*, 22 Fed. 106.

42. 16 U. S. St. at L. 207; U. S. Rev. St., §4918; 8 U. S. Comp. St., 1916, §9463; *Sundh Electric Co. v. Interborough Rapid Transit Co.*, 198 Fed. 94, 117 C. C. A. 280; *Palmer Pneumatic Tire Co. v. Lozier*, 69 Fed. 346; *Dederick v. Fox*, 56 Fed. 714; *American Roll-Paper Co. v. Knopp*, 44 Fed. 609.

[a] **Patents Granted to Same Inventor.**—The fact that the interference

alleged is between patents granted to the same inventor does not affect the jurisdiction of the court where the interests of the parties are antagonistic. *Keystone Trading Co. v. Zapota Mfg. Co.*, 210 Fed. 456.

[b] **No Relation to Proceedings in Patent Office.**—A suit in equity to cancel a patent on the ground of interference is entirely independent of and in nowise related to interference proceedings in the patent office and court of appeals of the District of Columbia. *Atkinson v. Boardman*, 1 Fed. Cas. No. 607.

[c] **When both parties allege invalidity** and pray for a decree annulling the adverse party's patent, the suit is one for interference and not for infringement. *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602.

43. *Mowry v. Whitney*, 14 Wall. (U. S.) 434, 20 L. ed. 860; *Boston Pneumatic Power Co. v. Eureka Patents Co.*, 139 Fed. 29.

[a] **A mere infringement is not enough;** there must be an actual conflict. *Donner v. American Sheet & Tin Plate Co.*, 160 Fed. 971.

44. *Nathan Mfg. Co. v. Craig*, 49 Fed. 370; *Morris v. Kempshall Mfg. Co.*, 20 Fed. 121; *Gold & Silver Ore Separating Co. v. United States Disintegrating Ore Co.*, 6 Blatchf. 307, 10 Fed. Cas. No. 5,508.

45. *Boston Pneumatic Power Co. v. Eureka Patents Co.*, 139 Fed. 29.

46. *Western Electric Co. v. Sperry Electric Co.*, 59 Fed. 295, 8 C. C. A. 129.

[a] **Joinder.**—Counts for interference and infringement may be joined. *American Roll-Paper Co. v. Knopp*, 44 Fed. 609; *Leach v. Chandler*, 18 Fed. 262.

47. *Jones v. Starr*, 26 App. Cas. (D. C.) 64.

2. Injunction.—Injunctive relief will be granted when necessary to protect the rights of the parties during, or subsequent to, the suit for annulment of a patent.⁴⁸ Where the defendant brings an action at law for infringement against the plaintiff in the same court, he will not be enjoined if it appears that the interference suit may be heard first;⁴⁹ but where a suit to determine priority between interfering patents is pending in another district, in which the interests of the parties to the suit for cancellation will be determined, the latter will be stayed.⁵⁰

3. Pleading.—*a. Bill.*—In drawing a bill for the cancellation of an interfering patent the general rules relating to bills in equity should be followed.⁵¹ The bill should allege that the defendant is the owner of the interfering patent.⁵²

b. Answer.—The answer may allege the invalidity of the complainant's patent based on any ground that may exist.⁵³ The defendant may seek affirmative relief by alleging the validity of his own and the invalidity of the plaintiff's patent.⁵⁴

4. Demurrer or Motion To Dismiss.—The general rules applicable to demurrers, or, in federal practice, motions to dismiss, apply in suits

Bill in equity, see *supra*, I, C, 2.

48. *Palmer Pneumatic Tire Co. v. Lozier*, 69 Fed. 346.

[a] The defendant may be restrained from disposing of his patent or rights thereunder without leave of court. *Keystone Trading Co. v. Zapota Mfg. Co.*, 210 Fed. 456.

[b] **Threatening Future Litigation.** Aside from a decree annulling a patent found to be invalid, the court may enjoin the patentee or owner of such void patent from threatening future litigation based thereon. *Sawyer v. Massey*, 25 Fed. 144.

49. *Palmer Pneumatic Tire Co. v. Lozier*, 69 Fed. 346.

50. *Lockwood v. Cutter Tower Co.*, 11 Fed. 724.

51. See the title "Bills and Answers."

[a] It is permissible, as a statement of an ultimate conclusion of fact, to aver that two patents cover substantially the same inventions. *Simplex Railway Appliance Co. v. Wands*, 115 Fed. 517, 53 C. C. A. 171.

[b] **Prayer.**—(1) Where the bill for cancellation also alleges infringement, a prayer for annulment and for general relief is sufficient (*Nikola Tesla Co. v. Marconi Wireless Tel. Co.*, 227 Fed. 903), but (2) it is safer, and doubtless the better practice, to pray specifically for relief under the count for infringement as well as for annul-

ment. *Nikola Tesla Co. v. Marconi Wireless Tel. Co.*, 227 Fed. 903.

[c] **By Assignee Pendente Lite.** Where one becomes an assignee of a patent involved in a pending interference suit for cancellation, he must file an original bill in the nature of a supplemental bill and prove his interest in the invention before a decree will be entered in his favor. *Ecaubert v. Appleton*, 67 Fed. 917, 15 C. C. A. 73.

52. *Nathan Mfg. Co. v. Craig*, 47 Fed. 522.

[a] **A claim of interference is sufficiently stated by the averments of the existence of plaintiff's patent, the subsequent issuance of a patent to the defendant which interferes with the plaintiff's rights under his patent, and that the enjoyment of plaintiff's rights under his patent is disturbed by the defendant making and selling machines under his patent, and in various other ways.** *Stonemetz Printers' Machinery Co. v. Brown Folding Mach. Co.*, 46 Fed. 72.

53. *Nikola Tesla Co. v. Marconi Wireless Tel. Co.*, 227 Fed. 903; *Foster v. Lindsay*, 9 Fed. Cas. No. 4,975, 3 Dill. 126, 9 Fed. Cas. No. 4,976, commenting on and distinguishing *Mowry v. Whitney*, 14 Wall. (U. S.) 434, 20 L. ed. 858.

54. *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602.

to annul interfering patents.⁵⁵

5. **Hearing.**—The ordinary rules of practice should be followed at the hearing of a suit for interference.⁵⁶

6. **Decree.**—Either of the interfering patents may be adjudged void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention.⁵⁷ But the statute presupposes a patentable invention and the court may find that neither patent is valid for want of patentability, fraud, or other reason,⁵⁸ although it has been held that the court is limited to the question of priority and may declare either, but not both, void.⁵⁹ However, if either patent be found invalid, the decree should annul it, and not merely find for the plaintiff or the defendant as the case may be.⁶⁰ Such adjudication is a determination of the rights of only parties to the suit and those deriving title under them subsequent to the rendition of the judgment.⁶¹

55. See generally the title "**Demurrer.**"²²

[a] **Lack of Interference.**—A bill for interference is not demurrable if, on an inspection of the patents, the court cannot say it is impossible to sustain the allegation of interference by any evidence which can be adduced. *Simplex Railway Appliance Co. v. Wands*, 115 Fed. 517, 53 C. C. A. 171.

56. See the title "**Hearing.**"

[a] **Dismissal.**—A dismissal by the plaintiff will not be permitted after the defendant has acquired substantial rights in the litigation, even though the plaintiff derives of his interest in his patent. *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602.

[b] **Reference.**—An examination before a special examiner will not be stopped for the purpose of having the court pass on objections to evidence. *Appleton v. Ecaubert*, 45 Fed. 281.

57. 16 U. S. St. at L. 207; U. S. Rev. St., §4918; 8 U. S. Comp. St., 1916, §9463; *Nikola Tesla Co. v. Marconi Wireless Tel. Co.*, 227 Fed. 903.

58. *Palmer Pneumatic Tire Co. v. Lozier*, 90 Fed. 732, 33 C. C. A. 255 (*reversing* 84 Fed. 659); *Ecaubert v. Appleton*, 67 Fed. 917, 15 C. C. A. 73; *Nikola Tesla Co. v. Marconi Wire-*

less Tel. Co., 227 Fed. 903; *Dittgen v. Racine Paper Goods Co.*, 181 Fed. 394; *General Chemical Co. v. Blackmore*, 156 Fed. 968; *Foster v. Lindsay*, 9 Fed. Cas. No. 4,975, 3 Dill. 126, 9 Fed. Cas. No. 4,976, *commenting on and distinguishing* *Mowry v. Whitney*, 14 Wall. (U. S.) 434, 20 L. ed. 858.

59. *Nathan Mfg. Co. v. Craig*, 47 Fed. 522; *American Clay-Bird Co. v. Ligowski Clay-Pigeon Co.*, 31 Fed. 466; *Sawyer v. Massey*, 25 Fed. 144; *Lockwood v. Cleveland*, 20 Fed. 164; *Pentlarge v. Pentlarge*, 19 Fed. 817; *United States & Foreign Salamander Felting Co. v. Asbestos Felting Co.*, 4 Fed. 813, 18 Blatchf. 312.

[a] **Patentability** is not a material issue in a suit for cancellation on the ground of interference. *Pentlarge v. Pentlarge*, 19 Fed. 817.

60. *Foster v. Lindsay*, 3 Dill. 126, 9 Fed. Cas. No. 4,976. But see *Dittgen v. Racine Paper Goods Co.*, 181 Fed. 394, holding that if both are found invalid the bill may be dismissed and relief granted to neither party.

61. 16 U. S. St. at L. 207; U. S. Rev. St., §4918; 8 U. S. Comp. St., 1916, §9463; *American Graphophone Co. v. National Phonograph Co.*, 127 Fed. 349. See Rule 25.

PATERNITY.—See **Bastardy Proceedings; Parent and Child.**

PAUPERS

By the Editorial Staff.

I. PROCEEDINGS FOR REMOVAL OF PAUPERS, 228

- A. *General Statement*, 228
- B. *Jurisdiction*, 228
- C. *The Application*, 229
- D. *Judgment or Order of Removal*, 229
 - 1. *Form and Sufficiency*, 229
 - 2. *Amendments*, 229
 - 3. *Conclusiveness of*, 230
 - 4. *Vacating and Quashing*, 230

II. PROCEEDINGS TO COMPEL SUPPORT, 230

- A. *Mode of Compelling*, 230
- B. *Jurisdiction*, 230
- C. *Who May Maintain Proceeding*, 230
- D. *Notice to Kindred*, 231
- E. *Pleadings*, 231
- F. *Order or Judgment*, 231
 - 1. *Form and Sufficiency*, 231
 - 2. *Enforcement of*, 232
- G. *Costs*, 232
- H. *Review*, 232

III. PROCEEDINGS TO RECOVER FOR SUPPLIES AND SERVICES FURNISHED PAUPER, 232

- A. *By One Poor District Against Another*, 232
 - 1. *General Statement*, 232
 - 2. *Venue*, 233
 - 3. *Parties*, 233
 - 4. *Pleading*, 233
 - 5. *Variance*, 233
- B. *By Individual Against Poor District*, 233

IV. ACTIONS AND DEFENSES IN FORMA PAUPERIS, 234

- A. *General Statement*, 234
- B. *To What Proceedings Statutes Apply*, 234
 - 1. *In General*, 234
 - 2. *Tort Actions*, 234

3. *Criminal Proceedings*, 235
4. *Qui Tam Actions*, 235
5. *Appeals*, 235
- C. *Who May Take Advantage of Privilege*, 235
 1. *Generally*, 235
 2. *Particular Classes of Persons*, 235
 - a. *Infants*, 235
 - b. *Married Women*, 236
 - c. *Personal Representatives*, 236
 - d. *Nonresidents*, 236
- D. *Application for Leave To Sue or Defend*, 236
 1. *Time for*, 236
 2. *Affidavit or Oath*, 237
 3. *Certificate of Counsel*, 238
 4. *Notice*, 238
 5. *Hearing and Determination*, 238
 - a. *In General*, 238
 - b. *Order Allowing*, 238
- E. *Assignment of Counsel*, 239
- F. *Costs*, 239
- G. *Dispaupering*, 239

V. PROCEEDINGS FOR VIOLATION OF POOR LAWS, 239

VI. PROCEEDINGS AGAINST POOR OFFICERS, 240

CROSS-REFERENCES:

For forms, see 9 STANDARD PROC. 948, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PROCEEDINGS FOR REMOVAL OF PAUPERS. — A. GENERAL STATEMENT. — Proceedings for the removal of paupers must be conducted strictly according to statute.¹

B. JURISDICTION² over proceedings for the removal of paupers depends upon the local statutes.³

1. *Simpson v. Maybaum*, 58 N. J. L. 323, 33 Atl. 814; *Overseers of Princeton v. Overseers of South Brunswick*, 23 N. J. L. 169.

[a] Notice to the pauper to appear at the hearing must generally be given. See the statutes, and *Mass.—Shirley v. Lunenburgh*, 11 Mass. 379. *Pa.* *Overseers of Gilpin Twp. v. Overseers of Parks Twp.*, 118 Pa. 84, 11 Atl. 791. *Vt.*—*Hartland v. Pomfret*, 11 Vt. 440.

2. See generally the title "Jurisdiction."

3. See the statutes, and *Lucas v. Ringgold*, 21 Iowa 83 (on board of supervisors; neither county judge nor county court has any jurisdiction); *Butler v. Dept. of Public Charities*, 158 Pa. 149, 27 Atl. 886; *Directors of Poor of Chester County v. Malany*, 64 Pa. 144, quarter sessions have exclusive jurisdiction.

C. THE APPLICATION is usually made by the filing of a petition or complaint,⁴ made by an overseer of the poor,⁵ with a justice of the peace.⁶

D. JUDGMENT OR ORDER OF REMOVAL. — 1. **Form and Sufficiency.** An order for the removal of a pauper should show that all the facts exist which are necessary under the statute to authorize such removal; that the officers making such order have acted clearly within their authority, and that the facts necessary to authorize such order were duly proved before the officers making it.⁷ While the order must not be uncertain in any respect,⁸ an adjudication that the pauper's legal settlement is in a certain town is sufficient, without stating that his last legal settlement was in that town.⁹ More than one person may be included in the same order for removal.¹⁰

2. **Amendments.** — Errors in form may be cured by amendment;¹¹ but defects in substance cannot be so cured.¹²

4. **Me.**—*Guilford v. Abbott*, 17 Me. 335. **N. H.**—*Merrimack v. Sullivan*, 45 N. H. 181. **N. J.**—*Simpson v. Maybaum*, 58 N. J. L. 323, 33 Atl. 814; setting forth all the jurisdictional facts. **Vt.**—*Wilmington v. Jamaica*, 42 Vt. 694.

5. See the statutes, and the following: **N. H.**—*Merrimack v. Sullivan*, 45 N. H. 181. **N. J.**—*Simpson v. Maybaum*, 58 N. J. L. 323, 33 Atl. 814; *Overseers of Princeton v. Overseers of South Brunswick*, 23 N. J. L. 169. **Pa.**—*Franklin Twp. v. Danville*, 25 Pa. Super. 40.

6. *Vernon v. Wantage*, 2 N. J. L. 311.

7. See the following. **N. J.**—*Overseers of New Barbadoes v. Overseers of Paterson*, 27 N. J. L. 544; *Overseers of Princeton v. Overseers of South Brunswick*, 23 N. J. L. 169; *Vernon v. Wantage*, 2 N. J. L. 311. **N. Y.** *Overseers of Poor of Shawangunk v. Overseers of Poor of Mamakating*, 1 Johns. 54. **Pa.**—*Overseers of Poor of Dromore Tp. v. Overseers of Poor of West Hanover Tp.*, 1 Yeates 366. **Vt.** *Derby v. Barre*, 38 Vt. 276, holding order insufficient.

[a] **Examination of the pauper** need not appear on the face of the order; nor need the testimony of any person be set forth. *Fallowfield v. Marlborough*, 1 Dall. (U. S.) 28, 1 L. ed. 23.

[b] **Order need not state pauper's refusal to give security** against becoming chargeable. *Vernon v. Wantage*, 2 N. J. L. 311.

[c] **Age of pauper child** need not be stated. *Elizabethtown v. Springfield*, 3 N. J. L. 475.

[d] **Names of different persons constituting the pauper's family** need not be set out in order of removal of pauper and his family. *Windham v. Chester*, 45 Vt. 459 (order of removal of a pauper, "her family and effects," is sufficient); *Landgrove v. Pawlet*, 20 Vt. 309.

[e] **Where paupers are to be sent out of the state**, the order should designate the route by which they are to be transported, and not leave it to the discretion of constables. *Niskayuna v. Guilderland*, 8 Johns. (N. Y.) 412.

8. *Niskayuna v. Guilderland*, 8 Johns. (N. Y.) 412.

9. *Overseers of Poor of Vernon v. Overseers of Poor of Smithville*, 17 Johns. (N. Y.) 89.

10. *Glocester v. Smithfield*, 2 R. I. 30.

11. *Overseers of Princeton v. Overseers of South Brunswick*, 23 N. J. L. 169; *Vernon v. Wantage*, 2 N. J. L. 311 (wherein order was addressed to overseers of the poor of the township from whence the pauper was to be removed instead of to a constable, it could be amended); *Cumberland v. Jefferson*, 25 Pa. 463, order defective, in omitting to state that the person had or was likely to become chargeable should on appeal be amended.

12. *Overseers of Princeton v. Overseers of South Brunswick*, 23 N. J. L. 169.

[a] **Omitting to state jurisdictional matter** is matter of substance and not amendable. *Overseers of Princeton v. Overseers of South Brunswick*, 23 N. J. L. 169.

3. **Conclusiveness of.**—A valid order of removal from which no appeal is taken is conclusive both as to the settlement of the pauper at the date of the order, and also of all other facts necessary to uphold the order.¹³

4. **Vacating and Quashing.**—An illegal order of removal will be quashed on motion.¹⁴ No intendment will be made against an order of removal, however.¹⁵

II. PROCEEDINGS TO COMPEL SUPPORT.—A. **MODE OF COMPELLING.**—Statutes sometimes provide a summary proceeding to compel the relatives of a pauper to furnish him support.¹⁶ In other jurisdictions the relative will be required to execute a bond to the poor district to indemnify such district for the maintenance of the pauper.¹⁷

B. **JURISDICTION**¹⁸ over proceedings of this character is regulated by local statute.¹⁹

C. **WHO MAY MAINTAIN PROCEEDING.**—The application must be made by one having an interest in the support of the poor person, in order to give the court jurisdiction.²⁰ Under some statutes, the action

13. *Poultney v. Sandgate*, 35 Vt. 146.

14. *Hardwick v. Pawlet*, 36 Vt. 320.

[a] **Motion to quash reaches only such defects as are apparent on the face of the papers.** *Landgrove v. Plymouth*, 52 Vt. 503.

[b] **Where the order is clearly double in that it adjudicates the settlement of two persons, whose legal settlement is independent of each other, and the settlement of one is not included in and dependent on that of the other the order will be quashed.** *Landgrove v. Plymouth*, 52 Vt. 503.

15. **Overseers of Reading v. Overseers of Cumree**, 5 Bin. (Pa.) 81; *Danville v. Peacham*, 41 Vt. 333.

16. See the statutes, and the following: **Ill.**—*People ex rel. State's Attorney v. Peters*, 173 Ill. App. 564; *Rogers v. Rogers*, 51 Ill. App. 683. **Ia.**—*Boone v. Ruhl*, 9 Iowa 276. **N. J.** *Ackerman v. Ackerman*, 55 N. J. L. 422, 27 Atl. 807. **N. Y.**—*Tillotson v. Smith*, 45 Hun 593, 12 N. Y. St. 331. **Pa.**—*In re James*, 116 Pa. 152, 9 Atl. 170.

[a] **Proceeding for seizure of property of one liable for support**, see *Downing v. Ruger*, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; *People ex rel. Read v. Overseers of Poor of Triangle*, 23 Barb. (N. Y.) 236; *Philadelphia v. Brennan*, 5 Pa. Dist. 116.

17. *Breichelbiel v. Powles*, 60 Hun 585, 15 N. Y. Supp. 465, 39 N. Y. St. 856.

[a] **Unless authority is given by**

statute, the court cannot require the relative to give such a bond, however. **N. J.**—*Ackerman v. Ackerman*, 55 N. J. L. 422, 27 Atl. 807. **N. Y.**—*In re Bourgeois' Case*, 7 Abb. N. C. 260. **Pa.** *Dierkes v. Philadelphia*, 93 Pa. 270.

18. See generally the title "**Jurisdiction.**"

19. See the statutes, and *Smith v. Palmyra*, 2 Walk. (Pa.) 342; *Darlington v. Darlington*, 5 Pa. Co. Ct. 132, court of quarter sessions, rather than court of common pleas has jurisdiction in these proceedings.

20. *In re James*, 116 Pa. 152, 9 Atl. 170.

[a] **Overseer of the poor is usually the proper party.** **Mass.**—*Salem v. Andover*, 3 Mass. 436. **N. J.**—*Ackerman v. Ackerman*, 55 N. J. L. 422, 27 Atl. 807. **N. Y.**—*Tillotson v. Smith*, 45 Hun 593, 12 N. Y. St. 331; *Stone v. Burgess*, 2 Lans. 439. See also *Baldwin v. McArthur*, 17 Barb. 414.

[b] **Kindred of the pauper may maintain proceedings to have other kindred assessed for the support of the pauper.** *Salem v. Andover*, 3 Mass. 436; *Walbridge v. Walbridge*, 46 Vt. 617.

[c] **Poor person himself may bring the proceeding.** *Ackerman v. Ackerman*, 55 N. J. L. 422, 27 Atl. 807; *Appeal of O'Connor*, 104 Pa. 437 (under act authorizing the overseers of the poor, or any other person or persons having an interest in the support of any poor person, to bring the proceeding); *In re Clement*, 5 Pa. Dist. 295.

against the kindred of a pauper should be in the name of the city or town in which the pauper resides.²¹

D. NOTICE TO KINDRED. — The kindred whom it is sought to compel to support the poor person must have reasonable notice of the proceeding and an opportunity to be heard.²²

E. PLEADINGS. — The application is usually commenced by the filing of a petition or complaint,²³ which should aver, among other things, all the essential jurisdictional facts.²⁴ It is sufficient to allege that the relative "is of sufficient ability to relieve and maintain" the pauper without setting forth his income and property in detail.²⁵

Where the statute imposes the duty of support when "directed by the county court" the complaint in an action to recover the cost of supporting the pauper must allege that the defendant relative has been ordered by the county court to provide the required support and has refused.²⁶

F. ORDER OR JUDGMENT. — 1. **Form and Sufficiency.** — The order must contain an adjudication that the person in question is a poor person entitled to relief from the township, or likely to become chargeable thereto;²⁷ and should direct the relative to relieve and maintain the poor person in a specified manner.²⁸ Where the order requires several members of the poor person's family to pay a certain sum per week, the order should specify the names of each of such

21. *Me.*—*Calais v. Bradford*, 51 Me. 414; *Great Barrington v. Gibbons*, 199 Mass. 527, 85 N. E. 737, by overseers of poor in name of town.

22. *Ackerman v. Ackerman*, 55 N. J. L. 422, 27 Atl. 807; *Kiser v. Overseers of Poor of Frankfort*, 3 N. J. L. 5.

[a] Such notice may be by summons or a rule to show cause. *Ackerman v. Ackerman*, 55 N. J. L. 422, 27 Atl. 807.

23. *People v. Hill*, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634; *In re James*, 116 Pa. 152, 9 Atl. 170; *In re O'Connor's Appeal*, 104 Pa. 437; *Com. v. Quigg*, 46 Pa. Super. 390.

24. *Com. v. Quigg*, 46 Pa. Super. 390; *Overseers of Poor of Walker Twp. v. Knisely*, 17 Pa. Super. 415.

[a] Show that the person presenting it has some interest in the support of the poor person named. *In re James*, 116 Pa. 152, 9 Atl. 170.

[b] Show that poor person is or will be a charge upon the county or township. *People v. Hill*, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634, alleging failure to support a person "then and there being a pauper," sufficient in absence of specific objection.

[c] Where allegation that town has incurred expense required, sufficient to

allege that the poor person has been supported by the town as a pauper since a certain date. *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555.

[d] Demand on the defendant by the pauper or some one on his behalf need not be alleged in the absence of a statute requiring it. *People v. Hill*, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634.

25. *Overseers of Poor of Walker Twp. v. Knisely*, 17 Pa. Super. 415.

26. *Multnomah County v. Faling*, 49 Ore. 603, 91 Pac. 21; *Faling v. Multnomah County*, 46 Ore. 460, 80 Pac. 1009.

27. *Ackerman v. Ackerman*, 55 N. J. L. 422, 27 Atl. 807.

28. *Meeker v. Meeker*, 61 N. J. L. 146, 38 Atl. 749 (should not direct payment arbitrarily to the guardian or overseer of the poor); *Ackerman v. Ackerman* 55 N. J. L. 422, 27 Atl. 807, order should fix and determine what sum per week the relative shall forfeit and pay if he refuse or neglect to comply with the order.

[a] Order which gives no option to relative either to support the poor person or to pay the amount provided, is not void and at most only irregular. *Aldridge v. Walker*, 73 Hun 281, 26 N. Y. Supp. 296, 57 N. Y. St. 273.

members and the apportioned sum each is required to pay.²⁹ The order should not embrace several poor persons in a joint provision.³⁰

2. Enforcement of.—Where the statute provides that the sum ordered to be paid "shall be levied by the process of the court," the order cannot be enforced by attachment and commitment.³¹

G. COSTS.³²—The defendants may be required to pay costs in a proceeding to compel the kindred of a poor person to contribute to his support;³³ but costs cannot be charged without statutory authority therefor; accordingly the applicant for the order cannot be charged in the absence of statute.³⁴

H. REVIEW.³⁵—In the absence of a statute,³⁶ no appeal will lie in these proceedings.³⁷ The proceeding may be reviewed by certiorari, but the court is restricted to an examination of the record and cannot review the evidence.³⁸

III. PROCEEDINGS TO RECOVER FOR SUPPLIES AND SERVICES FURNISHED PAUPER.—**A. BY ONE POOR DISTRICT AGAINST ANOTHER.**—**1. General Statement.**—In the absence of statute, one town or county cannot maintain an action against another town or county for the support of a pauper.³⁹ Where a remedy is prescribed by statute that remedy is generally exclusive.⁴⁰ No express form of action being provided by statute, however, assumpsit is proper, the statute creating a liability.⁴¹

29. O'Connor's Appeal, 104 Pa. 437, decree that A. and B., "and the other adult children of the petitioner" shall pay a stated sum per week is too vague and uncertain to be self-sustaining, and will be reversed.

30. Meeker v. Meeker, 61 N. J. L. 146, 38 Atl. 749, order should be severed.

31. *In re James*, 116 Pa. 152, 9 Atl. 170; *Dierkes v. Philadelphia*, 93 Pa. 270; *Com. v. Quigg*, 46 Pa. Super. 390.

32. Costs in general, see the title "Costs."

33. *South Reading v. Hutchinson*, 10 Allen (Mass.) 68; *Stone v. Burgess*, 2 Lans. (N. Y.) 439.

34. *Conn.*—*Condon v. Pomeroy-Grace*, 73 Conn. 607, 48 Atl. 756, 52 L. R. A. 696. **N. Y.**—*Tillotson v. Smith*, 45 Hun 593, 12 N. Y. St. 331. **Pa.** *Salem v. Cook*, 6 Pa. Co. Ct. 624.

[a] Under a statute allowing costs in any "civil action," costs may be given in this class of proceedings. *Condon v. Pomeroy-Grace*, 73 Conn. 607, 48 Atl. 756, 52 L. R. A. 696.

35. See generally the titles "Appeals;" "Certiorari;" "Review;" "Writ of Error."

36. *Tillotson v. Smith*, 45 Hun 593, 12 N. Y. St. 331.

37. *Ill.*—*People ex rel. State's At-*

torney v. Peters, 173 Ill. App. 564. **Me.**—*Ex parte Pierce*, 5 Greenl. 324. **Mass.**—*Nantucket v. Cotton*, 14 Mass. 243. **Pa.**—*Overseers of Poor of Lampiter Twp. v. Overseers of Poor of Lancaster*, 2 Yeates 164; *Overseers of Poor of Walker Twp. v. Kniseley*, 17 Pa. Super. 415. **Wis.**—*Eaton v. Williams*, 51 Wis. 99, 7 N. W. 838. **Eng.** *Reg. v. London Justices*, 1 Q. B. (1900) 438, 64 J. P. (1900) 357, 69 L. J. Q. B. 364, 82 L. T. N. S. 296, 48 Wkly. Rep. 319.

38. *Philadelphia v. Hays*, 56 Pa. Super. 352 (an appeal from an order of the quarter sessions in proceedings of this kind acts as a certiorari only, and does not carry up the evidence); *Overseers of Poor of Walker Twp. v. Knisely*, 17 Pa. Super. 415.

39. *Middlebury v. Hubbardton*, 1 D. Chip. (Vt.) 205.

40. *Woodstock v. Hancock*, 62 Vt. 348, 19 Atl. 991. But see *Wethersfield v. Stanford*, 1 Root (Conn.) 68, holding that although a statute provides a summary remedy in certain cases, this does not take away the common law remedy. See also *Park v. Jefferson*, 12 Colo. 585, 21 Pac. 912.

41. *Ill.*—*Clinton v. Pace*, 59 Ill. App. 576. **Mass.**—*Bath v. Freeport*, 5 Mass. 325. **Vt.**—*Woodstock v. Hartland*, 21

2. **Venue.**⁴² — An action by one poor district against another for relief furnished a pauper may be brought in the county of either party.⁴³

3. **Parties.**⁴⁴ — An action to recover for supplies furnished by one poor district to a pauper of another district should be brought in the name of the district.⁴⁵ In some states it may be brought in the name of the poor officers of the district.⁴⁶

4. **Pleading.** — The declaration or complaint must allege all facts necessary to bring the case within the purview of the statute.⁴⁷ It should allege the settlement of the pauper was in the defendant county or district;⁴⁸ that the person relieved was unable to support himself and in need;⁴⁹ that the statutory notice was given;⁵⁰ and, in some jurisdictions, that there are no relatives of the pauper.⁵¹

5. **Variance.**⁵² — The rule obtains that an immaterial variance between the pleading and proof is of no consequence;⁵³ but that a material variance will be fatal.⁵⁴

B. BY INDIVIDUAL AGAINST POOR DISTRICT. — A declaration or complaint by an individual against a poor district to recover for supplies or services rendered a pauper must set forth the facts bringing the case within the statute.⁵⁵ A material variance in such an action

Vt. 563; *Pawlet v. Sandgate*, 19 Vt. 621.

42. See generally the title "**Venue.**"

43. *Muskingum County Infirmary v. Toledo*, 15 Ohio St. 409.

44. See generally the title "**Parties.**"

45. *Taylor v. Green*, 12 N. J. L. 124; *Shotwell v. Thornall*, 2 N. J. L. 136; *Pawlet v. Sandgate*, 19 Vt. 621.

46. **N. Y.**—*Alger v. Miller*, 56 Barb. 227; *Pomeroy v. Wells*, 8 Paige 406; *Van Keuren v. Johnston*, 3 Denio 183. **Pa.**—*Overseers v. Kline*, 9 Pa. 217. **Va.**—*Chapline v. Overseers of Poor*, 7 Leigh (34 Va.) 231, 30 Am. Dec. 504.

47. *Fox v. Bristol*, 45 Ill. App. 330; *Bath v. Freeport*, 5 Mass. 325. See also the cases cited *infra*, this section.

48. **Ia.**—*Winnesheik v. Allamakee*, 62 Iowa 558, 17 N. W. 753. **Me.**—*Fryeburg v. Brownfield*, 68 Me. 145; *Ripley v. Hebron*, 60 Me. 379. **Mass.**—*Wrentham v. Attleborough*, 5 Mass. 430; *Bath v. Freeport*, 5 Mass. 325; *Salem v. Andover*, 3 Mass. 436. **N. C.**—*Burke County Comrs. v. Buncombe County Comrs.*, 101 N. C. 520, 8 S. E. 176. **Wis.**—*Pine Valley v. Unity*, 40 Wis. 682.

[a] **Allegation that plaintiff is "informed"** that pauper's settlement was in the defendant county is insufficient.

Winnesheik v. Allamakee, 62 Iowa 558, 17 N. W. 753.

49. **Me.**—*Fryeburg v. Brownfield*, 68 Me. 145. **Mass.**—*Rogers v. Newbury*, 105 Mass. 533. **Wis.**—*Pine Valley v. Unity*, 40 Wis. 682.

[a] **Omission To So Allege Not Fatal After Verdict.**—*Pawlet v. Rutland*, *Brayt. (Vt.)* 175.

50. **Me.**—*Fryeburg v. Brownfield*, 68 Me. 145. **Mass.**—*Bath v. Freeport*, 5 Mass. 325; *Salem v. Andover*, 3 Mass. 436. **N. H.**—*Hillsborough v. Londonberry*, 43 N. H. 451. **Wis.**—*Pine Valley v. Unity*, 40 Wis. 682.

[a] **Omission to allege notice must be taken advantage of by demurrer.** *Com. v. Dracut*, 8 Gray (Mass.) 455.

51. *Walpole v. Marlow*, 2 N. H. 385, failure to so allege is cured by verdict.

52. See generally the title "**Variance and Failure of Proof.**"

53. *Colebrook v. Stewartstown*, 28 N. H. 75, no fatal variance between allegation of support of four children and proof that there were five children in the family.

54. *Dalton v. Bethlehem*, 20 N. H. 505, pleading supplies furnished to "Jane" cannot be supported by notice of supplies furnished to "James," and variance fatal.

55. *Autauga v. Davis*, 32 Ala. 703;

between the allegations and proof is fatal.⁵⁶

IV. ACTIONS AND DEFENSES IN FORMA PAUPERIS.⁵⁷

A. GENERAL STATEMENT. — The right to prosecute or defend in forma pauperis did not exist at common law, but originated in the statute of 11 Henry VII, ch. 12.⁵⁸ In the absence of statute, the right does not exist today.⁵⁹ But courts of equity have allowed suits to be defended in forma pauperis under statutes permitting suits to be brought in this manner.⁶⁰

Suits in forma pauperis are not encouraged by the courts,⁶¹ and should be granted only in a reasonably clear case;⁶² statutes giving the right will not be extended by construction.⁶³

Misconduct in a former case is no bar to a party suing in forma pauperis, where such is permitted;⁶⁴ nor is his conviction of perjury.⁶⁵

B. TO WHAT PROCEEDINGS STATUTES APPLY. — 1. **In General.** This depends largely, of course, upon the language of the statutes.⁶⁶

Provisional Remedies. — One suing in forma pauperis cannot avail himself of a provisional remedy without giving the statutory undertaking;⁶⁷ but it has been held that an attachment may issue as ancillary to the summons, in an action in forma pauperis.⁶⁸

2. **Tort Actions.** — It has been held that the pauper's oath cannot be taken in actions for false imprisonment, malicious prosecution, or slander.⁶⁹

An action of replevin cannot be brought in forma pauperis.⁷⁰ However, where the property is not taken from the defendant under the

Rogers v. Newbury, 105 Mass. 533. See also cases cited *supra*, III, A, 4.

[a] Declaration in common counts sufficient in action against county for services rendered pauper, see Clinton v. Pace, 59 Ill. App. 576.

56. Howe v. Royalton, 32 Vt. 415, allegation of neglect of town to provide for support of poor person and proof that town on being requested agreed to provide for poor person but failed to perform the promise. See generally the title "Variance and Failure of Procf."

57. In admiralty practice, see 1 STANDARD PROC. 506, *et seq.*

58. See U. S.—Roy v. Louisville, etc. R. Co., 34 Fed. 276. Ind.—Harrison v. Stanton, 146 Ind. 366, 45 N. E. 582. Eng.—Oldfield v. Cobbett, 1 Phil. 613, 41 Eng. Reprint 765.

59. Campbell v. Chicago, etc. R. Co., 23 Wis. 490.

60. Oldfield v. Cobbett, 1 Phil. 613, 41 Eng. Reprint 765. See also Ferguson v. Dent, 15 Fed. 771.

61. Isnard v. Cazeaux, 1 Paige (N. Y.) 39.

62. See *infra*, IV, D, 5.

63. Harrison v. Stanton, 146 Ind. 366, 45 N. E. 582.

[a] Such statutes are strictly construed as against the applicant. Moore v. Cooley, 2 Hill (N. Y.) 412.

64. Corbett v. Corbett, 16 Ves. Jr. 407, 33 Eng. Reprint 1038.

65. Bowyer v. M'Evoy, 1 Ball & B. (Eng.) 56.

66. See the statutes.

[a] Extends to Suits Before a Justice of the Peace.—Barnett v. Lark, 45 Kan. 428, 25 Pac. 869.

67. Friedman v. Fischer, 5 N. Y. St. 913; Rowark v. Homesley, 68 N. C. 91, arrest in civil case cannot be had in suit in forma pauperis without jury bond.

68. See 3 STANDARD PROC. 445.

69. Cox v. Patten, 11 Lea (Tenn.) 545, under statute.

70. Horton v. Vowel, 4 Heisk. (Tenn.) 622 (however, if bond be given for double the value of the property, and the costs accumulate to a larger amount, on a rule for further security, the plaintiff may take the pauper's oath); Kincaid v. Bradshaw, 6 Baxt. (Tenn.) 102.

writ of replevin, the plaintiff may proceed for the value of the property in forma pauperis.⁷¹

3. Criminal Proceedings.—Generally the rules governing costs in criminal proceedings are not affected by statutes allowing suits in forma pauperis.⁷²

4. Qui Tam Actions.—One bringing a qui tam action cannot do so in forma pauperis.⁷³

5. Appeals.⁷⁴—In some states an appeal may be prosecuted in forma pauperis;⁷⁵ but in others the right is held not to extend to appeals.⁷⁶

C. WHO MAY TAKE ADVANTAGE OF PRIVILEGE.—1. Generally. The question of who may sue or defend in forma pauperis depends largely upon the statute of the particular state.⁷⁷ To take advantage of the statute the party must be without means to maintain or defend the suit.⁷⁸ One who has assigned his interest in the subject matter of the suit cannot take advantage of the statute.⁷⁹

One of several plaintiffs cannot sue in forma pauperis.⁸⁰

2. Particular Classes of Persons.—*a. Infants.*⁸¹—By the weight

71. *Stone v. Hopkins*, 11 Heisk. (Tenn.) 190.

72. See *Ex parte Harrison*, 112 Ind. 329, 14 N. E. 225; *Rex v. Clarke*, 3 Burr. 1308, 97 Eng. Reprint 847; *Rex v. Pearson*, 2 Burr. 1039, 97 Eng. Reprint 695.

73. *Johnson v. Hunter*, 9 Baxt. (Tenn.) 185.

[a] Unless the penalty is given to the party aggrieved rather than the informer, in which case party aggrieved may sue in forma pauperis. *Kirby v. Rice*, 8 Yerg. (Tenn.) 442.

74. In admiralty, see 1 STANDARD PROC. 560, et seq.

In criminal cases, see the title "Review."

In justices' courts, see 18 STANDARD PROC. 232, 237.

75. *Ga.*—*Savannah v. Brown*, 64 Ga. 229. *N. C.*—*Mason v. Osgood*, 71 N. C. 212. *Tenn.*—*Brumley v. Hayworth*, 3 Yerg. 421.

76. *Ostrander v. Harper*, 14 How. Pr. (N. Y.) 16; *Morse v. Troy*, 38 Hun (N. Y.) 301.

77. See the statutes, and the following: *U. S.*—*Whelan v. Manhattan B. Co.*, 86 Fed. 219; *Bradford v. Bradford*, 2 Flip. 280, 3 Fed. Cas. No. 1,766. *Miss.*—*Walker v. Smith*, 19 So. 102. *N. Y.*—*McNamara v. Nolan*, 13 Misc. 76, 34 N. Y. Supp. 178. *N. C.*—*Davis v. Higgins*, 91 N. C. 382; *Sumner v. Candler*, 74 N. C. 265; *McClenahan v. Thomas*, 4 N. C. 13, 6 N. C. 247, 1 Car. L. Repos. 101. *B. I.*—*Spalding v. Bain-*

bridge, 12 R. I. 244. *Tex.*—*Meyer v. Weber*, 40 S. W. 627.

78. *U. S.*—*Wickelman v. A. B. Dick Co.*, 85 Fed. 851, 29 C. C. A. 436. *N. Y.* *Isnard v. Cazeaux*, 1 Paige 39. *Eng.* *Burry Port Co. v. Bowser*, 26 L. J. Ch. 319, 5 W. R. 325; *Perry v. Walker*, 1 Coll. 229, 13 L. J. Ch. 75, 63 Eng. Reprint 396; *Boddington v. Woodley*, 5 Beav. 555, 12 L. J. Ch. 15, 6 Jur. 960, 49 Eng. Reprint 693.

[a] One earning twenty dollars per week cannot come within statute. *Wickelman v. A. B. Dick Co.*, 85 Fed. 851, 29 C. C. A. 436.

[b] That person is of physical ability to labor and acquire the necessary means will not prevent the granting of the application. *Kerr v. State*, 35 Ind. 288.

[c] In England if one owns property he cannot take advantage of the statute, even though such property be the subject of the suit. *Ridgway v. Edwards*, L. R. 9 Ch. 143, 29 L. T. N. S. 906, 22 Wkly. Rep. 288; *Butler v. Gardener*, 12 Beav. 525, 50 Eng. Reprint 1162; *Taprell v. Taylor*, 9 Beav. 493, 50 Eng. Reprint 434; *Spencer v. Bryant*, 11 Ves. Jr. 49, 32 Eng. Reprint 1006.

79. *Joyce v. Cooper*, 17 Jones & S. (N. Y.) 115; *Davis v. Higgins*, 91 N. C. 382.

80. *Ostrander v. Harper*, 14 How. Pr. (N. Y.) 16.

81. Suits by or against infants generally, see the title "Infants."

of authority, infancy does not prevent a party from taking advantage of the statute.⁸²

b. *Married women* may sue, by next friend, in forma pauperis.⁸³

c. *Personal Representatives*.—Generally an executor or administrator,⁸⁴ or committee of an incompetent,⁸⁵ cannot sue or defend in forma pauperis, though a contrary rule is recognized under some statutes.⁸⁶ When a suit has been regularly commenced in forma pauperis and the plaintiff dies, his representative may carry on the suit as he finds it.⁸⁷

d. *Nonresidents* are entitled to the benefit of a statute allowing suits or defenses in forma pauperis.⁸⁸

D. APPLICATION FOR LEAVE TO SUE OR DEFEND.—1. **Time for.** The application may be made after the commencement of the suit,⁸⁹

82. See the following: **U. S.**—McDuffee v. Boston, etc. R. Co., 82 Fed. 865; Roy v. Louisville, N. O. & T. R. Co., 34 Fed. 276. **Ill.**—Chicago & I. R. Co. v. Lane, 130 Ill. 116, 22 N. E. 513. **Ind.**—Britton v. State, 115 Ind. 55, 17 N. E. 254 (where the infant sues in forma pauperis it need not be by next friend); Wright v. McLarinan, 92 Ind. 103; Hood v. Pearson, 67 Ind. 368. **Kan.**—Missouri Pac. Ry. Co. v. Cooper, 57 Kan. 185, 45 Pac. 587. **Ky.**—Westerfield v. Wilson, 12 Bush 125. **N. Y.**—Feier v. Third Ave. R. Co., 9 App. Div. 607, 41 N. Y. Supp. 821; Shapiro v. Burns, 7 Misc. 418, 27 N. Y. Supp. 980, 31 Abb. N. C. 144, 23 Civ. Proc. 365, 58 N. Y. St. 479; Tobias v. Broadway, etc. R. Co., 14 N. Y. Supp. 641, 39 N. Y. St. 183. **N. C.**—Brendle v. Heron, 68 N. C. 495. **Eng.**—Bryant v. Wagner, 3 Jur. 460.

But see Cargle v. Nashville, C. & St. L. R. Co., 7 Lea (Tenn.) 717; Green v. Harrison, 3 Sneed (Tenn.) 131; Cohen v. Shyer, 1 Tenn. Ch. 192.

[a] **Infant cannot appeal in forma pauperis by guardian ad litem.** Sharer v. Gill, 6 Lea (Tenn.) 495; Musgrove v. Lusk, 5 Baxt. (Tenn.) 684.

83. Robertson v. Robertson, 3 Paige (N. Y.) 387; Ward v. Ward, 17 N. C. 553; Dowden v. Hook, 8 Beav. 399, 50 Eng. Reprint 157. But see Cargle v. Nashville, etc. R. Co., 7 Lea (Tenn.) 717; Hawkins v. Hawkins, 4 Sneed (Tenn.) 105.

[a] **Where a married woman is permitted to sue alone she may sue in forma pauperis.** Roberti v. Carlton, 18 How. Pr. (N. Y.) 466; Hawkins v. Hawkins, 4 Sneed (Tenn.) 105.

84. Smith v. Louisville, etc. R. Co., 89 Tenn. 664, 15 S. W. 842; Fowler v.

Davies, 16 Sim. 182, 60 Eng. Reprint 842; Paradise v. Sheppard, Dick. 136, 21 Eng. Reprint 220.

85. Bechtle v. Manhattan Ry. Co., 31 Abb. N. C. 483, 30 N. Y. Supp. 410, 62 N. Y. St. 120.

86. Cherokee & P. Coal & Min. Co. v. Britton, 3 Kan. App. 292, 45 Pac. 100; Mason v. Osgood, 71 N. C. 212, personal representatives as well as any other party to the record may appeal without giving security for costs when unable to do so by reason of poverty.

87. Hamlin v. Neighbors, 75 N. C. 66 (must make proper application at the time he is substituted); McCoy v. Broderick, 3 Sneed (Tenn.) 203.

88. **U. S.**—St. Louis & S. F. Ry. Co. v. Farr, 56 Fed. 994, 6 C. C. A. 211 (under statute of Arkansas); Heckman v. Mackey, 32 Fed. 574, 19 Abb. N. C. 394, 13 Civ. Proc. 11, under New York statute. **Ind.**—Fuller & Fuller Co. v. Mehl, 134 Ind. 60, 33 N. E. 773. **N. Y.**—Early statute was held not to apply to nonresidents. Alexander v. Meyers, 8 Daly 112; Christian v. Gouge, 10 Abb. N. C. 82, 58 How. Pr. 445. Under more recent statute, a non-resident may, in the discretion of the court be allowed to sue in forma pauperis. Harris v. Mutual L. Ins. Co., 59 Hun 625, 13 N. Y. Supp. 718, 20 Civ. Proc. 192, 37 N. Y. St. 599. **N. C.**—Porter v. Jones, 68 N. C. 320. **Tenn.**—Hilliard v. Stark, 14 Lea 9. See also Lisenbee v. Holt, 1 Sneed 42.

89. **Colo.**—Peck v. Farnham, 24 Colo. 141, 49 Pac. 364. **N. Y.**—Shapiro v. Burns, 7 Misc. 418, 27 N. Y. Supp. 980, 31 Abb. N. C. 144, 23 Civ. Proc. 365, 58 N. Y. St. 479. **Eng.**—Brunt v. Wardle, 3 M. & G. 534, 42 E. C. L. 282, 4 Scott N. R. 188, 1 D. N. S.

and, it has been held, either before trial or at any stage thereof.⁹⁰ After judgment,⁹¹ or an unreasonable delay,⁹² the application comes too late.

2. Affidavit or Oath.—The statutes usually provide for an affidavit or for the taking of an oath showing that the person is entitled to the benefit thereof.⁹³

Form and Sufficiency.—The affidavit should be certain.⁹⁴ It must set forth the facts necessary to bring the applicant within the terms of the statute,⁹⁵ as well as showing that the applicant has a good cause of action.⁹⁶ Any objection to the sufficiency or form of the affidavit

229, 11 L. J. C. P. 17, 133 Eng. Re. print 1254; *Doe dem. Ellis v. Owens*, 9 M. & W. 455.

[a] **Even after an order (1) requiring security for costs (U. S.**—*Woods v. Bailey*, 113 Fed. 390; *McDuffee v. Boston*, etc. R. Co., 82 Fed. 865. **Ill.** *Clement v. Brown*, 30 Ill. 43. **Kan.** *Huey v. Brimer*, 9 Kan. App. 149, 58 Pac. 485. **N. M.**—*Bearup v. Coffey*, 9 N. M. 500, 55 Pac. 289. **N. Y.**—*Shearman v. Pope*, 106 N. Y. 664, 12 N. E. 713; *Shapiro v. Burns*, 7 Misc. 418, 27 N. Y. Supp. 980, 58 N. Y. St. 479, 23 Civ. Proc. 365, 31 Abb. N. C. 144. **Tex.**—*Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280), though (2) application made long after order requiring security for costs comes too late. *Glasberg v. Dry Dock*, E. B. & B. R. Co., 12 Civ. Proc. (N. Y.) 50.

90. *Peck v. Farnham*, 24 Colo. 141, 49 Pac. 364.

91. *Ostrander v. Harper*, 14 How. Pr. (N. Y.) 16.

92. *Sweeney v. White*, 10 Misc. 29, 30 N. Y. Supp. 1051, 63 N. Y. St. 242, delay of three years after issue joined.

93. See the statutes, and *infra*, this section.

[a] **When an appeal in forma pauperis is allowed**, provision is usually made for the filing of an affidavit or oath. **Ga.**—*Hines v. Rosser*, 27 Ga. 85; *Elder v. Whitehead*, 25 Ga. 262. **N. C.** *Stell v. Barham*, 85 N. C. 88. **Tenn.** *State v. Gannaway*, 16 Lea 124.

[b] **Such affidavit must generally be made by the pauper himself**, not by his attorney. *Selma, R. & D. R. Co. v. Tyson*, 48 Ga. 351.

[c] **Where infants seek to use the statute**, their next friend may make the affidavit. *McDuffee v. Boston*, etc. R. Co., 82 Fed. 865.

[d] **The husband is the proper one**

to make the affidavit where he and his wife sue jointly. *McPhatridge v. Gregg*, 4 Coldw. (Tenn.) 324; *Grills v. Hill*, 2 Sneed (Tenn.) 711; *Crockett v. Maxey*, 4 Wills. Civ. Cas. (Tex.), §292, 18 S. W. 138.

[e] **Where there is more than one plaintiff**, each one seeking to take advantage of the statute must make his affidavit. *McDuffee v. Boston*, etc. R. Co., 82 Fed. 865; *McPhatridge v. Gregg*, 4 Coldw. (Tenn.) 324; *Grills v. Hill*, 2 Sneed (Tenn.) 711.

[f] **One partner may make the affidavit for the firm.** *Standard Carbonating & S. Co. v. Capital City Guards*, 99 Ga. 265, 25 S. E. 670.

94. *Woods v. Bailey*, 111 Fed. 121, so that charge of perjury could be based thereon, if it was false.

95. See the following: **U. S.**—*Boyle v. Great Northern R. Co.*, 63 Fed. 539. **N. Y.**—*Rutkowski v. Cohen*, 74 App. Div. 415, 77 N. Y. Supp. 546, 11 N. Y. Ann. Cas. 255; *McGillicuddy v. Kings County El. Ry. Co.*, 10 Misc. 21, 30 N. Y. Supp. 833, 62 N. Y. St. 648. **N. C.** *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890.

[a] **Show that he is unable to pay the expenses of the suit.** *Gibbons v. McComb*, 3 Ga. 252.

96. See the following: **N. Y.**—*Weinstein v. Frank*, 56 App. Div. 275, 67 N. Y. Supp. 746; *McGillicuddy v. Kings County El. Ry. Co.*, 10 Misc. 21, 30 N. Y. Supp. 833, 62 N. Y. St. 648; *Beyer v. Clark*, 29 Abb. N. C. 338, affidavits by both parties as to merits of cause of action were here presented. **N. C.**—*Miazza v. Calloway*, 74 N. C. 31. **R. I.**—*Lewis v. Smith*, 21 R. I. 324, 43 Atl. 542.

[a] **Court will sometimes require evidence that the applicant has a probable cause of action.** *Robertson v. Robertson*, 3 Paige (N. Y.) 387, court

should be made promptly.⁹⁷ An insufficient affidavit or oath may be amended,⁹⁸ or a new oath may be taken.⁹⁹

3. Certificate of Counsel.—In some jurisdictions, the application to sue in forma pauperis must be accompanied by a certificate of counsel that the applicant has a good cause of action.¹

4. Notice of the application must be given to the opposite party, where the application is made after the commencement of the suit and the adverse party has appeared.²

5. Hearing and Determination.—a. *In General.*—The court will inquire into the facts before granting the application,³ as there must be some showing in support of the affidavit.⁴ There is authority to the effect that if the application is not contested, it will be granted, however.⁵ The application may be contested by counter-affidavits.⁶

Discretion of Court.—It is largely discretionary with the court whether one shall be allowed to proceed in forma pauperis;⁷ and the application should only be granted in a clear case.⁸

b. *Order Allowing.*—The order granting leave to sue as a pauper extends only to the court in which it is made.⁹ Under some statutes

will ascertain by report of a master whether probable cause exists.

97. *Hood v. Pearson*, 67 Ind. 368; *Seymour v. Maddox*, 19 L. J. Q. B. (Eng.) 525.

[a] **Application of Administrator.** *Daus v. Nussberger*, 25 App. Div. 185, 49 N. Y. Supp. 291.

98. *Cole v. Hoeburg*, 36 Kan. 263, 13 Pac. 275; *Achison v. Riggle*, 6 Kan. App. 5, 49 Pac. 616; *Morris v. Smith*, 11 Humph. (Tenn.) 133.

[a] **Amendment Nunc Pro Tunc.** *Heckman v. Mackey*, 32 Fed. 574, 19 Abb. N. C. 394, 13 Civ. Proc. 11.

99. *Morris v. Smith*, 11 Humph. (Tenn.) 133.

1. *In re Atkinson*, 23 Ir. L. Rep. 509; *Bryant v. Wagner*, 7 Dowl. P. C. (Eng.) 676, 3 Jur. 893.

2. *Ostrander v. Harper*, 14 How. Pr. (N. Y.) 16; *Thomas v. Wilson*, 6 Hill (N. Y.) 257; *Isnard v. Cazeaux*, 1 Paige (N. Y.) 39. But see *Peck v. Farnham*, 24 Colo. 141, 49 Pac. 364, holding that where the application is made at the trial, notice is not required.

3. *Boyle v. Great Northern R. Co.*, 63 Fed. 539.

4. *Whittle v. St. Louis, etc. R. Co.*, 104 Fed. 286; *Whelan v. Manhattan R. Co.*, 86 Fed. 219; *Columb v. Webster Mfg. Co.*, 76 Fed. 198.

5. **U. S.**—*McDuffee v. Boston, etc. R. Co.*, 82 Fed. 865. **Ark.**—*Daniel v. Guy*, 19 Ark. 121. **N. Y.**—*Kahn v.*

Singer Mfg. Co., 18 Misc. 568, 42 N. Y. Supp. 461.

6. *Kahn v. Singer Mfg. Co.*, 18 Misc. 568, 42 N. Y. Supp. 461; *Weatherford, M. W. & N. W. Ry. Co. v. Duncan*, 10 Tex. Civ. App. 479, 31 S. W. 562, where statute provides that only clerk can make counter-affidavit, one made by another will be stricken out.

7. **Ill.**—*Chicago & I. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. 513; *Clement v. Brown*, 30 Ill. 43; *Rockford v. Russell*, 9 Ill. App. 229. **Ind.**—*Hoey v. McCarthy*, 124 Ind. 464, 24 N. E. 1038. **N. Y.**—*Joyce v. Cooper*, 17 Jones & S. 115; *Alexander v. Meyers*, 8 Daly 112. **R. I.**—*Spalding v. Bainbridge*, 12 R. I. 244.

8. **Ind.**—*Hoey v. McCarthy*, 124 Ind. 464, 24 N. E. 1038. **N. Y.**—*Harris v. Mutual L. Ins. Co.*, 59 Hun 625, 13 N. Y. Supp. 718, 20 Civ. Proc. 192, 37 N. Y. St. 599; *Downs v. Farley*, 12 Civ. Proc. 119, 18 Abb. N. C. 464. **N. C.**—*Miazza v. Calloway*, 74 N. C. 31.

Construction of statutes giving right, see *supra*, IV, A.

9. *Oakes v. High*, 11 Misc. 313, 32 N. Y. Supp. 289, 65 N. Y. St. 497; *Collett v. Frazier*, 56 N. C. 398; *Clark v. Dupree*, 13 N. C. 411.

[a] **Where case is moved by consent to another court**, application to proceed in forma pauperis must be made anew. *Collett v. Frazier*, 56 N. C. 398.

the order permitting prosecution of suit in forma pauperis must provide for attorney to act without compensation.¹⁰

E. ASSIGNMENT OF COUNSEL.—Counsel will be assigned by the court to act for the pauper in some jurisdictions.¹¹

F. COSTS.¹²—One suing in forma pauperis may, if successful, recover his costs;¹³ and suing as a pauper does not relieve him of liability for costs if judgment goes against him.¹⁴

G. DISPAUPERING.—On motion duly made for that purpose,¹⁵ the court may, for good cause, vacate the order permitting the suit to be maintained in forma pauperis.¹⁶ On dispaupering, the suit should not be dismissed, but plaintiff should be allowed to file bond for costs.¹⁷

V. PROCEEDINGS FOR VIOLATION OF POOR LAWS.—An action on the case cannot be brought by the overseers of the poor who have expended money to maintain a pauper illegally brought by the defendants into a poor district; the remedy is to recover the penalty given by statute.¹⁸ And no action will lie for bringing a pauper into a district, until such district has incurred some liability for the support of the pauper.¹⁹ Such an action may then be brought by the superintendents of the poor of the district.²⁰

The declaration or complaint, in an action for illegally bringing a pauper into a poor district, must allege the facts necessary to bring the case within the statute.²¹ Under a plea of not guilty, de-

10. See the statutes, and cases cited under two succeeding notes.

11. U. S.—Whelan v. Manhattan R. Co., 86 Fed. 219. Ind.—Wright v. McLarinan, 92 Ind. 103; Kerr v. State, 35 Ind. 288. N. Y.—Daus v. Nussberger, 25 App. Div. 185, 49 N. Y. Supp. 291. Eng.—Lewis v. Kennett, 3 Russ. 466, 38 Eng. Reprint 650.

[a] Attorney Designated by Party Need Not Be Assigned.—Helmrecht v. Bowen, 87 Hun 362, 34 N. Y. Supp. 1141, 68 N. Y. St. 873.

[b] Counsel Acts Without Compensation.—Whelan v. Manhattan R. Co., 86 Fed. 219; Matter of Kelly, 12 Daly (N. Y.) 110; Joyce v. Cooper, 17 Jones & S. (N. Y.) 115; Helmrecht v. Bowen, 87 Hun 362, 34 N. Y. Supp. 1141, 68 N. Y. St. 873.

12. As to generally, see the title "Costs."

13. Lampy v. Freedman, 60 Misc. 70, 111 N. Y. Supp. 685. See also Draper v. Buxton & Co., 90 N. C. 182; Booshee v. Surles, 85 N. C. 90.

14. U. S.—Davis v. Adams, 109 Fed. 271. Miss.—Leggett v. Ryan, 55 Miss. 379. Tex.—McPherson v. Johnson, 69 Tex. 484, 6 S. W. 798.

Contra, under statute, Booshee v. Surles, 85 N. C. 90.

15. Buccolo v. New York L. Ins. Co., 117 App. Div. 423, 102 N. Y. Supp. 794.

16. U. S.—Woods v. Bailey, 122 Fed. 967. Miss.—Feazell v. Staltzfus, 98 Miss. 886, 54 So. 444. N. Y.—Steele v. Mott, 20 Wend. 679. N. C.—Alston v. Holt, 172 N. C. 417, 90 S. E. 434. Tenn.—Moyers v. Moyers, 11 Heisk. 495.

[a] Sufficiency of showing rests largely in discretion of court. Young v. Nassau Elec. R. Co., 34 App. Div. 126, 54 N. Y. Supp. 600; Heatherly v. Hill, 8 Baxt. (Tenn.) 170.

[b] Court Should Proceed Cautiously.—Heatherly v. Hill, 8 Baxt. (Tenn.) 170.

17. See Dale v. Presnell, 119 N. C. 489, 26 S. E. 27.

18. Crouse v. Mabbett, 11 Johns. (N. Y.) 167.

19. Suprs. of the Poor of Newaygo County v. Nelson, 75 Mich. 154, 42 N. W. 797, no suit lies where defendant has paid all expenses of the pauper while in the district.

20. Suprs. of the Poor of Newaygo County v. Nelson, 75 Mich. 154, 42 N. W. 797.

21. Merrimack v. Sullivan, 45 N. H. 181, failure to allege that pauper was

defendant cannot prove that the pauper has a settlement in some town other than the plaintiff town.²²

The question of the intent of the defendant, in illegally bringing a pauper into a poor district, is one of fact for the jury.²³

Where a town has brought one action against a defendant for illegally bringing a pauper into such town and recovered judgment for the support of the pauper up to the time of trial, a second action cannot be thereafter maintained to recover any subsequent expense for caring for the pauper.²⁴

VI. PROCEEDINGS AGAINST POOR OFFICERS.—An indictment will lie against poor officers for wilful neglect of duty.²⁵ Mandamus is also a proper remedy to compel poor officers to perform their duties.²⁶

brought into the county by one knowing him to be a pauper vitiates complaint.

22. *Marshfield v. Edwards*, 40 Vt. 245, such plea only puts in issue allegations of declaration or complaint.

23. **Me.**—*Sanford v. Emery*, 2 Greenl. 5. **Mass.**—*Deerfield v. Delano*, 1 Pick. 465; *Greenfield v. Cushman*, 16 Mass. 293. **Vt.**—*Wallingford v. Gray*, 13 Vt. 228.

24. *Marlborough v. Sisson*, 31 Conn. 332, the case is not like that of a continuing nuisance.

25. *State v. Hoit*, 23 N. H. 355, even though mandamus might also lie.

Existence of criminal prosecution as bar to mandamus, see the title "**Mandamus.**"

[a] **Essentials of.**—(1) An indictment

against a poor officer for failure to relieve a pauper should allege that the defendant is a poor officer (*State v. Hoit*, 23 N. H. 355); (2) that it was his duty to relieve the pauper, and that he intentionally and wilfully neglected to do so. *State v. Hoit*, 23 N. H. 355. (3) The names of the paupers should be set forth or the indictment should allege that the names are unknown. *State v. Hawkins*, 77 N. C. 494. See generally the title "**Indictment and Information.**"

26. *Minklaer v. Rockefeller*, 6 Cow. (N. Y.) 276, action on case will not lie for failure of overseer of poor to apply to justice to obtain order for relief of pauper; mandamus is remedy.

As to mandamus generally, see the title "**Mandamus.**"

PAWN.—See **Pawnbrokers; Pledges.**

PAWNBROKERS

By the Editorial Staff.

I. ACTIONS BY PAWNER AGAINST PAWNEE, 241

II. ACTIONS BY PAWNEE AGAINST THIRD PERSON, 241

III. CRIMINAL PROSECUTIONS AGAINST PAWNBROKERS, 241

CROSS-REFERENCES:

Personal Property; Pledges.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. ACTIONS BY PAWNER AGAINST PAWNEE. — An action for conversion will lie against a pawnbroker who purchases the goods pawned with him, at a sale not held in strict accordance with the law.¹ So also, conversion is the proper remedy where the pawnbroker refuses to redeliver property on payment of the charges.²

II. ACTIONS BY PAWNEE AGAINST THIRD PERSON. — The pawnbroker may maintain trover or replevin against a third person unlawfully seizing goods pawned to him.³

III. CRIMINAL PROSECUTIONS AGAINST PAWNBROKERS. A complaint for carrying on the business of a pawnbroker without a license is sufficient if it follows the language of the statute.⁴ Such

1. *Uncle Sam's Loan Office v. Emery*, 49 Tex. Civ. App. 236, 107 S. W. 1155. See generally the title "**Trover and Conversion**."

2. *Schwartz v. Chicago State Pawn-ers Soc.*, 195 Ill. App. 93; *Buchanan v. Provident Loan Soc.*, 63 Misc. 269, 116 N. Y. Supp. 653; *McKenna v. Weaver*, 133 N. Y. Supp. 427.

[a] **Payment or tender** (1) of the amount due is generally a necessary condition precedent to replevin or trover for failure to return pawned goods. *Dyer v. Weinstein*, 196 Ill. App. 398.

(2) But if pawnbroker refuses to return goods because third persons claim them, a complaint in conversion

need not allege tender of amount of loan and interest. *Buchanan v. Provident Loan Soc.*, 63 Misc. 269, 116 N. Y. Supp. 653. See generally the title "**Tender**."

3. *Barnes v. Swift's Exrs.*, 11 Ohio Dec. (Reprint) 321, 26 Wkly. L. Bul. 110; *Swire v. Leach*, 18 C. B. N. S. 479, 11 Jur. N. S. 179, 34 L. J. C. P. 180, 11 L. T. N. S. 680, 13 Wkly. Rep. 385, 114 E. C. L. 479, 144 Eng. Reprint 531. See generally the titles "**Replevin**;" "**Trover and Conversion**."

4. *Com. v. Danziger*, 176 Mass. 290, 57 N. E. 461; *City of St. Joseph v. Levin*, 128 Mo. 588, 31 S. W. 101, 49

a complaint need not state the times when,⁵ or the names of persons to whom,⁶ loans were made by the defendant.

Am. St. Rep. 577. See generally 12 | State, 75 Tex. Crim. 17, 169 S. W.
STANDARD PROC. 447. | 683.

5. City of St. Paul v. Lytle, 69 | 6. City of St. Paul v. Lytle, 69
Minn. 1, 71 N. W. 703; Schapiro v. | Minn. 1, 71 N. W. 703.

Vol. XXI

PAYMENT

By the Editorial Staff.

I. PLEADING, 244

- A. *Negating Payment in Declaration or Complaint*, 244
- B. *Payment as Defense*, 244
 - 1. *Nature of*, 244
 - 2. *Plea of Payment*, 245
 - a. *Necessity for*, 245
 - (I.) *At Common Law*, 245
 - (II.) *Under Statutes*, 246
 - b. *Form and Sufficiency*, 248
 - (I.) *In General*, 248
 - (II.) *Payment in Money or Its Equivalent*, 250
 - (A.) *In General*, 250
 - (B.) *Alleging Acceptance of Note, Payment of Check, etc.*, 251
 - c. *Construction, Operation and Effect*, 251
- C. *Replication or Reply*, 252
- D. *Objections to Pleading*, 253

II. TRIAL, 253

- A. *In General*, 253
- B. *Variance*, 253
- C. *Questions of Law and Fact*, 254
- D. *Instructions*, 255

III. VERDICT, JUDGMENT AND REVIEW, 256

CROSS-REFERENCES:

Accord and Satisfaction;	Deposit in Court;
Bills and Notes;	Tender.

As to performance in general, see the title "Implied and Express Agreements."

As to presumptions, burden of proof, mode of proof, etc., see 9 ENCY. OF EV. 696.

For forms, see 9 STANDARD PROC. 950, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PLEADING. — A. NEGATING PAYMENT IN DECLARATION OR COMPLAINT. — Nonpayment should be alleged in the declaration or complaint, whenever it is an essential element of plaintiff's case.¹ If necessary to plead nonpayment, it is the better practice to allege it directly,² although a statement that the debt or obligation is "justly due and payable,"³ or that defendant is indebted to plaintiff,⁴ is sufficient.

B. PAYMENT AS DEFENSE. — 1. Nature of. — Payment, when new matter, is an affirmative defense.⁵ It is matter in bar and cannot

1. **Ala.**—*Winter v. Pollak*, 188 Ala. 153, 66 So. 11; 166 Ala. 255, 51 So. 998, 52 So. 829, 53 So. 339, 139 Am. St. Rep. 33, dissenting opinion. **Cal.** *Kirk v. Roberts*, 96 Cal. xvii, 31 Pac. 620; *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1094. **Conn.**—*Morehouse v. Throckmorton*, 72 Conn. 449, 44 Atl. 747. **Mo.**—*State v. Peterson*, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094. **Neb.** *Hudelson v. First Nat. Bank*, 51 Neb. 557, 71 N. W. 304. **N. Y.**—*Lent v. New York & M. Ry. Co.*, 130 N. Y. 504, 29 N. E. 988; *Krower v. Reynolds*, 99 N. Y. 245, 1 N. E. 775; *Van Giesen v. Van Giesen*, 10 N. Y. 316; *Altman v. Bungay Co.*, 161 App. Div. 583, 146 N. Y. Supp. 949. **Wis.**—*Meating v. Tigerton Lumb. Co.*, 113 Wis. 379, 89 N. W. 152.

See also 11 STANDARD PROC. 1006, 1008.

[a] **Balance Due for Services Rendered** is an action in which the allegation of nonpayment is essential and must be alleged. *Mills v. Lantrip*, 170 Ky. 81, 185 S. W. 514.

[b] **Nonpayment of the award** should be alleged in an action to recover the same. *Lent v. New York & M. Ry. Co.*, 130 N. Y. 504, 29 N. E. 988.

[c] **In an action on a promissory note**, an allegation of non-payment is essential. *Mitchell v. Clark*, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; *Frisch v. Caler*, 21 Cal. 71. See *Van Giesen v. Van Giesen*, 12 Barb. (N. Y.) 520. *Contra*, *Hartzell v. McClurg*, 54 Neb. 313, 74 N. W. 625.

[d] **Nonpayment at Maturity.** — *Conkling v. Weatherwax*, 181 N. Y. 258, 268, 73 N. E. 1028.

Alleging nonpayment to an assignor in an action by an assignee, see 3 STANDARD PROC. 130.

Allegation of nonpayment of commissions in an action by a factor or broker, see 8 STANDARD PROC. 894.

Allegation of nonpayment in an action on a guardian's bond, see 10 STANDARD PROC. 893.

2. *Frisch v. Caler*, 21 Cal. 71. See also 11 STANDARD PROC. 1008.

3. *De Cou Bros. Co. v. Englander*, 39 Pa. Super. 243.

4. *Jaqua v. Cordesman & Egan Co.*, 106 Ind. 141, 5 N. E. 907.

5. **Ala.**—*Wolfe v. Nall*, 62 Ala. 24; *Slaughter v. Martin*, 9 Ala. App. 285, 63 So. 689. **Ariz.**—*Rountree v. Clanton*, 17 Ariz. 107, 149 Pac. 58. **Ark.**—*Williams v. Uzzell*, 108 Ark. 241, 156 S. W. 843; *Blass v. Lawhorn*, 64 Ark. 466, 42 S. W. 1068. **Cal.**—*Frisch v. Caler*, 21 Cal. 71. **Colo.**—*Welles v. Colorado Nat. Life Assur. Co.*, 49 Colo. 508, 113 Pac. 524; *Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258. **Conn.** *Morehouse v. Throckmorton*, 72 Conn. 449, 44 Atl. 747. **Fla.**—*Lakeside Press, etc. Co. v. Campbell*, 39 Fla. 523, 22 So. 878. **Ill.**—*Harlev v. Harlev*, 67 Ill. App. 138. **Ind.**—*Rhodes v. Webb-Jameson Co.*, 19 Ind. App. 195, 49 N. E. 283; *Cox v. Hayes*, 18 Ind. App. 220, 47 N. E. 844. **Ky.**—*White's Admr. v. White's Admr.*, 19 Ky. L. Rep. 1590, 44 S. W. 83. **Minn.**—*Marshall & Ilsley Bank v. Child*, 76 Minn. 173, 78 N. W. 1048. **Miss.**—*Sivley v. Williamson*, 112 Miss. 276, 72 So. 1008. **Mo.**—*People's Bank v. Stewart*, 136 Mo. App. 24, 117 S. W. 99. **N. J.**—*Turner v. Hill*, 56 N. J. Eq. 293, 39 Atl. 137. **N. Y.**—*Lerche v. Brasher*, 104 N. Y. 157, 10 N. E. 58; *Tuchfabriken v. Meyer*, 31 App. Div. 52, 52 N. Y. Supp. 955. **Okla.**—*Standard Fashion Co. v. Joels*, 159 Pac. 846. **Pa.**—*Hellings v. Amey*, 1 Whart. 63. **Tex.**—*Garrett v. Grisham* (Tex. Civ. App.), 156 S. W. 505. **Wash.**—*Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177. **Wis.**—*Knapp v. Runals*, 37 Wis. 135.

[a] **Origin and Reason.** — (1) "The rule that payment is an affirmative de-

be pleaded by way of set-off,⁶ recoupment,⁷ counterclaim,⁸ or reconvention.⁹

2. Plea of Payment.—a. *Necessity for.*—(I.) **At Common Law.** The common law rule, still in force in many states,¹⁰ was that pay-

fense is not one embodied in the Code, but had its origin under the common law practice in the plea of non-assumpsit, and the reason for it was that in assumpsit the allegation in the declaration and the traverse in the plea were in the past tense, and under the rule which excluded all proof not strictly within the issue, no evidence was admissible, except such as had a tendency to show that the defendant never had made the promise. It was never applied in the action of debt, the allegation in that form of action being in the present tense, and under the plea of nil debet any fact tending to show that there was no indebtedness on the part of the defendant was admissible." *Lent v. New York & M. Ry. Co.*, 130 N. Y. 504, 29 N. E. 988. (2) This statement is based upon the early common law rule on the plea of non assumpsit, which was changed to permit, as in nil debet, evidence of payment, which change was in turn abrogated by statute. *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696. See *infra*, I, B, 2, a, (II).

[b] **When Payment Is or Is Not New Matter.**—(1) When a contract sought to be enforced is for the payment of money only, the plea of payment is an affirmative defense (*Patterson v. J. W. Gage Realty Co.*, 164 App. Div. 787, 150 N. Y. Supp. 215; *Skelly v. Mortimer*, 154 App. Div. 921, 138 N. Y. Supp. 1100), (2) but not otherwise, as for example, the payment of money and the execution of a mortgage as security for part of the purchase price of realty (*Patterson v. J. W. Gage Realty Co.*, 164 App. Div. 787, 150 N. Y. Supp. 215), or (3) when the action is not upon contract for the payment of money, but is based on an obligation created by operation of law (*Patterson v. J. W. Gage Realty Co.*, 164 App. Div. 787, 150 N. Y. Supp. 215; *Altman v. Bungay Co.*, 161 App. Div. 583, 146 N. Y. Supp. 949), or (4) for the recovery of the full amount of a lien due by reason of the nonpayment of an installment, interest, or taxes (*Altman v. Bungay Co.*, 161 App. Div. 583, 146 N. Y. Supp. 949), or (5) when the cause

of action is founded upon a breach of contract to pay on demand. *Smith v. State Bank*, 61 Misc. 647, 114 N. Y. Supp. 56. (6) Nor is payment an affirmative defense when nonpayment is a constituent of, or essential to, the plaintiff's right of recovery. *Smith v. State Bank*, 61 Misc. 647, 114 N. Y. Supp. 56. (7) For example, when the action is to recover a general balance due the plaintiff by the defendant. *Acharan v. Samuel Bros.*, 144 App. Div. 182, 128 N. Y. Supp. 943; *Jones v. El Reno Mill & Elev. Co.*, 26 Okla. 796, 110 Pac. 1071, Ann. Cas. 1912 B, 486.

[c] **That payment is pleaded when unnecessary** under the allegations of the complaint does not make it new matter. *Shulman v. Brantley*, 50 Ala. 81. And see cases cited *supra*, this note.

6. U. S.—*Columbia Digger Co. v. Rector*, 215 Fed. 618. **Ala.**—*Slaughter v. Martin*, 9 Ala. App. 285, 63 So. 689. **Ky.**—*Day v. Clarke's Admr.*, 1 A. K. Marsh. 521. **Tex.**—*San Antonio & G. S. Const. Co. v. Davis* (Tex. Civ. App.), 48 S. W. 754. See also *Ruzeski v. Wilrodt* (Tex. Civ. App.), 94 S. W. 142.

[a] **No inconsistency exists** between the defenses of payment and set-off. *Wheaton v. Nelson*, 11 Gray (Mass.) 15.

7. Krauss Engineering Co. v. McKinnon, 66 Misc. 181, 121 N. Y. Supp. 396. See *Uvalde Asphalt Pav. Co. v. National Trading Co.*, 135 App. Div. 391, 120 N. Y. Supp. 11.

8. Burke v. Thorne, 44 Barb. (N. Y.) 363.

9. House v. Croft, 8 Mart. N. S. (La.) 704.

10. Ill.—*Surface v. Chicago, M. & St. P. Ry. Co.*, 191 Ill. App. 261; *Coulter v. Travelers' Protective Assn.*, 144 Ill. App. 255. **N. J.**—*Axel v. Kraemer*, 75 N. J. L. 688, 70 Atl. 367. **Va.**—*Whitley v. Booker Brick Co.*, 113 Va. 434, 74 S. E. 160. **W. Va.**—*Shuman v. Shuman*, 79 W. Va. 445, 91 S. E. 264; *Shore v. Powell*, 71 W. Va. 61, 76 S. E. 126. But see *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 312.

[a] **Partial payment within the rule.** **Ky.**—*Craig v. Whips*, 1 Dana 375. **N. J.** *Axel v. Kraemer*, 75 N. J. L. 688, 70

ment need not be specially pleaded, but proof thereof was admissible under the general issue whether in debt,¹¹ or assumpsit.¹² A special plea of payment was proper, however;¹³ but if made, it was not equivalent to the general issue.¹⁴

(II.) **Under Statutes.**—In many jurisdictions, payment, as an affirmative defense, setting up new matter,¹⁵ to be available must be specially pleaded; neither evidence of payment,¹⁶ nor partial pay-

Atl. 367. **Va.**—Whitley v. Booker Brick Co., 113 Va. 434, 74 S. E. 160. But see Shuman v. Shuman, 79 W. Va. 445, 91 S. E. 264; Shore v. Powell, 71 W. Va. 61, 76 S. E. 126; Guthrie v. Huntington Chair Co., 69 W. Va. 152, 71 S. E. 14.

11. **Ky.**—Craig v. Whips, 1 Dana 375. **N. J.**—Axel v. Kraemer, 75 N. J. L. 688, 70 Atl. 367. **N. Y.**—McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696. **Va.**—Richmond City & S. P. Ry. Co. v. Johnson, 90 Va. 775, 20 S. E. 148.

[a] **The early rule at common law** required a special plea of payment in assumpsit, but not in debt. McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696.

12. **U. S.**—Jeffrey v. Schlasinger, Hempst. 12, 13 Fed. Cas. No. 7,253a. **Ala.**—McMillian v. Wallace, 3 Stew. 185. **Cal.**—Mickle v. Heinlen, 92 Cal. 596, 28 Pac. 784; Wetmore v. San Francisco, 44 Cal. 294. **Conn.**—Ripley v. Fitch, 1 Root 404. **Del.**—Cleaden v. Webb, 4 Houst. 473. **Ill.**—Kennard v. Secor, 57 Ill. App. 415. **Ind.**—Mahon v. Gardner, 6 Blackf. 319. **Ky.**—Wheatley v. Phelps, 3 Dana 302; Craig v. Whips, 1 Dana 375. **Mich.**—Brennan v. Tietzort, 49 Mich. 397, 13 N. W. 790. **Miss.**—Alliston v. Lindsey, 12 Smed. & M. 656. **N. H.**—Bowman v. Noyes, 12 N. H. 302. **N. J.**—Axel v. Kraemer, 75 N. J. L. 688, 70 Atl. 367; Somerville v. Stewart, 48 N. J. L. 116, 3 Atl. 77. **N. Y.**—McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696. **Tenn.**—Sublett v. McLin, 10 Humph. 181. **Vt.**—Worthen v. Dickey, 54 Vt. 277; Shaw v. Moon, 49 Vt. 68.

See also 3 STANDARD PROC. 188, 212; 7 STANDARD PROC. 73.

[a] **But payment after the commencement of the action** had to be specially pleaded. Pemigewasset Bank v. Brackett, 4 N. H. 557; Boyd v. Weeks, 2 Denio (N. Y.) 321, 43 Am. Dec. 749. But see McMillian v. Wallace, 3 Stew. (Ala.) 185; Moore v. McNairy, 12 N. C. 319, where such payment shown in mitigation of damages.

13.—**U. S.**—Dibble v. Duncan, 2 McLean 553, 7 Fed. Cas. No. 3, 880. **Ill.**—Betts v. Francis, 1 Ill. 165. **Ind.**—Ensey v. Cleveland, etc. R. Co., 10 Ind. 178. **Ky.**—Wheatley v. Phelps, 3 Dana 302; Craig v. Whips, 1 Dana 375. **Md.**—Barr v. Perry, 3 Gill 313. **N. H.**—Bowman v. Noyes, 12 N. H. 302. **Ore.**—Snodgrass v. Andross, 19 Ore. 236, 23 Pac. 969. **Pa.**—Stillwell v. Rickards, 152 Pa. 437, 25 Atl. 831; Uhler v. Sanderson, 38 Pa. 128. **Tenn.**—Sublett v. McLin, 10 Humph. 181. **W. Va.**—Douglass v. Central Land Co., 12 W. Va. 502.

[a] **Partial Payment.**—Somerville v. Stewart, 48 N. J. L. 116, 3 Atl. 77; Britton v. Bishop, 11 Vt. 70.

14. **Cal.**—See Frisch v. Caler, 21 Cal. 71. **Ky.**—Wheatley v. Phelps. 3 Dana 302. **Can.**—Hanington v. Bostwick, 31 N. Bruns. 621.

15. See *supra*, I, B, 1.

16. **U. S.**—Kalloch v. Hoagland, 239 Fed. 252, 152 C. C. A. 240. **Ala.**—Polak v. Winter, 166 Ala. 255, 51 So. 998, 52 So. 829, 53 So. 339, 139 Am. St. Rep. 33 (dissenting opinion); Gulfport Fertilizer Co. v. Jones (Ala. App.), 73 So. 145. **Ariz.**—Rountree v. Clanton, 17 Ariz. 107, 149 Pac. 58. **Ark.**—Williams v. Uzzell, 108 Ark. 241, 156 S. W. 843. **Cal.**—Hegler v. Eddy, 53 Cal. 597. **Colo.**—Welles v. Colorado Nat. Life Assur. Co., 49 Colo. 508, 113 Pac. 524; Harvey v. Denver & R. G. R. Co., 44 Colo. 258, 99 Pac. 31, 130 Am. St. Rep. 120; Florence O. & R. Co. v. First Nat. Bank, 38 Colo. 119, 88 Pac. 182. **Conn.**—Morehouse v. Throckmorton, 72 Conn. 449, 44 Atl. 747. **Ga.**—Harris v. Dover, 18 Ga. App. 320, 89 S. E. 351. **Haw.**—Piipilani v. Houghtailing, 11 Hawaii 100. **Ind.**—Baker v. Kistler, 13 Ind. 63. **Ia.**—Junge v. Bowman, 72 Iowa 648, 34 N. W. 612. **Kan.**—Kansas Nat. Bank v. Quinton, 57 Kan. 750, 48 Pac. 20; St. Louis, Ft. S. & W. R. Co. v. Grove, 39 Kan. 731, 18 Pac. 958; Stevens v. Thompson, 5 Kan. 305, *distinguishing* Marley v. Smith, 4 Kan. 183. **La.**—Davis v. Davis' Syndie, 17 La. 259;

ment,¹⁷ can be given under general issue. This is rule even when the particular defense relied upon is the presumption of payment arising from the lapse of time.¹⁸ On the other hand, when payment is not an affirmative defense, not new matter,¹⁹ it need not be specially pleaded; it may be proved under a general denial.²⁰ Such is the rule

Ruhlman v. Smith, 15 La. Ann. 670. Minn.—Marshall & Ilsley Bank v. Child, 76 Minn. 173, 78 N. W. 1048. Miss.—Sivley v. Williamson, 112 Miss. 276, 72 So. 1008. Mo.—Ferguson v. Davidson, 158 Mo. 323, 59 S. W. 88; Edwards v. Giboney, 51 Mo. 129; People's Bank v. Stewart, 136 Mo. App. 24, 117 S. W. 99. Neb.—Hudelson v. First Nat. Bank, 51 Neb. 557, 71 N. W. 304; Ashland Land & Live-Stock Co. v. May, 51 Neb. 474, 71 N. W. 67; Mullen v. Morris, 43 Neb. 596, 62 N. W. 74. N. Y. Conkling v. Weatherwax, 181 N. Y. 258, 73 N. E. 1028; Patterson v. J. W. Gage Realty Co., 164 App. Div. 787, 150 N. Y. Supp. 215; Stumpf v. Cohen, 78 Misc. 158, 137 N. Y. Supp. 905. N. D. Tolerton & Warfield Co. v. Sult, 33 N. D. 283, 156 N. W. 939. Ohio.—Lord v. Graveson, 4 Ohio Cir. Ct. (N. S.) 268; Flowers v. Slater, 2 Ohio Dec. (Reprint) 336. Okla.—Standard Fashion Co. v. Joels, 159 Pac. 846. Ore.—Farmers' & Traders' Nat. Bank v. Hunter, 35 Ore. 188, 57 Pac. 424; Clark v. Wick, 25 Ore. 446, 36 Pac. 165; Benicia Agricultural Wks. v. Creighton, 21 Ore. 495, 28 Pac. 775, 30 Pac. 676. Pa. Christiana Hdw. & Supply Co. v. Sigle, 22 Pa. Dist. 647. S. C.—Hopper v. Hopper, 61 S. C. 124, 39 S. E. 366. S. D.—Kimball State Bank v. Harker, 35 S. D. 276, 152 N. W. 100. Tex. Hudgins Produce Co. v. J. R. Beggs & Co. (Tex. Civ. App.), 185 S. W. 339; Garrett v. Grisham (Tex. Civ. App.), 156 S. W. 505; Rutherford v. Gaines (Tex. Civ. App.), 118 S. W. 866. Vt. McDonald v. Place, 88 Vt. 80, 90 Atl. 948. Wash.—Palmer v. Parker, 91 Wash. 683, 158 Pac. 1017; Pickle v. Anderson, 62 Wash. 552, 114 Pac. 177. Wis.—Heber v. Heber's Estate, 139 Wis. 472, 121 N. W. 328; Gardner v. Avery Mfg. Co., 117 Wis. 487, 94 N. W. 292. Can.—Gooderman v. Chalmers, 1 U. C. Q. B. 172.

See also 7 STANDARD PROC. 95.

[a] An apparent exception to the general rule that payment must be specially pleaded occurs when a case is referred, the pleadings then being treated as adapted to the facts found,

when by so doing no new cause of action is brought in. McDonald v. Place, 88 Vt. 80, 90 Atl. 948.

[b] Payment as a defense to a counterclaim must be pleaded in the replication or reply. Mo.—Judy v. Duncan, 21 Mo. App. 548. N. Y.—Wilcox v. Joslin, 56 Hun 645, 10 N. Y. Supp. 342. Tex.—Wooley v. Bell (Tex. Civ. App.), 68 S. W. 71.

17. N. Y.—McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696; Acharan v. Samuel Bros., 144 App. Div. 182, 128 N. Y. Supp. 943. S. C.—Hopper v. Hopper, 61 S. C. 124, 39 S. E. 366. Tex. Key v. Hickman (Tex. Civ. App.), 149 S. W. 275.

[a] Where Both Parties Allege Part Payment.—Where a partial payment is averred in the complaint, and payment of a smaller sum affirmatively pleaded in the answer, the defendant is entitled to avail himself of the plaintiff's allegation. Mullen v. Morris, 43 Neb. 596, 62 N. W. 74.

18. Ky.—Tibbs' Heirs v. Clark, 5 Mon. 526. N. J.—Gulick v. Loder, 13 N. J. L. 68, 23 Am. Dec. 711. N. Y. House v. Carr, 125 App. Div. 89, 109 N. Y. Supp. 245. Tenn.—Stanley v. McKinzer, 7 Lea 454.

[a] Payment must be averred directly, and the presumption relied upon as evidence to sustain that plea. House v. Carr, 125 App. Div. 89, 109 N. Y. Supp. 245. But see Austin v. Wilson, 46 Iowa 362 (holding that evidence of the running of the statute of limitations is not proof of payment); Hepburn's case, 3 Bland (Md.) 95, holding presumption available without being specially pleaded in any form.

[b] Available Under the Plea of Payment.—Wingett's Appeal, 122 Pa. 486, 15 Atl. 863.

19. As to nature of payment as defense, see *supra*, I, B, 1.

20. Dak.—Brown v. Forbes, 6 Dak. 273, 43 N. W. 93. N. Y.—Patterson v. J. W. Gage Realty Co., 164 App. Div. 787, 150 N. Y. Supp. 215; Altman v. Bungay Co., 161 App. Div. 583, 146 N. Y. Supp. 949; Acharan v. Samuel Bros., 144 App. Div. 182, 128 N. Y. Supp. 943.

in actions for a general balance due,²¹ for merchandise,²² for services rendered,²³ or on a promissory note.²⁴ So also, when it is incumbent on the plaintiff to allege and prove a subsisting indebtedness at the time of the institution of the action, payment may be proved under a general denial;²⁵ the same is true when by proving his cause of action the plaintiff necessarily opens the door for proof of payment.²⁶ Of course, it is not necessary to plead payment when it is admitted in the plaintiff's pleadings,²⁷ or when the defense is that the debt never existed.²⁸

b. *Form and Sufficiency.*—(I.) **In General.** —A general plea of payment, as a rule, is sufficient,²⁹ without specifying the time, place,

N. D.—Tolerton & Warfield Co. v. Sult, 33 N. D. 283, 156 N. W. 939. **Okla.** Jones v. El Reno Mill & Elev. Co., 26 Okla. 796, 110 Pac. 1071, Ann. Cas. 1912B, 486. **S. D.**—Kimball State Bank v. Harker, 35 S. D. 276, 152 N. W. 100.

[a] **But payment made after action commenced** must be specially pleaded. **Cal.**—Glascock v. Ashman, 52 Cal. 493. **Fla.**—Withers v. Sandlin, 36 Fla. 619, 18 So. 856. **N. M.**—Bank of Commerce v. Broyles, 16 N. M. 414, 120 Pac. 670.

21. Brown v. Forbes, 6 Dak. 273, 43 N. W. 93. See Kimbell State Bank v. Harker, 35 S. D. 276, 152 N. W. 100.

[a] **Reason Stated.**—“When the complaint sets forth a balance in excess of all payments, owing to the structure of the pleading, it is necessary for the plaintiff to prove the allegation as made and this leaves the amount of the payments open to the defendant under a general denial.” Conkling v. Weatherwax, 181 N. Y. 258, 268, 73 N. E. 1028.

[b] **For Full Amount.**—If the action is for the full amount of goods sold or work and labor performed, and not a general balance due, payment must be pleaded by defendant. See the following cases: **Colo.**—Harvey v. Denver & R. G. R. Co., 44 Colo. 258, 99 Pac. 31, 130 Am. St. Rep. 120. **Mo.** Ferguson v. Davidson, 158 Mo. 323, 59 S. W. 88. **Neb.**—Ashland Land & Live Stock Co. v. May, 51 Neb. 474, 71 N. W. 67; Lamb v. Thompson, 31 Neb. 448, 48 N. W. 58; Clark v. Mullen, 16 Neb. 481, 20 N. W. 642.

22. Tolerton & Warfield Co. v. Sult, 33 N. D. 283, 156 N. W. 939; Jones v. El Reno Mill & Elev. Co., 26 Okla. 796, 110 Pac. 1071, Ann. Cas. 1912B, 486.

23. **Ala.**—Pollak v. Winter, 166 Ala. 255, 51 So. 998, 52 So. 829, 53 So. 339,

139 Am. St. Rep. 33 (dissenting opinion); 188 Ala. 153, 66 So. 11, second appeal. **Cal.**—Brooks v. Ardizzone, 9 Cal. App. 215, 98 Pac. 393. **Colo.**—Mott v. Baxter, 29 Colo. 418, 68 Pac. 220. **N. M.**—Cunningham v. Springer, 13 N. M. 259, 82 Pac. 232. **N. Y.**—White v. Smith, 46 N. Y. 418; Quin v. Lloyd, 41 N. Y. 349.

24. Parker v. Mayes, 85 S. C. 419, 67 S. E. 559, 137 Am. St. Rep. 912; Key v. Jones (Tex. Civ. App.), 191 S. W. 736.

25. Mickle v. Heinlen, 92 Cal. 596, 28 Pac. 784; Wetmore v. San Francisco, 44 Cal. 294; Cunningham v. Springer, 13 N. M. 259, 82 Pac. 232.

26. Harder v. Continental P. & P. Card Co., 117 N. Y. Supp. 1001.

[a] **In an action on an assigned claim**, when the evidence discloses that the assignment was made under circumstances destructive of the plaintiff's cause of action, that situation becomes as available to the defendant as though a special plea to the same effect had been interposed. Penwell v. Flickinger, 46 Mont. 526, 129 Pac. 323.

27. Thompson v. Baird (Tex. Civ. App.), 146 S. W. 354.

28. Marvin v. Mandell, 125 Mass. 562.

29. **U. S.**—Columbia Digger Co. v. Rector, 215 Fed. 618; Loveridge v. Larned, 7 Fed. 294. **Ark.**—See Williams v. Uzzell, 108 Ark. 241, 156 S. W. 843. **Cal.**—Sprigg v. Barber, 122 Cal. 573, 55 Pac. 419. **Ind.**—See Hollander v. Fletcher, 62 Ind. App. 149, 112 N. E. 847. **Ia.**—Shawler v. Johnson, 52 Iowa 473, 3 N. W. 604. **Mass.**—Goss v. Calkins, 164 Mass. 546, 42 N. E. 96; Swett v. Southworth, 125 Mass. 417. **Minn.** Colter v. Greenhagen, 3 Minn. 126. **Neb.**—Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251; Keys v. Fink, 81 Neb. 571,

amount, the individual to whom or by whom made, or other details,³⁰ although in some jurisdictions, the plea should set out such details.³¹ The circumstances may be such that they should be specifically set out in order to apprise the plaintiff of their nature and so avoid surprise.³²

Partial payment may generally be shown under a general plea of payment.³³ But it is not improper to file a special plea setting out the

116 N. W. 162. **N. Y.**—McLaughlin v. Webster, 141 N. Y. 76, 35 N. E. 1081; Pattison v. Taylor, 8 Barb. 250, 1 Code Rep. (N. S.) 174.

[a] **Necessity of direct allegation**, see Upton v. Paxton (Iowa), 29 N. W. 809; Farmers' & Traders' Nat. Bank v. Hunter, 35 Ore. 188, 57 Pac. 424.

30. Ind.—Johnson v. Breedlove, 104 Ind. 521, 6 N. E. 906; Cranor v. Winters, 75 Ind. 301. **La.**—Holmes v. Deplaigne, 23 La. Ann. 238. **Mass.**—Wolcott v. Smith, 15 Gray 537. **Minn.** Powers v. Bunnell, 121 Minn. 152, 140 N. W. 748. **Neb.**—Keys v. Fink, 81 Neb. 571, 116 N. W. 162. **S. D.**—Fall v. Johnson, 8 S. D. 163, 65 N. W. 909.

[a] **Evidence of payment to a third party** is permissible under the general plea of payment which goes to show the legal extinguishment of the debt, such as payment to an assignor, to an officer holding an execution, or to some one on the request of the creditor. Shriner v. Lamborn, 12 Md. 170; Boyce v. Young's Exr., 3 Har. & MeH. (Md.) 84; Fall v. Johnson, 8 S. D. 163, 65 N. W. 909.

31. Ariz.—Rountree v. Clanton, 17 Ariz. 107, 149 Pac. 58. **Ga.**—Wortham v. Sinclair, 98 Ga. 173, 25 S. E. 414; O'Neal v. Phillips, 83 Ga. 556, 10 S. E. 352; Lott v. Banks (Ga. App.), 94 S. E. 322; Groves v. Sexton, 5 Ga. App. 160, 62 S. E. 731. Compare Talbotton R. Co. v. Gibson, 106 Ga. 229, 32 S. E. 151. **Pa.**—Hiestand v. Williamson, 128 Pa. 122, 18 Atl. 427; McCracken v. First Reformed Presby. Cong., 111 Pa. 106, 2 Atl. 94.

[a] **Application of payments**, when pleaded, must be set out in full. National Deposit Bank of Philadelphia v. Mawson, 46 Pa. Super. 85, to allege a payment "on account" is uncertain and indefinite as to time, amount, and manner of payment.

[b] **When the cause of action consists of various debits and credits**, the affidavit of defense must definitely set out the amounts of the payments, which

the defendant expects to assert and rely upon as a defense. Hallowell v. Paige, 46 Pa. Super. 108. As to the manner of averring payment in affidavits of defense, see generally 1 STAND-ARD PROC. 699.

[c] **Unless (1) it is impossible to do so and the defendant alleges a sufficient excuse for the omission.** I. Epstein & Bro. Co. v. Thomas, 15 Ga. App. 741, 84 S. E. 201. See also Atlantic Coast Line R. Co. v. Hart Lumber Co., 2 Ga. App. 88, 58 S. E. 316; Com. v. Magee, 224 Pa. 168, 73 Atl. 347. It is not a sufficient excuse (2) to aver that defendant cannot make an allegation as to payment by deceased because of want of sufficient information, except that decedent paid his board monthly, as his habit was, and that he had ample money all the time to pay his debts, and was prompt to pay what he owed at maturity. Ginn v. Carithers, 14 Ga. App. 298, 80 S. E. 698.

32. See Williams v. Uzzell, 108 Ark. 241, 156 S. W. 843.

[a] **When the action is by a nominal plaintiff to the use of another, under a statute which considers the beneficiary the sole party to the record, a plea of payment must allege payment to the beneficial plaintiff, or to the person entitled thereto before the one holding the beneficial interest acquired his right.** Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 595, 4 Sup. Ct. 566, 28 L. ed. 527.

33. Ala.—McCurdy v. Middleton, 90 Ala. 99, 7 So. 655. **Conn.**—Elm City Lumb. Co. v. Mackenzie, 77 Conn. 1, 58 Atl. 10. **Ill.**—Keyes v. Fuller, 9 Ill. App. 528. **Md.**—Rohr v. Anderson, 51 Md. 205. **Can.**—Gooderham v. Chalmers, 1 U. C. Q. B. 172.

But see Shuman v. Shuman, 79 W. Va. 445, 91 S. E. 264 (holding that partial payment must be pleaded specially or by way of account or bill of particulars); also Arnold v. Cole, 42 W. Va. 663, 26 S. E. 312.

defense of partial payment.³⁴

A bill of particulars, unless required by statute,³⁵ need not accompany the plea of payment.³⁶ In a proper case, a bill of particulars may be directed, however.³⁷

(II.) **Payment in Money or Its Equivalent.**—(A.) **IN GENERAL.**—Formerly, when a claim of payment was based on a special agreement, it was necessary to plead the facts, a general plea of payment being insufficient,³⁸ and this rule is still adhered to in some jurisdictions;³⁹ but the general rule is that such a plea is sufficient, whether the claim is based on the payment of money or its equivalent, or a discharge by reason of a special agreement between the parties.⁴⁰

34. *Somerville v. Stewart*, 48 N. J. L. 116, 3 Atl. 77.

[a] **In an action on an assigned claim**, a plea by the defendant of payment to the assignor before the assignment of a certain amount, less than the sum claimed, is a plea of partial payment and not a counterclaim. *Clark v. Bell*, 14 Cal. App. 326, 111 Pac. 1037.

35. See the statutes, and *Russell v. Fabyan*, 28 N. H. 543, 61 Am. Dec. 629, (covenant for rent); also the cases cited *infra*, this note.

[a] **Where the defense is payment of various items**, it is sometimes necessary to attach an itemized account or bill of particulars thereof. *Ariz.*—*Cheda v. Skinner*, 6 Ariz. 196, 57 Pac. 64. *Miss.*—*Miller v. Brooks*, 4 Smed. & M. 175; *Webster v. Tiernan*, 4 How. 352. *Tex.*—*Grothaus v. Witte*, 72 Tex. 124, 11 S. W. 1032; *Hahn v. Broussard*, 3 Tex. Civ. App. 481, 23 S. W. 88.

[b] **Application of Particular Items.**—*Schroeter v. Bowdon*, 53 Tex. Civ. App. 135, 115 S. W. 331.

[c] **Supplementing General Denial.** *Richmond City & S. P. Ry. Co. v. Johnson*, 90 Va. 775, 20 S. E. 148; *Rice's Exr. v. Annatt's Admr*, 8 Gratt. (49 Va.) 557.

36. *Del.*—*State v. Lobb's Admr.*, 3 Harr. 421. *Ill.*—*Hays v. Smith*, 4 Ill. 427. *Mass.*—*Wilby v. Harris*, 13 Mass. 496. *Miss.*—*Price v. Sinclair*, 5 Smed. & M. 254. *Tex.*—*Able v. Lee*, 6 Tex. 427. *W. Va.*—*Lawson v. Zinn*, 48 W. Va. 312, 37 S. E. 612.

Compare 4 STANDARD PROC. 389, et seq.

37. *Seely v. Breakwater Co.*, 144 N. Y. Supp. 771.

38. *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696; *Uvalde Asphalt P. Co. v. National Trading Co.*, 135 App. Div. 391, 120 N. Y. Supp. 11; *Morley v. Culverwell*, 7 Mees. & W. (Eng.) 174.

39. *Mass.*—*Ulsch v. Muller*, 143 Mass. 379, 9 N. E. 736; *Wheaton v. Nelson*, 11 Gray 15. But see *Howe v. Mackay*, 5 Pick. 44, holding that under a general plea of payment in debt on a judgment it may be shown that the judgment had been paid by transfer of real estate of equal value. *Mo.* *People's Bank v. Stewart*, 136 Mo. App. 24, 117 S. W. 99, 152 Mo. App. 314, 133 S. W. 70; *Moore v. Renick*, 95 Mo. App. 202, 68 S. W. 936; *Rider v. Culp*, 68 Mo. App. 527. But see *White v. Black*, 115 Mo. App. 28, 90 S. W. 1153. *Pa.* *Lovegrove v. Christman*, 164 Pa. 390, 30 Atl. 385; *Steiner v. Erie D. S. & Loan Co.*, 98 Pa. 591; *Covely v. Fox*, 11 Pa. 171. *Tex.*—*Able v. Lee*, 6 Tex. 427.

[a] **To justice court practice** the rule is not applicable. *Rider v. Culp*, 68 Mo. App. 527.

[b] **An agreement by which the acceptance of certain wood operated as a satisfaction of the contract, and the delivery and receipt of the wood by the plaintiff under this agreement, are substantive facts, which should be set forth in the answer.** *Ulsch v. Muller*, 143 Mass. 379, 9 N. E. 736.

[c] **The substantial facts of the accord and satisfaction should be alleged.** *People's Bank v. Stewart*, 136 Mo. App. 24, 117 S. W. 99, 152 Mo. App. 314, 133 S. W. 70; *Moore v. Renick*, 95 Mo. App. 202, 68 S. W. 936. See also *Carroll v. Weaver*, 65 Conn. 76, 31 Atl. 489; *Salomon v. Pioneer Co-op. Co.*, 21 Fla. 374, 58 Am. Rep. 667.

40. *Ark.*—*Dawson v. Owen*, 78 Ark. 93, 93 S. W. 567; *Bush v. Sproat*, 43 Ark. 416. *Conn.*—*Morehouse v. Northrop*, 33 Conn. 380, 89 Am. Dec. 211. *Del.* *Mitchell v. Conrad*, 1 Marv. 417, 41 Atl. 77. *Ind.*—*Wolcott v. Ensign*, 53 Ind. 70; *Hart v. Crawford*, 41 Ind. 197. *Ia.* *State Bank of Tabor v. Kelly*, 109 Iowa

(B.) ALLEGING ACCEPTANCE OF NOTE, PAYMENT OF CHECK, ETC. — Where the declaration or complaint avers that the debt was paid with a certain note, it must also aver that the note was accepted as payment.⁴¹ If payment by check is alleged, it has been held that payment thereof should also be averred.⁴² So also, where an order on a third party,⁴³ or services rendered,⁴⁴ is averred as payment, it must be averred that the same were accepted as such.

c. *Construction, Operation and Effect.* — The construction of a plea of payment follows, as a general rule, the ordinary rules of pleading.⁴⁵ It does not put in issue the debtor's original liability,⁴⁶ but admits the material allegations of plaintiff's complaint,⁴⁷ and gives the privilege of opening and closing to the party pleading it, throwing upon him the burden of proof.⁴⁸ The affirmative allegation of

544, 80 N. W. 520. **Ky.**—Whittington v. Roberts, 4 Mon. 173. **La.**—Mandell v. Stephens, 9 Rob. 491. **Minn.**—Thompson-Houston Elec. Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536. **Neb.**—Hapgood Plow Co. v. Martin, 16 Neb. 27, 19 N. W. 512. **N. Y.**—McLaughlin v. Webster, 141 N. Y. 76, 35 N. E. 1081 (provision in will); Newcomb v. La Roe, 160 App. Div. 819, 146 N. Y. Supp. 133; Van Ness v. Ransom, 83 Misc. 178, 144 N. Y. Supp. 420. **S. C.**—Sullivan & Co. v. Sullivan, 20 S. C. 509. **Utah.**—Heath v. White, 3 Utah 474, 24 Pac. 762. **Wash.**—Edmunds v. Black, 13 Wash. 490, 43 Pac. 330.

41. Blunt v. Williams, 27 Ark. 374; Berlin Iron Bridge Co. v. Bonta, 180 Pa. 448, 36 Atl. 867; Philadelphia v. Stewart, 9 Pa. Dist. 228. See also Blum v. Jurick, 83 Misc. 116, 144 N. Y. Supp. 822; Shattuck v. Buck, 77 Misc. 95, 136 N. Y. Supp. 103.

42. Meltzner v. Schwarz, 19 Pa. Dist. 44. See also Strong v. Stevens, 4 Duer (N. Y.) 668, holding that an allegation of payment by check which is still outstanding is insufficient.

43. Brandt v. Thurber & Co., 1 White & W. Civ. Cas. (Tex.), §640.

44. Corbett v. Hughes, 75 Iowa 281, 39 N. W. 500.

45. See the title "Construction and Theory of Pleadings."

[a] Particular statements in a plea of payment will control the general. Hewitt v. Powers, 84 Ind. 295.

46. Loose v. Loose, 36 Pa. 538.

47. **U. S.**—Murphy v. Byrd, Hempst. 221, 17 Fed. Cas. No. 9,947b. **Ark.**—Dav v. Lafferty, 4 Ark. 450. **Cal.**—Caulfield v. Sanders, 17 Cal. 569. **Colo.**—Mohr v. Barnes, 4 Colo. 350. **Fla.**—Raney v. Baron, 1 Fla. 327. **Ill.**—Witter

v. McNeil, 4 Ill. 433. **Ind.**—Pattison v. Shaw, 82 Ind. 32. **Ky.**—See Harris v. Merz A. I. Wks., 82 Ky. 200. **La.**—Jones v. Bishop, 12 La. 397; Robinson v. Landrum, 10 La. Ann. 539. **N. D.**—Lokken v. Miller, 9 N. D. 512, 84 N. W. 368. **Pa.**—Long v. Rhoads, 126 Pa. 378, 17 Atl. 622. **Tenn.**—Connecticut Mut. L. Ins. Co. v. Dunscorn, 108 Tenn. 724, 69 S. W. 345, 91 Am. St. Rep. 769, 58 L. R. A. 694. **Tex.**—Matossy v. Frosh, 9 Tex. 610.

[a] Where the demand is unliquidated, the plea does not admit plaintiff's right to recover the full amount of his demand. Haley v. Caller, Minor (Ala.) 63.

48. **Ala.**—Pearce v. Walker, 103 Ala. 250, 15 So. 568. **Ark.**—Blass v. Lawhorn, 64 Ark. 466, 42 S. W. 1068. **Cal.**—Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127. **Colo.**—Thomas v. Carey, 26 Colo. 485, 58 Pac. 1093. **Fla.**—International Harvester Co. v. Smith, 51 Fla. 220, 40 So. 840. **Ga.**—Lanier v. Huguley, 91 Ga. 791, 18 S. E. 39. **Ill.**—Ross v. Skinner, 107 Ill. App. 579. **Ia.**—Walker v. Russell, 73 Iowa 340, 35 N. W. 443. **Kan.**—National Bank v. Hellyer, 53 Kan. 695, 37 Pac. 130, 42 Am. St. Rep. 316. **Ky.**—Harris v. Merz A. I. Wks., 82 Ky. 200. **La.**—Diggs, Hobson & Co. v. Parish, 18 La. 6. **Me.**—Witherell v. Swan, 32 Me. 247. **Mich.**—Doolittle v. Gavigan, 74 Mich. 11, 41 N. W. 846. **Mo.**—Griffith v. Creighton, 61 Mo. App. 1, 1 Mo. App. Rep. 295. **Neb.**—Wessel v. Bishop, 76 Neb. 74, 107 N. W. 220. **N. H.**—Smith v. Lewiston Steam Mill, 66 N. H. 613, 34 Atl. 153. **N. J.**—Smith's Exrs. v. Burnet, 17 N. J. Eq. 40. **N. Y.**—Dean v. Pitts, 10 Johns. 35. **N. C.**—Vaughan v. Lewellyn, 94 N. C. 472. **N. D.**—Sat-

payment by the defendant, in a case where the plaintiff is bound to allege non-payment, merely serves as notice that the issue of non-payment is to be raised.⁴⁹ The effect of a plea of payment before suit brought, if proved, is to effectually bar the plaintiff's recovery;⁵⁰ but if the plea is payment after the commencement of the action, the plaintiff is entitled to costs.⁵¹ Plaintiff, by joining issue on the plea of part payment without taking judgment for the part unanswered, does not discontinue his action; and if the issue is resolved in his favor, he is entitled to a judgment for the amount of his demand.⁵²

C. REPLICATION OR REPLY.⁵³—A replication or reply to a defense of payment as a plea of new matter may,⁵⁴ or may not,⁵⁵ be necessary, depending upon the rules of pleading in the various jurisdictions. No reply, of course, is necessary when non-payment is an essential allegation in the complaint and issue is joined with a general denial,⁵⁶ or when in such case issue is joined with a plea of payment which is in effect a general denial;⁵⁷ but the fact that the plaintiff has pleaded non-payment does not meet the necessity of replying to the

terlund v. Beal, 12 N. D. 122, 95 N. W. 518. **Pa.**—North Pennsylvania R. Co. v. Adams, 54 Pa. 94, 93 Am. Dec. 677. **S. C.**—Adger & Co. v. Pringle, 11 S. C. 527. **Tex.**—Tinsley v. McIlhenny, 30 Tex. Civ. App. 352, 70 S. W. 793. **Vt.** Smith v. Woodworth, 43 Vt. 39. **Va.** Moore v. Tate, 22 Gratt. (63 Va.) 351. **Wis.**—Meyer v. Hafemeister, 119 Wis. 539, 97 N. W. 165, 100 Am. St. Rep. 900.

As to right to open and close generally, see the title "Opening and Closing."

As to burden of proof on the plea of payment generally, see 9 ENCY. OF EV. 700.

49. Smith v. State Bank, 61 Misc. 647, 114 N. Y. Supp. 56.

50. Slaughter v. Martin, 9 Ala. App. 285, 63 So. 689.

51. Slaughter v. Martin, 9 Ala. App. 285, 63 So. 689.

52. Beebe v. Hershy, 7 Ark. 428; Beebe v. Sutton, 7 Ark. 405.

Effect upon action and subsequent pleading by failing to take judgment for a part of demand when entitled to it generally, see the title "Replication and Reply."

53. See generally the title "Replication and Reply."

54. **Ind.**—Hubler v. Pullen, 9 Ind. 273, 68 Am. Dec. 620. **Miss.**—Rushing v. Key, 4 Smed. & M. 191. **Mo.**—Hutchison v. Patrick, 3 Mo. 65; Manifee v. D'Lashmuth, 1 Mo. 258; Cordner v. Roberts, 58 Mo. App. 440. **Ohio.** Knauber v. Wunder, 5 Ohio Dec. (Reprint) 516, 6 Am. L. Rec. 366. **Ore.**

Minard v. McBee, 29 Ore. 225, 44 Pac. 491; Benicia Agricultural Wks. v. Creighton, 21 Ore. 495, 28 Pac. 775, 30 Pac. 676. **Pa.**—See Beale v. Buchanan, 9 Pa. 123.

[a] Acceptance of payment under duress must be pleaded in the replication. Smith v. Cottrel, 8 Baxt. (Tenn.) 62.

55. **Ia.**—Kirk v. Woodbury, 55 Iowa 190, 7 N. W. 498. **Md.**—McCart v. Regester, 68 Md. 429, 13 Atl. 361. **N. Y.** Burke v. Thorne, 44 Barb. 363; Bracket v. Wilkinson, 13 How. Pr. 102; Reilay v. Thomas, 11 How. Pr. 266. **W. Va.** Kinsley v. Monongalia County Court, 31 W. Va. 464, 7 S. E. 445; Wellsburg First Nat. Bank v. Kimberlands, 16 W. Va. 555; Hickman v. Painter, 11 W. Va. 386.

56. **Ia.**—Burton v. Hill, 4 G. Gr. 379. **Ky.**—Logan County Nat. Bank v. Barclay, 104 Ky. 97, 46 S. W. 675; Ermert v. Dietz, 19 Ky. L. Rep. 1639, 44 S. W. 138. **Minn.**—McArdle v. McArdle, 12 Minn. 98.

57. Frisch v. Caler, 21 Cal. 71; Van Gieson v. Van Gieson, 12 Barb. (N. Y.) 520.

[a] When Plea of Payment Not New Matter.—That a replication is necessary to negative a plea of new matter has no application to an unnecessary plea of payment, for when it is necessary to allege nonpayment in the complaint, a plea of payment is simply a denial and not an allegation of new matter. Frisch v. Caler, 21 Cal. 71.

defendant's plea of payment when it is considered an affirmative defense of new matter.⁵⁵

D. **OBJECTIONS TO PLEADING.**—As a rule, a plea of payment is not subject to a general demurrer;⁵⁹ but when defective, it may be objected to in some jurisdictions by a special demurrer,⁶⁰ or by motion to make more definite and certain.⁶¹

II. **TRIAL.**—A. **IN GENERAL.**—The same general rules governing the trial of all civil cases obtain when payment is an issue.⁶²

B. **VARIANCE.**⁶³—As a general rule, payment must be proved as alleged.⁶⁴ A plea of payment is not proved by evidence of tender,⁶⁵ set-off,⁶⁶ counterclaim,⁶⁷ or discharge.⁶⁸ An accord and satisfaction may in some jurisdictions,⁶⁹ but not in other jurisdictions,⁷⁰ be shown

58. *Benicia Agricultural Wks. v. Creighton*, 21 Ore. 495, 28 Pac. 775, 30 Pac. 676.

59. *Ill.*—*Sherman v. Gassett*, 9 Ill. 521. *Ind.*—*Epperson v. Hostetter*, 95 Ind. 583; *Hart v. Crawford*, 41 Ind. 197. *S. C.*—*Buist v. Fitzsimons*, 44 S. C. 130, 21 S. E. 610.

Grounds of demurrer generally, see 6 STANDARD PROC. 888, et seq.

60. *O'Neil v. Phillips*, 83 Ga. 556, 10 S. E. 352. See also *Sherman v. Gassett*, 9 Ill. 521.

61. *Del.*—*Tyre v. Mulvena*, 2 Marv. 295, 43 Atl. 172. *Ind.*—*Epperson v. Hostetter*, 95 Ind. 583; *Hart v. Crawford*, 41 Ind. 197. *Minn.*—*Powers v. Bunnell*, 121 Minn. 152, 140 N. W. 748. *Neb.*—*Crilly v. Ruyle*, 87 Neb. 367, 127 N. W. 251. *N. Y.*—*Farmers' & Citizens' Bank v. Sherman*, 33 N. Y. 69, *affirming* 6 Bosw. 181. *Ohio.*—*Lewis v. Smith*, 2 Disney 434, 13 Ohio Dec. 266.

[a] **Time of payment omitted.** *Baer v. Christian*, 83 Ga. 322, 9 S. E. 790.

62. See generally the title "Trial."

63. See generally the title "Variance and Failure of Proof."

64. *Ala.*—*Tuskaloosa Cotton-Seed Oil Co. v. Perry*, 85 Ala. 158, 4 So. 635; *Gilmer v. Wallace*, 75 Ala. 220. *Ind.* See *Braden v. Lemmon*, 127 Ind. 9, 26 N. E. 476. *Ia.*—*Hoddy v. Osborn*, 9 Iowa 517. *La.*—*Gaude v. Gaude*, 28 La. Ann. 181. *Md.*—*Staley v. Thomas*, 68 Md. 439, 13 Atl. 53. *Mass.*—*Canfield v. Miller*, 13 Gray 274; *Wheaton v. Nelson*, 11 Gray 15. *Mich.*—*Judd v. Burton*, 51 Mich. 74, 16 N. W. 237. *Minn.* *First Nat. Bank of Shakopee v. Strait*, 71 Minn. 69, 73 N. W. 645. *N. Y.* *Mann v. Morewood*, 5 Sandf. 557; *Bonney v. Seeley*, 2 Wend. 481. *Ohio.* *Brown v. Ginn*, 19 Ohio Cir. Ct. 660, 10 Ohio Cir. Dec. 538. *S. D.*—*Peter Mintener Lumber Co. v. Harvey*, 27 S. D.

624, 132 N. W. 252. *Eng.*—*Palmer v. Costerton*, 4 Q. B. 525, 45 E. C. L. 525, 114 Eng. Reprint 996.

[a] **Proof of payment in money or by check** has been denied under an allegation of payment by note. *Canfield v. Miller*, 13 Gray (Mass.) 274. See *Talbotton R. Co. v. Gibson*, 106 Ga. 229, 32 S. E. 151.

[b] **When the defendant sets up an itemized list of payments**, and issue is joined thereon, he is precluded from showing other payments outside of those set out, unless he amends his pleading. *Lapham v. Kansas & T. Oil, Gas & Pipe Line Co.*, 87 Kan. 65, 123 Pac. 863, Ann. Cas. 1913D, 813.

[c] **Where the date of payment is pleaded**, evidence of payment at a time subsequent thereto is not admissible. *Denham v. Crowell*, 1 N. J. L. 467.

[d] **But where payment at a particular place is averred**, proof of payment at a different place may be shown. *Brown v. Gooden*, 16 Ind. 444.

65. *Clark v. Mullenix*, 11 Ind. 532.

66. *Williams v. Uzzell*, 108 Ark. 241, 156 S. W. 843; *Rowland v. Blaksley*, 1 Q. B. 403, 2 G. & D. 734, 6 Jur. 732, 11 L. J. Q. B. 279, 41 E. C. L. 599, 113 Eng. Reprint 1187.

[a] **Based on Agreement With Plaintiff's Agent.**—*Williams v. Uzzell*, 108 Ark. 241, 156 S. W. 843.

67. *Wagener & Co. v. Mars*, 20 S. C. 533.

68. *State v. Reading's Terre-Tenants*, 1 Harr. (Del.) 23.

69. *Ark.*—*Turner v. Huggins*, 14 Ark. 21. *Conn.*—*McNerney v. Barnes*, 77 Conn. 155, 58 Atl. 714. *Ind.*—*Braden v. Lemmon*, 127 Ind. 9, 26 N. E. 476. *Vt.*—*Hadley v. Boro*, 62 Vt. 285, 19 Atl. 476.

70. *Hardey v. Coe*, 5 Gill (Md.) 189.

under a general plea of payment.

C. QUESTIONS OF LAW AND FACT.⁷¹—The question of payment,⁷² and whether the same was voluntarily made,⁷³ is for the court when the facts are not in dispute. But under conflicting evidence, it is for the jury to determine the fact of payment in whole,⁷⁴ or in part,⁷⁵ it being within their province to draw proper inferences and presumptions in respect thereto.⁷⁶ It is likewise for the jury, under disputed facts, to pronounce as to the medium of payment;⁷⁷ the application or appropriation of payments;⁷⁸ and as to whether a note,⁷⁹

71. See generally the title "**Province of Judge and Jury.**"

72. *Fidelity Title & Trust Co. v. Chapman*, 226 Pa. 312, 75 Atl. 428; *Richards v. Walp*, 221 Pa. 412, 70 Atl. 815.

73. *Eslow v. City of Albion*, 153 Mich. 720, 117 N. W. 328, 22 L. R. A. (N. S.) 872.

74. *Ala.*—*Winter v. Pollak*, 188 Ala. 153, 66 So. 11; 166 Ala. 255, 51 So. 998, 52 So. 829, 53 So. 339, 139 Am. St. Rep. 33, dissenting opinion. *Ariz.*—*Albert Steinfeld & Co. v. Wing Wong*, 14 Ariz. 336, 128 Pac. 354. *Ark.*—*Lee Wilson & Co. v. Morgan*, 121 Ark. 633, 180 S. W. 469; *Fidelity Mut. Life Ins. Co. v. Click*, 93 Ark. 162, 124 S. W. 764. *Cal.*—*Light v. Stevens*, 159 Cal. 288, 113 Pac. 659; *Cowan v. Abbott*, 92 Cal. 100, 28 Pac. 213. *Del.*—*Hudson v. Williams*, 6 Penne. 550, 72 Atl. 985. *Haw.*—*Pratt v. Ahin*, 16 Hawaii 150. *Ind.*—*Louden v. Birt*, 4 Ind. 566. *Kan.*—*Tennison v. Platt*, 50 Kan. 631, 32 Pac. 369. *Ky.*—*Williamson v. McGinnis*, 11 B. Mon. 74, 52 Am. Dec. 561. *Mich.*—*Linsell v. Linsell*, 138 Mich. 64, 100 N. W. 1009. *N. Y.*—*Fulton Grain & M. Co. v. Anglim*, 34 App. Div. 164, 54 N. Y. Supp. 632; *Thompson v. Welde*, 10 App. Div. 125, 41 N. Y. Supp. 819; *Clark v. Mt. Gilead Baptist Church*, 156 N. Y. Supp. 305. *N. C.*—*Model Mill Co. v. Webb*, 164 N. C. 87, 80 S. E. 232. *Pa.*—*Fidelity Title & Trust Co. v. Chapman*, 226 Pa. 312, 75 Atl. 428; *Reynolds v. Richards*, 14 Pa. 205; *Ransom v. Crawford*, 44 Pa. Super. 592. *S. C.*—*Simons' Exrs. v. Walter's Exr.*, 1 McCord 97. *Tex.*—*Buckley v. Runge*, 57 Tex. Civ. App. 322, 122 S. W. 596. *Wis.*—*Twohy Mere. Co. v. McDonald's Estate*, 108 Wis. 21, 83 N. W. 1107.

75. *Barrett v. Sipp*, 50 Ind. App. 304, 98 N. E. 310.

76. *Ky.*—*Waters v. Waters*, 1 Mete. 519; *Shields v. Pringle*, 2 Bibb 387. *N. Y.*—*Macaulay v. Palmer*, 125 N. Y.

742, 26 N. E. 912; *Hall v. Roberts*, 63 Hun 473, 18 N. Y. Supp. 480, 45 N. Y. St. 355. *N. C.*—*Williams v. Peal*, 20 N. C. 609. *Pa.*—*O'Hara v. Corr*, 210 Pa. 341, 59 Atl. 1099; *Lee v. Newell*, 107 Pa. 283. *Tenn.*—*Lyon v. Guild*, 5 Heisk. 175. *Vt.*—*Kimball v. Ives*, 17 Vt. 430.

[a] **Inferences of continued indebtedness** from partial payment may be drawn by the jury. *Broadway v. Groenendyke*, 153 Ind. 508, 55 N. E. 434; *Mozingo v. Ross*, 150 Ind. 688, 50 N. E. 867, 65 Am. St. Rep. 387, 41 L. R. A. 612; *Barrett v. Sipp*, 50 Ind. App. 304, 98 N. E. 310.

[b] **Length of time necessary to raise the presumption of payment**, when not settled by statute or otherwise, is for the jury's consideration. *Dox v. Postmaster-General*, 1 Pet. (U. S.) 318, 326, 7 L. ed. 160.

77. *Mich.*—*Just v. Porter*, 64 Mich. 565, 31 N. W. 444. *N. Y.*—*Hayden v. Pierce*, 144 N. Y. 512, 39 N. E. 638, *affirming* 71 Hun 593, 25 N. Y. Supp. 55. *Ohio.*—*Chase v. Brundage*, 58 Ohio St. 517, 51 N. E. 31. *Tenn.*—*Union Bank v. Smiser*, 1 Sneed 501.

78. *Cal.*—*Clarke v. Scott*, 45 Cal. 86. *Ga.*—*Phillips v. McGuire*, 73 Ga. 517. *Ill.*—*Drake v. Lux*, 233 Ill. 522, 84 N. E. 693. *Ia.*—*Bishop v. Hart*, 114 Iowa 96, 86 N. W. 218. *Md.*—*Fowke v. Bowie*, 4 Har. & J. 566. *Mo.*—*Wear Bros. v. Schmelzer*, 92 Mo. App. 314; *Dick Bros. Q. Brew. Co. v. Finnell*, 39 Mo. App. 276. *N. Y.*—*Reich v. Reich*, 6 Misc. 628, 27 N. Y. Supp. 137. *Pa.*—*Brown v. Burr*, 160 Pa. 458, 28 Atl. 828. *S. C.*—*Heyward-Williams Co. v. Zeigler*, 106 S. C. 425, 91 S. E. 298.

79. *U. S.*—*Lyman v. Bank of United States*, 12 How. 225, 13 L. ed. 965; *Leschen & Sons Rope Co. v. Mayflower Gold Min. Co.*, 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N. S.) 1. *Ala.*—*Keel v. Larkin*, 72 Ala. 493; *Myatts v. Bell*, 41 Ala. 222. *Fla.*—*Salomon v. Pioneer*

bill,⁸⁰ check,⁸¹ or order⁸² was taken in payment of the debt, or as a renewal, or simply as evidence of the debt, or as collateral security, or conditional payment.

D. INSTRUCTIONS.⁸³—In accordance with the general rule, the court's charge should be in harmony with the law applicable to the case,⁸⁴ relating, *e. g.*, to the application of payments,⁸⁵ the burden of proving payment,⁸⁶ presumption of payment,⁸⁷ what does or does

Co-op. Co., 21 Fla. 374, 58 Am. Rep. 667. **Ga.**—Standard Cooperage Co. *v.* O'Neill, 146 Ga. 235, 91 S. E. 82. **Ill.** Archibald *v.* Argall, 53 Ill. 307; Crabtree *v.* Rowand, 33 Ill. 421; Rayfield *v.* Tinscher, 180 Ill. App. 454. **Kan.** Webb *v.* National Bank, 67 Kan. 62, 72 Pac. 520. **Ky.**—Bullen *v.* McGillicuddy, 2 Dana 90. **Mass.**—Vickery *v.* Ritchie, 207 Mass. 318, 93 N. E. 578; Spooner *v.* Roberts, 180 Mass. 191, 62 N. E. 4; Casey *v.* Weaver, 141 Mass. 280, 6 N. E. 372. **Mich.**—Bond *v.* McMahon, 94 Mich. 557, 54 N. W. 281; Craddock *v.* Dwight, 85 Mich. 587, 48 N. W. 644. **Minn.**—Combination Steel & Iron Co. *v.* St. Paul City Ry. Co., 47 Minn. 207, 49 N. W. 744. **Miss.**—Keerl *v.* Bridges, 10 Smed. & M. 612. **Mo.**—The Charlotte *v.* Hammond, 9 Mo. 59, 43 Am. Dec. 536; State *ex rel.* Waggoner *v.* Lichtman-Goodman & Co., 131 Mo. App. 65, 109 S. W. 819. **N. H.**—Foster *v.* Hill, 36 N. H. 526. **N. Y.**—Tobey *v.* Barber, 5 Johns. 68, 4 Am. Dec. 326. **Okla.**—Ohio Cultivator Co. *v.* Dunkin, 168 Pac. 1002. **Pa.**—Ramlack *v.* Wolf, 178 Pa. 356, 35 Atl. 879; Cake *v.* First Nat. Bank of Lebanon, 86 Pa. 303. **Tenn.**—Union Bank of Smiser, 1 Sneed 501. **W. Va.**—Bowyer *v.* Knapp, 15 W. Va. 277. **Wis.**—Grubbe *v.* Pierce, 156 Wis. 29, 145 N. W. 207, Ann. Cas. 1915 C, 1199, 51 L. R. A. (N. S.) 358.

[a] Note of a Third Party.—**Ia.** Upton *v.* Paxton, 72 Iowa 295, 33 N. W. 773. **Mass.**—Quimby *v.* Durgin, 148 Mass. 104, 19 N. E. 14, 1 L. R. A. 514. **Miss.**—Crow *v.* Burgin, 38 So. 625. **N. H.** Wilson *v.* Hanson, 20 N. H. 375. **N. Y.** Johnson *v.* Weed, 9 Johns. 310, 6 Am. Dec. 279. **Pa.**—Cridland *v.* Stevens, 9 Pa. Super. 41.

80. **Mich.**—Craddock *v.* Dwight, 85 Mich. 587, 48 N. W. 644. **N. Y.**—Hall *v.* Stevens, 40 Hun 578, 2 N. Y. St. 303, reversed on other grounds, 116 N. Y. 201, 22 N. E. 374, 5 L. R. A. 802. **Pa.** Jones *v.* Johnson, 3 Watts & S. 276, 38 Am. Dec. 760.

81. **Cal.**—Western Pac. Land Co. *v.* Wilson, 19 Cal. App. 338, 125 Pac. 1076.

Minn.—Isackson *v.* Lovell, 115 Minn. 481, 132 N. W. 918; Goodall *v.* Norton, 88 Minn. 1, 92 N. W. 445. **Pa.**—Holmes *v.* Briggs, 131 Pa. 233, 18 Atl. 928, 17 Am. St. Rep. 804; Lingenfelter *v.* Williams, 7 Sad. 70, 9 Atl. 653. **R. I.**—National Park Bank *v.* Levy, 17 R. I. 746, 24 Atl. 777, 19 L. R. A. 475. **Va.** Blair *v.* Wilson, 28 Gratt. (69 Va.) 165. **Wash.**—Megrath *v.* Gilmore, 10 Wash. 339, 39 Pac. 131.

82. Bond *v.* McMahon, 94 Mich. 557, 54 N. W. 281; Bank of Iron River *v.* Board of School Directors, 91 Wis. 596, 65 N. W. 368.

83. See generally the title "Instructions."

84. See generally 13 STANDARD PROC. 771.

85. **Ala.**—Turrentine *v.* Grigsby, 118 Ala. 380, 23 So. 666; Boyd *v.* Jones, 96 Ala. 305, 11 So. 405, 38 Am. St. Rep. 100. **Cal.**—Ray *v.* Borgfeldt, 169 Cal. 253, 146 Pac. 679; Light *v.* Stevens, 159 Cal. 288, 113 Pac. 659. **Ga.**—Lawton *v.* Blithe, 83 Ga. 663, 10 S. E. 353. **Ill.** Snell *v.* Cottingham, 72 Ill. 124. **Ia.** Marshall Dental Mfg. Co. *v.* Harkensen, 84 Iowa 117, 50 N. W. 559. **Ky.**—Ditto *v.* Hopkins, 164 Ky. 412, 175 S. W. 658; Hoskins' Admr. *v.* Brown, 27 Ky. L. Rep. 216, 84 S. W. 767. **Mass.**—Ives *v.* Farmers' Bank, 2 Allen 236. **Tex.** Reed *v.* Corry (Tex. Civ. App.), 61 S. W. 157. **Vt.**—Lapham *v.* Kelly, 35 Vt. 195.

86. **Ill.**—Weakley *v.* Mizell, 193 Ill. App. 494; Lasswell *v.* Gahan, 122 Ill. App. 513. **Miss.**—Crow *v.* Burgin, 38 So. 625. **Pa.**—Paige *v.* Paige, 53 Pa. Super 311.

87. **Ga.**—Patterson *v.* Campbell, 136 Ga. 664, 71 S. E. 1117. **Ky.**—Stockton's Admr. *v.* Johnson, 6 B. Mon. 408. **Mo.** Moore *v.* Renick, 95 Mo. App. 202, 68 S. W. 936. **N. C.**—Spruill *v.* Davenport, 27 N. C. 663. **Okla.**—Caulk *v.* Carlson, 44 Okla. 532, 145 Pac. 335. **Tenn.**—Bender *v.* Montgomery, 8 Lea 586.

[a] Possession of a note by the defendant, of which payment is sought

not constitute payment,⁸⁸ and what is or is not material to the proof of payment.⁸⁹ The instructions should be in harmony with the issues,⁹⁰ and the pleadings,⁹¹ and must not be misleading,⁹² nor invade the province of the jury.⁹³

III. VERDICT, JUDGMENT AND REVIEW.—The general rules applicable to all civil actions are applied, when there is an issue of payment, to the verdict,⁹⁴ judgment,⁹⁵ and review on appeal.⁹⁶

to be enforced by the plaintiff, is ordinarily a prima facie presumption of payment, but it is not error to refuse an instruction to that effect when the defendant's honesty in obtaining possession of the note has been drawn in question. *Caulk v. Carlson*, 44 Okla. 532, 145 Pac. 335.

88. *Cal.*—*Comptoir D'Escompte de Paris v. Dresbach*, 78 Cal. 15, 20 Pac. 28. *Mass.*—*Brown v. Bishop*, 225 Mass. 276, 114 N. E. 316. *Mich.*—*Pennsylvania Min. Co. v. Brady & Co.*, 16 Mich. 332. *Minn.*—*Isackson v. Lovell*, 115 Minn. 481, 132 N. W. 918. *Mo.*—*McMurray v. Taylor*, 30 Mo. 263, 77 Am. Dec. 611. *Pa.*—*Schilling v. Durst*, 42 Pa. 126.

89. *Fletcher v. Young*, 10 Ga. App. 183, 73 S. E. 38.

90. *People's Bank v. Stewart*, 152 Mo. App. 314, 133 S. W. 70, 136 Mo. App. 24, 117 S. W. 99 (holding that when the plea raises the issue of payment in money it is error to go outside of that issue and charge on an issue of payment by an agreement); *Sheldon v. Heaton*, 22 App. Div. 308, 47 N. Y. Supp. 1124.

91. *Gulfport Fertilizer Co. v. Jones* (Ala. App.), 73 So. 145, holding that in the absence of a plea of payment there should be no charge on payment.

[a] *Assuming an Issue.*—*Upton v. Paxton* (Iowa), 29 N. W. 809.

92. *Ala.*—*Porter v. Watkins*, 196

Ala. 333, 71 So. 687. *Cal.*—*Low v. Warden*, 77 Cal. 94, 19 Pac. 235. *Ky.* *Stockton's Admr. v. Johnson*, 6 B. Mon. 408. *Mass.*—*Sullivan v. Sheehan*, 173 Mass. 361, 53 N. E. 902. *Ore.* *Boothe v. Scriber*, 48 Ore. 561, 87 Pac. 887, 90 Pac. 1002. *R. I.*—*Earle v. Berry*, 27 R. I. 221, 61 Atl. 671, 1 L. R. A. (N. S.) 867. *Vt.*—*Belknap v. Billings*, 78 Vt. 214, 62 Atl. 56.

93. *Benton v. Toler*, 109 N. C. 238, 13 S. E. 763; *Gay v. McGuffin*, 9 Tex. 501.

[a] *Effect of a Receipt.*—*Eagle Brew. Co. v. Colaluca*, 38 R. I. 224, 94 Atl. 680.

94. See generally the title "*Verdict.*"

95. See generally the title "*Judgments.*"

96. See *infra* this note, and generally the title "*Appeals.*"

[a] *Harmless Error.*—*Hinkle v. Higgins*, 83 Tex. 615, 19 S. W. 147.

[b] *Objections on Appeal.*—*Clark v. Bell*, 14 Cal. App. 326, 111 Pac. 1037.

[c] *Conclusiveness of Verdict Based on Conflicting Evidence.*—*Smith v. Camp*, 84 Ga. 117, 10 S. E. 539.

[d] *Review of Questions of Fact Affirmed by an Inferior Appellate Court.*—*Drake v. Lux*, 233 Ill. 522, 84 N. E. 693.

[e] *Same Theory on Appeal.*—*Crilly v. Ruyle*, 87 Neb. 367, 127 N. W. 251.

PAYMENT INTO COURT.—See *Deposit in Court.*

PEACE.—See *Breach of the Peace; Quieting Title; Security To Keep the Peace.*

PEDDLERS.—See *Hawkers and Peddlers.*

PENALTIES, FORFEITURES AND FINES

By the Editorial Staff.

I. DEFINITIONS AND DISTINCTIONS, 260

- A. *The Terms Defined*, 260
 - 1. "*Fine*" *Defined*, 260
 - 2. "*Forfeiture*" *Defined*, 260
 - 3. "*Penalty*" *Defined*, 261
 - 4. "*Fine*" or "*Penalty*" *as Embracing Costs*, 261
 - 5. "*Fine*" and "*Amercement*" *Distinguished*, 262
- B. *Fines, Penalties and Forfeitures Distinguished From Each Other*, 262

II. NATURE OF PROCEEDINGS TO ENFORCE, 262

- A. *As Being Civil or Criminal*, 262
- B. *As Being Ex Contractu or Ex Delicto*, 264

III. JURISDICTION, 265

- A. *Extra Territorial Jurisdiction*, 265
- B. *Jurisdiction of Equity and Admiralty Courts*, 266
- C. *Jurisdiction of Particular Courts as Dependent on Statutes*, 266
- D. *Jurisdiction of Justices and Other Inferior Courts*, 267
- E. *As Affected by Amount in Controversy*, 267

IV. VENUE, 267

V. WHAT IS THE PROPER REMEDY, 269

- A. *As Determined by Statute*, 269
- B. *Rules Where No Procedure Is Prescribed*, 271
 - 1. *Common Law Remedy by Indictment*, 271
 - 2. *Action of Debt*, 272
 - 3. *A Libel In Rem*, 273
 - 4. *Information To Enforce Forfeiture*, 273
 - 5. *Arbitration*, 273

VI. MATTERS PRELIMINARY TO RIGHT TO BRING PROCEEDINGS 273

- A. *Necessity of Previous Conviction*, 273
- B. *Preliminary Complaint*, 274

VII. PARTIES, 274

- A. *Informer's Right To Sue*, 274
 - 1. *At Common Law*, 274
 - 2. *Statutory Authority To Sue Necessary*, 274
 - 3. *Construction of Particular Statutes as Giving Right*, 275
 - 4. *Right to the Penalty as Implying the Right to Sue*, 276
 - 5. *Disability To Sue*, 277
- B. *Right of Commonwealth To Bring Suit*, 277
- C. *Exclusiveness of Statutory Right To Sue*, 277
- D. *Statutory Right To Sue Is Strictly Construed*, 278
- E. *Amendment or Substitution of Parties Plaintiff*, 278
- F. *Joinder of Parties Plaintiff*, 278
- G. *Parties Defendant*, 279
 - 1. *Who May Be Sued*, 279
 - 2. *Joinder of Defendants*, 279

VIII. PROCESS AND SEIZURE, 280

- A. *Summons or Other Process*, 280
- B. *Necessity of Seizure*, 282

IX. THE PLEADINGS, 282

- A. *Plaintiff's Pleadings*, 282
 - 1. *In General*, 283
 - 2. *Recitals of Statute*, 283
 - 3. *Alleging the Offense*, 285
 - 4. *Allegations as to Right to Penalty and Capacity To Sue*, 286
 - 5. *Allegations as to Damages*, 286
 - 6. *Joinder*, 287
 - 7. *Minuting and Indorsing*, 288
 - 8. *Treating Indictment as Complaint*, 288
- B. *Defendant's Pleadings*, 288

C. *Amendment*, 289

X. ABATEMENT AND REVIVAL, 289

XI. DISCONTINUANCE AND DISMISSAL, 290

XII. RIGHT TO JURY TRIAL, 290

XIII. SUMMARY FORFEITURE, 291

XIV. PROVINCE OF COURT OR JURY, 292

XV. VERDICT, FINDINGS AND JUDGMENT, 292

A. *In General*, 292B. *Default Judgment*, 292C. *Assessment of Penalty*, 292D. *Amount of Judgment or Verdict*, 293E. *Specifying Particular Penalty for Which Recovery Is Given*, 293F. *In Whose Favor Judgment Should Run*, 294G. *Judgment Against Joint Offenders*, 294

XVI. COSTS, 295

A. *Right To Tax*, 295B. *Amount Taxable*, 295C. *Security for Costs*, 295

XVII. REVIEW, 295

A. *New Trial*, 295B. *Appeal*, 296C. *Writ of Error*, 297

XVIII. ENFORCEMENT OF JUDGMENT, 297

A. *Civil Proceedings*, 297B. *Criminal Proceedings*, 2971. *Execution*, 2972. *Imprisonment of Defendant To Compel Payment*, 2983. *Distinction Between Capias Pro Fine, Capias ad Satisfaciendum, and Fieri Facias*, 3024. *Confessing Judgment and Giving Security Thereupon*, 303

5. *Application of Prisoner's Funds in Court's Possession*, 304

XIX. PARDON, REMISSION AND COMPOUNDING, 304

A. *Pardon or Remission*, 304B. *Compounding*, 305

CROSS-REFERENCES:

Admiralty; Search and Seizure;
Summary Proceedings.

Enforcement of in particular proceedings, see the specific titles and the index to this work.

Informations in civil cases generally, see 12 STANDARD PROC. 704, et seq.

For forms, see 9 STANDARD PROC. 953, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITIONS AND DISTINCTIONS. — A. THE TERMS DEFINED. — 1. “**Fine**” Defined. — Viewed in its narrower sense a fine is a pecuniary punishment for an offense against the sovereignty,¹ and in the commonly accepted legal definition it applies only to such punishments as are meted out by the court after conviction.² It has been said, too, that the sole purpose of a fine is punishment.³ In its broader acceptation it is any moneys paid to make an end of the transaction,⁴ and is not necessarily synonymous with pecuniary punishment, nor confined to such recoveries as may be had in criminal prosecutions.⁵

2. “**Forfeiture**” Defined. — In its strict sense forfeiture is the

1. 1 Coke on Litt. 126b; State v. Robertson, 15 Rich. L. (S. C.) 17. Pac. R. Co., 64 Neb. 679, 90 N. W. 877.

2. N. Y.—Village of Lancaster v. Richardson, 4 Lans. 136. See also City of Hudson v. Granger, 23 Misc. 401, 52 N. Y. Supp. 9. N. C.—State v. Addington, 143 N. C. 683, 57 S. E. 398, following State v. Burton, 113 N. C. 655, 18 S. E. 657. See also State v. Ostwalt, 118 N. C. 1208, 24 S. E. 660. Tex.—State v. Steen, 14 Tex. 396.

3. State v. Steen, 14 Tex. 396. See Sinclair v. District of Columbia, 192 U. S. 16, 24 Sup. Ct. 212, 48 L. ed. 322; United States v. More, 3 Cranch (U. S.) 159, 2 L. ed. 397. [a] Punishment synonymous with fine when used by jury in a verdict assessing the “punishment” at a specified sum. Beggs v. State, 122 Ind. 54, 23 N. E. 693.

4. Atchison, T. & S. F. R. Co. v. State, 22 Kan. 1.

5. Mass.—Hanscomb v. Russell, 11 Gray 373. Mo.—State v. West Plains Tel. Co., 232 Mo. 579, 135 S. W. 20. N. C.—State v. Addington, 143 N. C. 683, 57 S. E. 398.

loss of particular property which thereupon becomes vested in the person injured as a recompense for the wrong inflicted upon him.⁶

3. "**Penalty**" Defined.—A penalty or penal sum is a sum of money payable as an equivalent or punishment for an injury.⁷ In other words "penalty" is the all inclusive term, importing not only punishment by whatever name called,⁸ but damages as well,⁹ and though an obligation be in the form of a bond or security it may nevertheless be a penalty.¹⁰ By penalty, however, punishment is usually understood,¹¹ and that too of a pecuniary nature.¹² So a statute which provides for imprisonment does not in the strict sense impose a penalty,¹³ nor is a license tax in the nature of a penalty.¹⁴

4. "**Fine**" or "**Penalty**" as Embracing Costs.—The terms fine and penalty do not of themselves include costs.¹⁵

6. 2 Bl. Com. 267; *Wiseman v. McNulty*, 25 Cal. 230. See also *Union Glass Co. v. First Nat. Bank* No. 1, 10 Pa. Co. Ct. 565.

[a] **Escheat and Forfeiture Distinguished**.—4 Kent's Com. 426. See *Matthews v. Ward*, 10 Gill & J. (Md.) 443.

7. **Okla.**—*Rogers v. Bonnett*, 2 Okla. 553, 37 Pac. 1078. **Utah.**—*Haskins v. Dern*, 19 Utah 89, 56 Pac. 953. **W. Va.** *Hall v. Norfolk & W. R. Co.*, 44 W. Va. 36, 30 S. E. 216.

[a] "**A penalty or penal sum is a sum of money payable as an equivalent for an injury.**" R. & L. Law Dict., quoted in *Eason v. Witcofskey*, 29 S. C. 239, 7 S. E. 291.

[b] Defining "**Penal Statute**" and "**Penalty.**"—In *Woolverton v. Taylor*, 132 Ill. 197, 23 N. E. 1007, the court says: "A penal statute is defined to be 'one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited' (Potter's Dwarrior on Statutes, p. 74). A penalty 'is in the nature of punishment for the non-performance of an act or for the performance of an unlawful act. It involves the idea of punishment, whether enforced by a civil or criminal liability.' Anderson's Law Dict. 763."

8. **Mich.**—*Grover v. Huckins*, 26 Mich. 476. See also *Burrows v. Delta Transp. Co.*, 106 Mich. 582, 64 N. W. 501. **Mo.**—*State ex rel. Reid v. Walbridge*, 119 Mo. 383, 24 S. W. 457. See also *State ex rel. Henson v. Sheppard*, 192 Mo. 497, 91 S. W. 477. **Vt.**—*Drew v. Russell*, 47 Vt. 250. **Eng.**—*Reg. v. Smith*, 9 Cox C. C. 110. See also *Featherstone v. People*, 194 Ill. 325, 62 N. E. 634; *Reg. v. Swan*, 4 Cox C. C. 108.

9. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; *Taylor v. Sandiford*, 7 Wheat. (U. S.) 13, 5 L. ed. 384; *Burrows v. Delta Transp. Co.*, 106 Mich. 582, 64 N. W. 501 (following *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474); *Robinson v. Miner*, 68 Mich. 549, 37 N. W. 21.

10. *United States v. Montell*, Taney 47, 26 Fed. Cas. No. 15,798. See also *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. ed. 780; *State v. Eggerman*, 81 Tex. 569, 16 S. W. 1067; *Hill County v. Atchison*, 19 Tex. Civ. App. 664, 49 S. W. 141.

11. *Taylor v. Matchell*, 1 How. (Miss.) 596.

12. *City of Earlville v. Radley*, 141 Ill. App. 359. See *Queen v. Justices of Middlesex* (1882), L. R. 9 Q. B. Div. (Eng.) 41; *Rex v. Leech*, 17 Ont. L. R. (Can.) 643, 662.

13. *Village of Lancaster v. Richardson*, 4 Lans. (N. Y.) 136. See also *Drew v. Russell*, 47 Vt. 250. But compare *Hodge v. Queen*, L. R. 9 App. Cas. (Eng.) 117, where the court says: "Whether the word 'penalty' is well adapted to include imprisonment may be questioned, but in this Act it is so used. . . . 'Penalty' here seems to be used in its wider sense as equivalent to punishment."

14. *San Luis Obispo County v. Hendricks*, 71 Cal. 242, 11 Pac. 682, quoted and followed in *City of Sacramento v. Dillman*, 102 Cal. 107, 36 Pac. 385.

15. *Lord v. State*, 37 Me. 177. See also *Anglea v. Com.*, 10 Gratt. (51 Va.) 696, where it was held a pardon "from all pains, penalties and forfeitures" would not relieve one from the payment of costs. "The fine is imposed for the purpose of punish-

5. "Fine" and "Amercement" Distinguished. — In its strict common law use "amercement" differed from a fine mainly in the method of its infliction.¹⁶ In its more modern use it is applied to statutory proceedings against officers of the court for neglect of duty.¹⁷

B. FINES, PENALTIES AND FORFEITURES DISTINGUISHED FROM EACH OTHER. — In theory the distinction is clear, that a fine is pecuniary, a forfeiture applies only to property and a penalty is the generic term which includes both the others. But in practice the three terms are often used interchangeably.¹⁸ Whether forfeiture and fine are to be considered synonymous depends entirely upon the context in which they are used.¹⁹ Forfeiture is distinguishable from fine in that it may mean the sequestration of property and fine does not necessarily carry that signification.²⁰ As used in statutes the words forfeiture and penalty are usually synonymous,²¹ but the wording of the particular statute will of course govern.²² A distinction is sometimes drawn between a fine as being imposed in criminal proceedings and a penalty as being recovered in a civil action,²³ and it has been said that the imposition of the fine makes it a penalty.²⁴ While technically these distinctions may be sound there can be no question that the use of the word "penalty" frequently imports a "fine" in the stricter sense.²⁵

II. NATURE OF PROCEEDINGS TO ENFORCE. — A. AS BEING CIVIL OR CRIMINAL. — An action for a penalty is a civil proceeding,²⁶ and is generally considered a "civil cause" within the statutory

ment." The costs "are exacted simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws."

16. See 4 Bl. Com. 379; Bacon's Abr., "Fines and Amercements."

17. See the following cases: *Kan.* *Graves v. Bulkley*, 25 Kan. 249. *Neb.* *Fire Assn. v. Ruby*, 49 Neb. 584, 68 N. W. 939. *N. J.*—*Patterson Bank v. Hamilton*, 13 N. J. L. 158; *Stansbury v. Patent Clock Mfg. Co.*, 5 N. J. L. 433. *Ohio*.—*Wadsworth v. Parsons*, 6 Ohio 449; *Stone v. Ruffin*, 2 Ohio 503; *Dawson v. Holcomb*, 1 Ohio 275; *Bushnell v. Eaton*, Wright 720.

[a] "An amercement is a penalty and is for a fixed sum without regard to the little or much of the plaintiff's damage." *Thompson v. Berry*, 65 N. C. 484. See also *Taylor v. Rhyne*, 65 N. C. 530; *Frost v. Rowland*, 27 N. C. 385; *McLin v. Hardie*, 25 N. C. 407.

18. *Gosselink v. Campbell*, 4 Iowa 296, citing *Webster's Dict.* and *Jac. Law Dict.* See *Ky.*—*Com. v. French*, 130 Ky. 744, 114 S. W. 255. *N. H.*

State v. McConnell, 70 N. H. 158, 46 Atl. 458. *Wis.*—*State v. Hamley*, 137 Wis. 458, 119 N. W. 114.

19. See *Ex parte Alexander*, 39 Mo. App. 108.

20. *Rosebaugh v. Saffin*, 10 Ohio 31.

21. See the following: *Ala.*—*Maclin v. Wilson*, 21 Ala. 670. *Pa.*—*Crawley v. Com.*, 123 Pa. 275, 16 Atl. 416. *S. C.* *Butler v. Butler*, 62 S. C. 165, 40 S. E. 138. *Can.*—*Shrigley v. Taylor*, 4 Ont. Rep. 396.

22. See *Hawkins v. Furnace Co.*, 40 Ohio St. 507; *Southern Exp. Co. v. Com.*, 92 Va. 59, 22 S. E. 809.

23. *Ind.*—*Common Council v. Fairchild*, 1 Ind. 315. *N. Y.*—*City of Hudson v. Granger*, 23 Misc. 401, 52 N. Y. Supp. 9. *N. C.*—*Board of Education v. Henderson*, 126 N. C. 689, 36 S. E. 158.

24. *Wilcox v. Knoxville Borough*, 12 Pa. Co. Ct. 641.

25. See: *U. S.*—*United States v. Reisinger*, 128 U. S. 398, 9 Sup. Ct. 99, 32 L. ed. 480. *Minn.*—*State v. Horgan*, 55 Minn. 183, 56 N. W. 688. *N. H.*—*State v. Marshall*, 64 N. H. 549, 15 Atl. 210.

26. *U. S.*—*United States v. Atlantic Coast Line R. Co.*, 173 Fed. 764, 98 C. C. A. 110; *United States v. Louis-*

and constitutional provisions.²⁷ It is sometimes said to be only "quasi civil" in its nature,²⁸ and it is clearly to some extent criminal in its nature.²⁹ Of course the wording of the statute as a whole determines the nature of the proceedings provided therein.³⁰ In other words the use of particular technical terms is not necessarily conclusive.³¹

It has been said that an action in the name of the state for a penalty is criminal though civil in form,³² and that the true test is to

ville & N. R. Co., 167 Fed. 306, 93 C. C. A. 58; *United States v. Southern Pac. Co.*, 172 Fed. 909; *United States v. Baltimore & O. R. Co.*, 170 Fed. 456; *United States v. Southern Pac. Co.*, 162 Fed. 412. **Ill.**—*People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923; *Town of Partridge v. Snyder*, 78 Ill. 519; *Webster v. People*, 14 Ill. 365; *Caldwell v. Wright*, 25 Ill. App. 74. **Md.**—*State v. Mace*, 5 Md. 337. **Mass.**—*Roberge v. Burnham*, 124 Mass. 277. **Mich.**—*People v. Hoffman*, 3 Mich. 248. **N. H.**—*Dow v. Norris*, 4 N. H. 16. **Neb.**—*Mitchell v. State*, 12 Neb. 538, 11 N. W. 848. **N. C.**—*City of Wilmington v. Davis*, 63 N. C. 582. **Eng.**—*Wilson v. Rostall*, 4 T. R. 753, 100 Eng. Reprint 1283; *Atcheson v. Everitt*, 1 Cowp. 382, 98 Eng. Reprint 1142.

See 9 ENCY. OF EV. 749; 5 ENCY. OF EV. 835.

In admiralty, see 1 STANDARD PROC. 420, note 49.

[a] Within the rule as to removal of causes, see *Gruetter v. Cumberland Tel. & Tele. Co.*, 181 Fed. 248, and the title "Removal of Causes."

[b] A qui tam action is a civil action. *Brophy v. Perth Amboy*, 44 N. J. L. 217.

27. See *Grenada Lumb. Co. v. State*, 98 Miss. 536, 54 So. 8; *Mobile & O. R. Co. v. State*, 51 Miss. 137; *Dow v. Norris*, 4 N. H. 16. But see *Ellmore v. Hoffman*, 2 Ashm. (Pa.) 159, where an action for a penalty is said not to be a "civil cause of action" within the clause of a statute defining jurisdiction. Compare 5 ENCY. OF EV. 835.

28. See *infra*, this note.

[a] "Proceedings for offenses punishable by fine only are of a quasi civil nature and hence statutes permitting informations therein are not unconstitutional," under a constitution forbidding informations for indictable offenses. *Louisville & N. R. Co. v. Com.*, 112 Ky. 635, 66 S. W. 505. See also *Equitable Life Assur. Soc. v. Com.*, 113 Ky. 126, 67 S. W.

388; *Com. v. Avery*, 14 Bush (Ky.) 625. Compare *American Express Co. v. Com.*, 171 Ky. 1, 186 S. W. 887.

29. See *infra*, this note.

[a] An action to recover a penalty is a civil proceeding, though to some extent criminal in its nature. *Hepner v. United States*, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. ed. 720; *United States v. Zucker*, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. ed. 777; *Lees v. United States*, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. ed. 1150; *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746; *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. ed. 684; *United States v. Illinois Cent. R. Co.*, 170 Fed. 542, 95 C. C. A. 628; *United States v. Baltimore & O. S. W. R. Co.*, 159 Fed. 33, 86 C. C. A. 223; *Atcheson v. Everitt*, 1 Cowp. 382, 98 Eng. Reprint 1142. See also *Roberge v. Burnham*, 124 Mass. 277; *Hitchcock v. Munger*, 15 N. H. 97.

30. *State v. West Plains Tel. Co.*, 232 Mo. 579, 135 S. W. 20; *Wells v. Com.*, 107 Va. 834, 57 S. E. 588, *distinguishing Jernigan v. Com.*, 104 Va. 850, 52 S. E. 361, and *Ex parte Marx*, 86 Va. 40, 9 S. E. 475.

31. *State v. McConnell*, 70 N. H. 158, 46 Atl. 458, *citing State v. Pate*, 44 N. C. 244. See *United States v. Elliott*, 25 Fed. Cas. No. 15,043.

[a] The mere "inaccurate use" of the word "fined" does not warrant the assumption that the proceedings are criminal. *Kelly v. Davis*, 1 Head (Tenn.) 71.

32. See *infra*, this note.

[a] The action in the name of the commonwealth to recover a penalty is not a civil action within the meaning of the statutes making judgments of common pleas final but is reviewable on certiorari. While civil in form it is a proceeding for a criminal offense. *Com. v. Betts*, 76 Pa. 465, *approved and followed in Com. v. Butler*, 39 Pa. Super. 125. Compare *Mahoney Boro v. Wadlinger*, 142 Pa. 308, 21 Atl. 823.

inquire whether the proceeding is by indictment or action.³³ But on the other hand it has been held that the character of the proceeding is not changed or affected by such considerations.³⁴ It seems the true test is that the procedure adopted as a whole determines the nature of the proceedings.³⁵ Where the purpose of the proceeding is the personal conviction and sentence of the defendant, it is clearly criminal.³⁶ Therefore if a statute provides a penalty of fine or imprisonment, or both, the procedure for its enforcement must be by criminal proceedings and not civil action.³⁷ Similarly the prosecution must be according to criminal procedure where not only a fine is imposed but the offender is put under bonds not to repeat the offense.³⁸

Actions To Enforce Municipal Ordinances. — In many jurisdictions proceedings to enforce municipal ordinances are considered merely civil proceedings, notwithstanding the procedure is to some degree that applicable to criminal proceedings.³⁹

B. AS BEING EX CONTRACTU OR EX DELICTO. — Though in form *ex contractu* the action for a penalty is in substance *ex delicto*,⁴⁰ the weight of opinion having repudiated the doctrine laid down by Blackstone, that the action arises out of the implied contract between the individual and the community,⁴¹ though that theory is still sometimes

33. *Mitchell v. State*, 12 Neb. 538, 11 N. W. 848.

[a] An information *qui tam* is a criminal proceeding while an action *qui tam* is civil. *Canfield v. Mitchell*, 43 Conn. 169. But see *Ward v. Tyler*, 1 Nott & McC. (S. C.) 22.

34. *Brophy v. Perth Amboy*, 44 N. J. L. 217, the court holding a *qui tam* action to be civil, says: "The distinction suggested that the proceeding is to be regarded as criminal where the act prohibited is punishable by indictment or other criminal procedure, but otherwise as civil, is not allowable. The character of the proceeding for the recovery of the pecuniary penalty is not changed or affected by such considerations."

35. *Mo.*—*State v. Ford*, 70 Mo. 469. *N. Y.*—*City of Hudson v. Granger*, 23 Misc. 401, 52 N. Y. Supp. 9. *Vt.* *Waters v. Day*, 10 Vt. 487.

36. See *Dobbins Distillery v. United States*, 96 U. S. 395, 24 L. ed. 637; *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820.

37. *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. ed. 684; *United States v. Clafin*, 97 U. S. 546, 24 L. ed. 1082. See also: *U. S.*—*United States v. Morin*, 4 Biss. 93, 26 Fed. Cas. No. 15,810. *Wash.*—*Fowler v. United States*, 1 Wash. Ter. 3. *Wyo.* *Fein v. United States*, 1 Wyo. 246.

[a] The prosecuting attorney may

not waive the punishment by proceeding in a civil action to collect the money penalty. *United States v. Morin*, 4 Biss. 93, 26 Fed. Cas. No. 15,810.

38. *Pardee v. Smith*, 27 Mich. 33.

39. See the title "**Municipal Corporations.**"

40. *U. S.*—*Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908. *Ala.* *Wright v. Sample*, 162 Ala. 222, 50 So. 268. See also *Crawford v. Slaton*, 133 Ala. 393, 31 So. 940; *Higdon v. Kennermer*, 120 Ala. 193, 24 So. 439; *Williams v. Bowden*, 69 Ala. 433. *Ga.* *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 11 S. E. 396. *Ill.*—*Bowers v. Green*, 2 Ill. 42; *Coles v. Madison County*, 1 Ill. 154. *Ind.*—*Western Union Tel. Co. v. Young*, 93 Ind. 118. *N. Y.*—*McCoun v. New York Cent. & H. R. R. Co.*, 7 Lans. 75. *Pa.*—*Schaffer v. M'Namee*, 13 Serg. & R. 44; *Zeigler v. Gram*, 13 Serg. & R. 102.

[a] **Penalty for Failure To Deliver Telegram.**—*Western Union Tel. Co. v. Bright*, 90 Va. 778, 20 S. E. 146.

41. See cases in preceding note.

[a] **Doctrine of Blackstone.**—In *Hitchcock v. Munger*, 15 N. H. 97, in discussing the nature of a *qui tam* action the court says: "In *Hill v. Davis*, 4 Mass. 140 (137), following the doctrine of Blackstone, 3 Comm. 117, 161, the court considered the action as *ex contractu*. But in *Hardyman v.*

met with.⁴² Information qui tam for a penalty has been said to be in nature an action of tort.⁴³

III. JURISDICTION. — A. EXTRATERRITORIAL JURISDICTION. Penal laws have no extraterritorial force, and therefore cannot be enforced as against persons not within the state,⁴⁴ but a penalty may be enforced though part of the transaction on which it is based took place without the state.⁴⁵ The law is fundamental that no country will enforce the penal laws of another country.⁴⁶ Pursuant to this rule the courts of one state will not enforce the penal laws of a sister state,⁴⁷ and the courts of the respective states will not enforce the penal laws of the United States.⁴⁸ The term "penal" law is here used in its

Whitaker, 2 East 573 (n), it was held to be founded upon a tort. And such is the opinion of this court in *Powers v. Speer*, 3 N. H. 35."

42. *Katzenstein v. Raleigh & D. R. Co.*, 84 N. C. 688. See also *Doughty v. Atlantic, etc. R. Co.*, 78 N. C. 22; *Town of Edenton v. Wool*, 65 N. C. 379; *City of Wilmington v. Davis*, 63 N. C. 582. Compare *Wartman v. Empire Loan Co.*, 45 Tex. Civ. App. 469. 101 S. W. 499.

43. *United States v. Elliott*, 25 Fed. Cas. No. 15,043.

44. *Jones v. Fidelity Loan & Trust Co.*, 7 S. D. 122, 63 N. W. 553. See also *Western Trans. & Coal Co. v. Kilderhouse*, 87 N. Y. 430.

45. *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12, the sender of a telegram may recover a statutory penalty on its non-delivery without the state.

46. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; *The Antelope*, 10 Wheat. (U. S.) 66, 6 L. ed. 268. See also: **U. S.**—*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239; *State of Indiana v. Alleghany Oil Co.*, 85 Fed. 870. **Md.**—*First Nat. Bank v. Price*, 33 Md. 487. **Mass.**—*Halsey v. McLean*, 12 Allen 438. **N. J.**—*Derrickson v. Smith*, 27 N. J. L. 166. **Ohio.** *Kulp v. Fleming*, 65 Ohio St. 321, 62 N. E. 334. **Pa.**—*Aultman's Appeal*, 98 Pa. 505.

See 17 STANDARD PROC. 773, note 77.

47. *Thornton v. Dean*, 19 S. C. 583. See also: **U. S.**—*Stearns v. United States*, 2 Paine 300, 22 Fed. Cas. No. 13,342. **Ill.**—*Sherman v. Gassett*, 9 Ill. 521. **Mass.**—*Gale v. Eastman*, 7 Met. 14. **Vt.**—*Slack v. Gibbs*, 14 Vt. 357. **Wis.**—*Bettys v. Milwaukee & St. P. R. Co.*, 37 Wis. 323, double damages

given by way of penalty for killing stock.

See 15 STANDARD PROC. 648.

[a] This rule extends to the enforcement of a judgment based on a penal statute of a sister state notwithstanding the constitutional provision that full faith and credit must be given to such judgments. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239, citing *Wharton's Conflict of Laws*, §833; *Westlake's International Law* (1st ed.), §388; *Piggott on Foreign Judgments*, §§209, 210; 2 *Kames on Equity* (3rd ed.) 326, 366; *Story's Conflict of Laws*, §§600, 622, and *disapproving Ia.*—*Indiana v. Helmer*, 21 Iowa 370. **Mass.** *Healy v. Root*, 11 Pick. 389. **Ohio.** *Spencer v. Brockway*, 1 Ohio 259, in so far as they hold the contrary on the ground that when these decisions were rendered the provisions of the constitution and acts of congress as to full faith and credit had not been given a full exposition from this court. See also 15 STANDARD PROC. 648.

48. **U. S.**—*Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. ed. 715. **Conn.**—See *Ely v. Peck*, 7 Conn. 239 (where it was attempted under an act of congress to enforce a penalty against a seaman for desertion); *Davison v. Champlin*, 7 Conn. 244, where the penalty was for violation of the postal laws. **Ky.**—*Haney v. Sharp*, 1 Dana 442. **Mass.**—*Ward v. Jenkins*, 10 Met. 583. **N. H.**—*State v. Pike*, 15 N. H. 83. **N. Y.**—*United States v. Lathrop*, 17 Johns. 4; *Delafield v. State*, 2 Hill 159. **Wis.**—*Brigham v. Claffin*, 31 Wis. 607.

[a] Where such jurisdiction has been upheld it is said to be optional with the state court to refuse to assume it. *Stearns v. United States*, 2 Paine 300, 22 Fed. Cas. No. 13,341.

international sense as distinguished from a law which though in form a penalty is remedial in its nature.⁴⁹

The United States courts have jurisdiction to entertain actions for the recovery of penalties given by state statutes to individuals to compensate them for injuries sustained, but will not entertain jurisdiction of a cause where the penalty is to be paid to the state treasury, even though part thereof goes to the informer or person suing therefor.⁵⁰ The supreme court of the United States will not take jurisdiction of an action by a state to enforce a penalty under its original jurisdiction of controversies between a state and citizens of another state,⁵¹ nor will that court lend its aid to enforce such penal statutes by injunction.⁵²

B. JURISDICTION OF EQUITY AND ADMIRALTY COURTS.—It is a universal rule never to enforce either a penalty or a forfeiture in equity,⁵³ the only apparent exceptions to this rule being due to constitutional and statutory enactments abolishing the distinctions between law and equity courts.⁵⁴

Jurisdiction as at Common Law or in Admiralty.—Where a seizure is made on land, the United States district court sits as a common law court, but where it is made on navigable waters the court sits as a court of admiralty.⁵⁵

C. JURISDICTION OF PARTICULAR COURTS AS DEPENDENT ON STATUTES.—The jurisdiction of particular courts to try actions for penalties and forfeitures is to be determined by the constitution and statutes of the particular states,⁵⁶ or by the constitution and statutes

[b] **Jurisdiction conferred on state by act of congress** to enforce penalty created by the act. See *Missouri River Tel. Co. v. First Nat. Bank*, 74 Ill. 217. Compare *In re Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, and 17 STANDARD PROC. 827.

49. See *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327 (*explaining* *Claffin v. Houseman*, 93 U. S. 130, 23 L. ed. 833); *Ordway v. Central Nat. Bank*, 47 Md. 217; 15 STANDARD PROC. 648.

[a] **As to distinction between penal and remedial laws**, see *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123.

50. *Younts v. Southwestern Tel. & Tele. Co.*, 192 Fed. 200. See also *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; *Boston & Maine R. Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615; *United Breweries Co. v. Colby*, 170 Fed. 1008, writ of error dismissed, 178 Fed. 1005.

51. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239. See also *Oklahoma v. Gulf, C. & S. F. R. Co.*, 220 U. S. 290, 31

Sup. Ct. 437, 55 L. ed. 469; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123.

52. *Oklahoma v. Gulf, C. & S. F. R. Co.*, 220 U. S. 290, 31 Sup. Ct. 437, 55 L. ed. 469.

53. *Woolverton v. Taylor*, 132 Ill. 197, 23 N. E. 1007; *Queenan v. Palmer*, 117 Ill. 62, 619, 7 N. E. 470, 613. And see the title "**Equity Jurisdiction and Procedure.**"

54. See *Grenada Lumb. Co. v. State*, 98 Miss. 536, 54 So. 8.

55. "*The Sarah*," 8 Wheat. (U. S.) 391, 5 L. ed. 644. See also *Shawnee Nat. Bank v. United States (C. C. A.)*, 249 Fed. 583.

For forfeiture proceedings in admiralty, see the title "**Admiralty.**"

56. See the constitutions and statutes, and the following cases: **Ky.** *Com. v. Sherman*, 85 Ky. 686, 4 S. W. 790; *Phoenix Ins. Co. v. Com.*, 5 Bush 68. **Mo.**—*State v. Ford*, 70 Mo. 469. **R. I.**—*State v. Slocum*, 9 R. I. 373. **Tex.**—*State v. Eggerman Co.*, 81 Tex. 569, 16 S. W. 1067; *Aulanier v. The Governor*, 1 Tex. 653; *Hill County v. J. M. Atkinson*, 19 Tex. Civ. App. 664, 49 S. W. 141.

of the United States.⁵⁷

D. JURISDICTION OF JUSTICES AND OTHER INFERIOR COURTS. — The jurisdiction of inferior courts such as justices of the peace depend entirely upon the constitutions and statutes and upon the general principles elsewhere treated.⁵⁸ A general grant of civil jurisdiction carries jurisdiction of actions for penalties in the absence of express contrary intention.⁵⁹

E. AS AFFECTED BY AMOUNT IN CONTROVERSY. — In arriving at the minimum or maximum jurisdictional amount the general rules, elsewhere treated, are applied.⁶⁰ Where exclusive jurisdiction of suits for a particular penalty is given by statute to a justice's court, it is not ousted of jurisdiction because several penalties are joined, the aggregate amount of which exceeds the ordinary jurisdictional limit for a justice's court.⁶¹

IV. VENUE.⁶² — At the early common law actions for penalties were transitory,⁶³ but later in England, ⁶⁴ and by statute in most of

57. *Lees v. United States*, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. ed. 1150.

[a] The United States courts have exclusive jurisdiction to determine a forfeiture under the laws of the United States. *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 4 L. ed. 381; *Slocum v. Mayberry*, 2 Wheat. (U. S.) 1, 4 L. ed. 169. See also the title "United States Courts."

58. See the titles "Jurisdiction;" "Justices of the Peace;" also 17 STANDARD PROC. 966, and the following cases: *N. J.*—*Koch v. Vanderhoof*, 49 N. J. L. 619, 9 Atl. 771. Compare *Woolley v. Bell*, 69 N. J. L. 581, 55 Atl. 66. *N. Y.*—*Mayor, etc. of New York v. Decker*, 12 Daly 64. *Pa.*—*Ellmore v. Hoffman*, 2 Ashm. 159, following *Zeigler v. Gram*, 13 Serg. & R. 102, and *Schaffer v. M'Namee*, 13 Serg. & R. 44.

[a] Effect on justice's jurisdiction of title to land being drawn in question in action of debt for penalty arising out of trespass on land, see *Morrison v. Bedell*, 22 N. H. 234; also 17 STANDARD PROC. 967, note 63 [a]; 17 STANDARD PROC. 946, et seq.

[b] Whether jurisdiction exclusive, see *Cal.*—*Smith v. Omnibus R. Co.*, 36 Cal. 281; *Reed v. Omnibus R. Co.*, 33 Cal. 212. *Ill.*—*People v. Young*, 72 Ill. 411. *N. H.*—*Rochester v. Roberts*, 29 N. H. 360. *N. C.*—*City of Wilmington v. Davis*, 63 N. C. 582.

59. See 17 STANDARD PROC. 866, and following cases: *Ill.*—*Indianapolis, etc. R. Co. v. People*, 91 Ill. 452. *Mass.* *Com. v. Conn. R. Co.*, 15 Gray 447. See also *Hansecomb v. Russell*, 11 Gray 373. *N. J.*—*Koch v. Vanderhoof*, 49

N. J. L. 619, 9 Atl. 771. *N. C.*—*Katzenstein v. Raleigh & G. R. Co.*, 84 N. C. 688, following *City of Wilmington v. Davis*, 63 N. C. 582.

60. See 17 STANDARD PROC. 831, et seq.

[a] Where several penalties are joined, see 17 STANDARD PROC. 864, 867. (1) Where the offense is completed by one act, additional penalties for further acts connected therewith are added together and the jurisdiction determined by the sum of the penalties. *Conn.*—*Barkhamsted v. Parsons*, 3 Conn. 1. *Miss.*—*Mobile & O. R. Co. v. State*, 51 Miss. 137. *Can.*—*Reg. v. Plows*, 26 Ont. 339. Compare *Indianapolis, etc. R. Co. v. People*, 91 Ill. 452; and 17 STANDARD PROC. 867. (2) Where the aggregate sum is above the minimum limit of its jurisdiction, the superior court has jurisdiction. *Carter v. Wilmington, etc. R. Co.*, 126 N. C. 437, 36 S. E. 14. See also *Burrell v. Hughes*, 116 N. C. 430, 21 S. E. 971; *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890.

61. *Reed v. Omnibus R. Co.*, 33 Cal. 212, followed in *Smith v. Omnibus R. Co.*, 36 Cal. 281.

62. See generally "Venue."

63. *Conn.*—*Gilbert v. Marcy*, 1 Kirby 401. *Neb.*—*Omaha & R. V. R. Co. v. Brown*, 29 Neb. 492, 46 N. W. 39. *N. C.*—*Green v. Mangum*, 7 N. C. 39. *Vt.*—*McLeod v. Connecticut, etc. R. Co.*, 58 Vt. 727, 6 Atl. 648.

See also Will's Gould on Pl., pp. 267, 275, 282; Bacon's Abr., "Actions Local and Transitory."

64. St. 31 Eliz., ch. 5, §2. See also 21 Jac. 1, ch. 4; *Whitehead v. Wynn*,

the states, the action is triable in the county where the offense was committed.⁶⁵ In some jurisdictions the statutes specifically permit the action to be brought either where the act was done or where the defendant is found,⁶⁶ or in the case of forfeiture of property, make the venue either where the defendant or the property is found.⁶⁷ Where there is no statute specifically fixing the venue, the question becomes one for local construction of the general statutes governing venue.⁶⁸ Statutes fixing the venue are construed to be mandatory,⁶⁹ and it has been said that the jurisdiction of the "subject-matter" is involved so that it cannot be waived.⁷⁰ Where recognizance has been broken, the action is properly brought in the county where the recognizance was

5 M. & S. 427, 105 Eng. Reprint 1107; *Barber v. Tilson*, 3 M. & S. 429, 105 Eng. Reprint 672; *Robinson v. Garthwaite*, 9 East 296, 103 Eng. Reprint 586.

But by the "Judicature Acts" the importance of the distinction between local and transitory actions is largely done away with. *Bacon's Abr.*, "Actions Qui Tam," C.

65. See the statutes.

66. See the statutes, and act of congress March 3, 1911, ch. 231, §43; Ala. Code, 1907, §6110.

[a] **Filing Corporation Reports.**—(1) Proceedings to enforce a penalty against an officer of a corporation for making and filing a false report should be begun where the report was filed, and not where a debt was contracted on which the right to forfeiture was based. *Veeder v. Baker*, 83 N. Y. 156. (2) Likewise on failure to file reports a corporation should be sued for the penalty in the county where the report should have been filed and not in the county where its principal office was situated. *Com. v. Morrell Ref. Car. Co.*, 129 Ky. 738, 112 S. W. 860.

[b] A corporation disobeying an order to do an act in a county other than that of its principal office, should be sued in the county where its office and officers are situated. *Central R. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518.

[c] But proceedings against a corporation (1) for carrying on business without first complying with a statute requiring certain statements to be filed is properly begun where such business is carried on (*Com. v. Grand Cent.*, etc. Bldg. Com., 97 Ky. 325, 30 S. W. 626), and (2) the same rule has been applied where an agent failed to comply with certain regulations. *Ithaca*

Fire Dept. v. Beecher, 99 N. Y. 429, 2 N. E. 154.

[d] **Prosecution for accepting rebates**, should be in the county where they were given. *Com. v. Long*, 17 Ky. L. Rep. 207, 30 S. W. 628.

67. See 1 Rem. & Bal. Code (Wash.), §966.

68. See the title "Venue," and the following cases: Ill.—*Crabb v. Young*, 146 Ill. App. 48. Miss.—*Cox v. Ross*, 56 Miss. 481. Neb.—*McNee v. Sewell*, 14 Neb. 532, 16 N. W. 827. Tex.—*Wartman v. Empire Loan Co.*, 45 Tex. Civ. App. 469, 101 S. W. 499. Vt.—*Slack v. Gibbs*, 14 Vt. 357. See also *McLeod v. Connecticut & P. R. R. Co.*, 58 Vt. 727, 6 Atl. 648.

69. *Barton v. Hanauer*, 4 Kan. App. 531, 44 Pac. 1007. See also *Ware v. Henderson*, 25 S. C. 385, following *Trapier v. Waldo*, 16 S. C. 276. Compare *Morris v. Farrington*, 133 Mass. 466.

[a] See as construing these provisions generally: Colo.—*Denver & R. G. R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285. Me.—*Chesley v. Brown*, 11 Me. 143. Neb.—*Omaha & R. V. R. Co. v. Brown*, 29 Neb. 492, 46 N. W. 39.

[b] **Not Applicable to Justice Court.** *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799. Compare *Chesley v. Brown*, 11 Me. 143.

[c] **The statute extends to acts of omission** as well as commission. So held in *Whitehead v. Wynn*, 5 M. & S. 427, 105 Eng. Reprint 1107, the action being for a penalty for absenting oneself from a certain parish, it was contended that absenting was not committing any act.

70. *Baltimore & O. R. Co. v. Hollenberger*, 76 Ohio St. 177, 81 N. E. 184. See the titles "Jurisdiction;" "Venue."

of record and not in the county where the crime was committed.⁷¹ Where the acts constituting the offense were not all committed in one place, the question of venue may be merely one of determining at what point in the chain of acts the offense was completed,⁷² or may be one involving simply the form of the particular proceeding.⁷³ Where the cause of action is not wholly for a penalty the statute does not apply.⁷⁴

V. WHAT IS THE PROPER REMEDY.—A. AS DETERMINED BY STATUTE.—Subject only to constitutional limitations upon that power there can be no question that the legislative body having power to enact a law inflicting a penalty, has also the power to prescribe the means of enforcing the penalty,⁷⁵ and may not only prescribe a procedure but decree in whom shall be the right of enforcing the

71. *Smith v. Collins*, 42 Kan. 259, 21 Pac. 1058.

72. See *Chicago, R. I. & P. R. Co. v. Territory*, 25 Okla. 238, 105 Pac. 677, where the suit was for a penalty for unlawfully receiving and shipping game. The question turns upon whether the offense was committed, under the particular statute, when the game was received or subsequently. Compare *Baltimore & O. R. Co. v. Hollensberger*, 76 Ohio St. 177, 81 N. E. 184.

73. See *Ah Fong v. Sternes*, 79 Cal. 30, 21 Pac. 381; *People v. Platt*, 46 Hun (N. Y.) 394.

74. *Ah Fong v. Sternes*, 79 Cal. 30, 21 Pac. 381; *Comrs. of Kearny Co. v. Rush*, 44 Kan. 231, 24 Pac. 484.

75. **U. S.**—*Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. ed. 463. **Ariz.**—*Miami Copper Co. v. State*, 17 Ariz. 127, 149 Pac. 758, 762. **Ohio**.—*Markle v. Town Council of Akron*, 14 Ohio 586. **Va.**—*Southern Express Co. v. Com.*, 92 Va. 59, 22 S. E. 809. **Wis.**—*State v. Zillmann*, 121 Wis. 472, 98 N. W. 543.

See also *McFarland v. Mississippi River, etc. R. Co.*, 175 Mo. 422, 75 S. W. 152.

[a] **Statute Construed To Permit Indictment for a Mere Penalty.**—*United States v. Craft*, 43 Fed. 374, following *United States v. Moore*, 11 Fed. 248; *United States v. James Bougher*, 6 McLean 277, 24 Fed. Cas. No. 14,627. See also *United States v. Abbott*, 24 Fed. Cas. No. 14,416.

[b] Words "forfeit and pay" held to indicate civil remedy intended. *United States v. Claffin*, 97 U. S. 546, 24 L. ed. 1082.

[c] "Sued for and recovered" (1) has been held to be primarily ap-

plicable to civil actions (*Stockwell v. United States*, 13 Wall. 531, 20 L. ed. 491), (2) but do not of themselves preclude a criminal proceeding. *United States v. Moore*, 11 Fed. 248. See also *Walsh v. United States*, 3 Woodb. & M. 341, 29 Fed. Cas. No. 17,116. But compare *State v. Helfrid*, 2 Nott & McC. (S. C.) 233.

[d] "Action at law" construed to mean criminal prosecution. *State v. Carr*, 6 Ore. 133.

[e] **Fines for Offenses May Be Recovered by Civil Action.**—*Com. v. Sherman*, 85 Ky. 686, 4 S. W. 790; *Com. v. Louisville & N. R. Co.*, 80 Ky. 291; *Harp v. Com.*, 22 Ky. L. Rep. 1792, 61 S. W. 467; *Com. v. Louisville & N. R. Co.*, 18 Ky. L. Rep. 610, 37 S. W. 589. See *Equitable Life Assur. Soc. v. Com.*, 113 Ky. 126, 67 S. W. 388; *Louisville & N. R. Co. v. Com.*, 112 Ky. 635, 66 S. W. 505.

[f] **Construing "fines" and "penalties"** as indicating civil or criminal form of proceeding intended by statute, see **Ill.**—*Carle v. People*, 12 Ill. 285. **Minn.**—*State v. Horgan*, 55 Minn. 183, 56 N. W. 688. **Neb.**—*State v. Missouri Pac. R. Co.*, 64 Neb. 679, 90 N. W. 877. **N. H.**—*State v. Marshall*, 69 N. H. 549, 15 Atl. 210. **Va.**—*Russell v. Louisville, etc. R. Co.*, 93 Va. 322, 25 S. E. 99. **Wis.**—*State v. Hamley*, 137 Wis. 458, 119 N. W. 114. See also *Stoltman v. Lake*, 124 Wis. 462, 102 N. W. 920; *Ogden v. City of Madison*, 111 Wis. 413, 87 N. W. 568; *Chafin v. Waukesha Co.*, 62 Wis. 463, 22 N. W. 732; *City of Oshkosh v. Schwartz*, 55 Wis. 483, 13 N. W. 552; *State v. Hayden*, 32 Wis. 663.

[g] **Changing form of remedy construed not to change grade of offense.**

penalty, and to whom the penalty shall belong when recovered.⁷⁶

Exclusiveness of Statutory Remedy.—Generally the method of enforcing a penalty prescribed by the statute creating a penalty, fine or forfeiture is exclusive,⁷⁷ especially where the statute creates a new offense, prescribes a penalty and a method of enforcing that penalty.⁷⁸ If the offense was formerly punishable, but a statute creates a new method of punishment, the new method is merely cumulative.⁷⁹ The

State *v. Maze*, 6 Humph. (Tenn.) 17.

[h] **Use of Words "Bill, Plaint or Information."**—By weight of opinion indictment lies as well as civil action. *Wiley v. Yale*, 1 Met. (Mass.) 553; *State v. Meyer*, 1 Spears (S. C.) 305; *State v. Helfrid*, 2 Nott & McC. (S. C.) 233, explaining *State v. Matthews*, 2 Brev. 82. But to the contrary, see *State v. Corwin*, 4 Mo. 609; *Journey v. State*, 1 Mo. 428.

[i] **That word "bill" means "debt,"** hence action of debt lies. *Sims v. Alderson*, 8 Leigh (35 Va.) 479.

[j] **Penalties for acts not criminal at common law** need not be prosecuted by criminal charge under the constitution. *Railway Co. v. State*, 56 Ark. 166, 19 S. W. 572. See also *Kansas City, etc. R. Co. v. State*, 63 Ark. 134, 37 S. W. 1047; *Railway Co. v. State*, 55 Ark. 200, 17 S. W. 806.

76. *Southern Exp. Co. v. Com.*, 92 Va. 59, 22 S. E. 809, giving fines to a particular fund.

[a] **In absence of statute** no part of fine can be given to informer. *State v. Sinnott*, 15 Neb. 472, 19 N. W. 613.

[b] **Permitting Any One To Sue.** **Constitutionality.**—Acts giving the penalty prescribed for a violation of a statute to anyone who will sue for the same are constitutional. *Goodwin v. Caraleigh Fertilizer Works*, 119 N. C. 120, 25 S. E. 795; *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 968.

77. **Cal.**—*Reed v. Omnibus R. Co.*, 33 Cal. 212, followed in *Smith v. Omnibus R. Co.*, 36 Cal. 281. **Mass.**—*Wiley v. Yale*, 1 Met. 553. **Mo.**—*State v. Corwin*, 4 Mo. 609. See also *Journey v. State*, 1 Mo. 428. **S. C.**—*State v. Meyer*, 1 Spears 305; *State v. Helfrid*, 2 Nott & McC. 233; *State v. Matthews*, 2 Brev. 82. **Va.**—*Sims v. Alderson*, 8 Leigh (35 Va.) 479.

78. **U. S.**—*United States v. Laeski*, 29 Fed. 699; *Pentlarge v. Kirby*, 19 Fed. 501. **Cal.**—*People v. Craycroft*, 2 Cal. 243, cited with approval in *County of Monterey v. Abbott*, 77 Cal. 541, 20 Pac. 73, 18 Pac. 113. **Ky.**—*Com.*

v. Louisville & N. R. Co., 18 Ky. L. Rep. 610, 37 S. W. 589. **Neb.**—*State v. Sinnott*, 15 Neb. 472, 19 N. W. 613. **N. C.**—*State v. Snuggs*, 85 N. C. 541; *State v. Loftin*, 19 N. C. 31. **Eng.** *Millar v. Taylor*, 4 Burr. 2303, 2323, 98 Eng. Reprint 201. See also *The Queen v. Buchanan*, 8 Q. B. 888, 115 Eng. Reprint 1107; *Rex v. Wright*, 1 Burr. 543, 97 Eng. Reprint 441; *Rex v. Davis*, 1 Sayer 163, 96 Eng. Reprint 839; *Castle's Case*, Cro. Jac. 644, 79 Eng. Reprint 555; *The Queen v. Hall*, L. R. (1891), 1 Q. B. 747.

79. **Cal.**—*People v. Craycroft*, 2 Cal. 243, cited with approval in *County of Monterey v. Abbott*, 77 Cal. 541, 20 Pac. 73, 18 Pac. 113. **Neb.**—*State v. Sinnott*, 15 Neb. 472, 19 N. W. 613. **N. C.**—*State v. Loftin*, 19 N. C. 31. **S. C.**—*Gibbes v. Town Council of Beaufort*, 20 S. C. 213. **Eng.**—*Rex v. Robinson*, 2 Burr. 800, 97 Eng. Reprint 568. See also *Rex v. Boyall*, 2 Burr. 832, 97 Eng. Reprint 586; *Rex v. Davis*, 1 Sayer 163, 96 Eng. Reprint 839; *Queen v. Hall*, L. R. (1891), 1 Q. B. 747; *Reg. v. Lovibond*, 1871, 24 L. T. 357.

[a] **Presumption as to Intent To Create New Remedy.**—In the absence of language showing a clear intention so to do, it will not be presumed that it was the intention by a new statute to take away the well recognized method of enforcing a penalty by indictment. *United States v. Stevenson*, 215 U. S. 190, 30 Sup. Ct. 35, 54 L. ed. 153; *Snowden v. State*, 69 Md. 203, 14 Atl. 528. Compare *United States v. James Bougher*, 6 McLean, 277, 24 Fed. Cas. No. 14,627.

[b] **Effect of Prescribing Penalty in Subsequent Clause.**—Since the doing of an act forbidden by law is a misdemeanor at common law, it has been held that indictment lies where the mode of procedure is specified only in a subsequent statute or subsequent substantive clause of the same statute. *Phillips v. State*, 19 Tex. 158. See also *Moore v. State*, 9 Yerg. (Tenn.) 353.

rule applies not only to the extent of forbidding criminal procedure where a civil action is prescribed by the statute,⁸⁰ and conversely that a civil action will not lie where a criminal proceeding is specified,⁸¹ but applies also to the particular form of the civil action to be used.⁸² The character of the procedure is not to be determined merely by the classification of the statute in a re-compilation.⁸³ The statutes sometimes provide that the remedy shall not be exclusive.⁸⁴

B. RULES WHERE NO PROCEDURE IS PRESCRIBED.—1. Common Law Remedy by Indictment.—If a statute fails to prescribe any method of enforcing a penalty for an offense, created by it, indictment lies at common law,⁸⁵ though in jurisdictions which do not recognize

[c] **Prosecutions of Distinct Common Law Offense.**—The giving of a penalty and prescribing a remedy does not take away the common law right to prosecute by indictment for a distinct common law offense. *State v. Cole*, 2 McCord (S. C.) 117.

80. Mo.—*State v. Ford*, 70 Mo. 469. **Ohio.**—*State v. Chandler*, 8 Ohio Dec. (Reprint) 322. **Tenn.**—*State v. Maze*, 6 Humph. 17; *Moore v. State*, 9 Yerg. 353. **Can.**—*Rex v. Hays*, 14 Ont. L. R. 201.

[a] **Embargo Act.**—*United States v. Allen*, 4 Day 474, 24 Fed. Cas. No. 14,431. See also *United States v. Gadsby*, 1 Cranch C. C. 55, 25 Fed. Cas. No. 15,180; *United States v. Ellis*, 1 Cranch C. C. 125, 25 Fed. Cas. No. 15,046.

[b] **Keeping a Billiard Table Without License.**—*State v. Fillyaw*, 3 Ala. 735. See also *State v. Matthews*, 2 Brev. (S. C.) 82.

[c] **Failure To Signal at Railway Crossing.**—*Kansas City, etc. R. Co. v. State*, 63 Ark. 134, 37 S. W. 1047; *Railway Co. v. State*, 55 Ark. 200, 17 S. W. 806.

81. Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 578, 31 Sup. Ct. 612, 55 L. ed. 582. See also *Hepner v. United States*, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. ed. 720; *Ward v. Tyler*, 1 Nott & McC. (S. C.) 22.

82. Confrey v. Stark, 73 Ill. 187. See also *Race v. Oldridge*, 90 Ill. 250; *Vaughan v. Thompson*, 15 Ill. 39. Compare *Wiley v. Yale*, 1 Met. (Mass.) 553.

[a] **Where the statutes prescribe an action of debt for the enforcement of a town ordinance that form of action must be used.** *Israel v. Town of Jacksonville*, 2 Ill. 290.

83. Wells v. Com., 107 Va. 834, 57 S. E. 588, putting "Sunday law" in

chapter treating of offenses against morality and decency. See also *United States v. Howard*, 17 Fed. 638, where putting sections in the same title in a revision was held not to limit the method of proceeding. But compare *United States v. Payne*, 22 Fed. 426, and *In re Seagraves*, 4 Okla. 422, 48 Pac. 272, where the same statute was declared to provide only a penalty recoverable by action of debt and not to create an indictable offense.

84. See the statutes, and *State v. Mackin*, 51 Mo. App. 129, *distinguishing State v. Amor*, 77 Mo. 568. See also *McFarland v. Mississippi River, etc. R. Co.*, 175 Mo. 422, 75 S. W. 152, where a penalty recoverable only by an injured party was held to be of a private nature and not within the statute.

85. Mass.—*Colburn v. Sweet*, 1 Met. 232. **R. I.**—*State v. Smith*, 35 R. I. 285, 86 Atl. 887; *State v. Providence Gas Co.*, 27 R. I. 142, 61 Atl. 44. **S. C.** See *State v. Meyer*, 1 Spears 305.

[a] **Indictment Proper.**—In *State v. McConnell*, 70 N. H. 158, 46 Atl. 458, quoted with approval in *State v. Waterhouse*, 71 N. H. 488, 53 Atl. 304, the court says: "A forfeiture prescribed by statute for an offense created by statute is properly recovered by indictment or information when no person is named to take the penalty." Both cases cite *State v. Tappan*, 15 N. H. 91, wherein it was held that the statute of limitations recognized indictment as a proper mode of prosecution in behalf of the state where no prosecution was instituted by an individual.

[b] **Statute prescribing recovery by "due process"**—indictment lies. *Ransdell v. Patterson*, 1 App. Cas. (D. C.) 489.

the common law, such a statute is said to be unenforceable.⁸⁶ If no procedure be prescribed where an act is declared to be unlawful and a punishment or penalty is annexed thereto, the sovereignty may proceed either by civil action or by indictment, or by information.⁸⁷

2. Action of Debt.—Where the form of the action is not specified, it has been almost universally held that debt will lie for the recovery of a pecuniary penalty;⁸⁸ but it has been held that debt, assumpsit, trespass, or case, lies as the particular nature of the wrong or injury may require.⁸⁹ Also from its nature, debt cannot lie unless the penalty prescribed be a sum certain⁹⁰ or capable of being easily as-

86. *State v. Williams*, 7 Rob. (La.) 252.

87. U. S.—*United States v. Stevenson*, 215 U. S. 190, 30 Sup. Ct. 35, 54 L. ed. 153; *Lees v. United States*, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. ed. 1150; *Adams v. Woods*, 2 Cranch 336, 2 L. ed. 297; *Walsh v. United States*, 3 Woodb. & M. 341, 29 Fed. Cas. No. 17,116; *United States v. James Bougher*, 6 McLean 277, 24 Fed. Cas. No. 14,627. **Minn.**—*State v. Shelvin-Carpenter Co.*, 99 Minn. 158, 108 N. W. 935, *reaffirmed* in 102 Minn. 470, 113 N. W. 634, 114 N. W. 738. **Neb.** *State v. Missouri Pac. R. Co.*, 64 Neb. 679, 90 N. W. 877, *citing State v. Sinnott*, 15 Neb. 472, 19 N. W. 613; *Mitchell v. State*, 12 Neb. 538, 11 N. W. 848.

88. U. S.—*United States v. Tilden*, 28 Fed. Cas. No. 16,523; *United States v. James Bougher*, 6 McLean 277, 24 Fed. Cas. No. 14,627. See also *Walsh v. United States*, 3 Woodb. & M. 341, 29 Fed. Cas. No. 17,116; *United States v. Elliott*, 25 Fed. Cas. No. 15,043; *United States v. Allen*, 24 Fed. Cas. No. 14,431; *United States v. Stockwell*, 3 Cliff. 284, 23 Fed. Cas. No. 13,466; *Jacob v. United States*, 1 Brock. 520, 13 Fed. Cas. No. 7,157. **Ala.**—*Southern Car & F. Co. v. Calhoun County*, 141 Ala. 250, 37 So. 425, *following Spence v. Thompson*, 11 Ala. 746. **Ariz.** *Miami Copper Co. v. State*, 17 Ariz. 127, 149 Pac. 758. **Conn.**—*Drakesly v. Roots*, 2 Root 138. **Ga.**—*Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 11 S. E. 396. **Ill.**—*Vaughan v. Thompson*, 15 Ill. 39. **Ky.**—*Portland Dry Dock, etc. Co. v. Trustees of Portland*, 12 B. Mon. 77. **Me.**—*Rockland v. Farnsworth*, 87 Me. 473, 32 Atl. 1012. **Miss.**—*Mobile & O. R. Co. v. State*, 51 Miss. 137. **N. H.**—*Craig v. Genrish*, 58 N. H. 513. **Ohio.**—*Markle v. Town Council of Akron*, 14 Ohio 586. **Tenn.**

Wood v. Mayor, etc. of Grand Junction, 5 Heisk. 440; *Meaher v. Mayor, etc. of Chattanooga*, 1 Head 74; *Kelly v. Davis*, 1 Head 71. **Va.**—*Russell v. Louisville, etc. R. Co.*, 93 Va. 322, 25 S. E. 99; *Sims v. Alderson*, 8 Leigh 479. **W. Va.**—*West v. Rawson*, 40 W. Va. 48, 21 S. E. 1019. **Can.**—*Church v. Richards*, 6 U. C. Q. B. 562.

[a] Though the act complained of was itself a trespass (1) the penalty must be recovered in debt and not in trespass *vi et armis* (*McKenzie v. Gibson*, 73 Ala. 204; *Robley v. Culwell*, 69 Ill. App. 272); or (2) trespass *quare clausum fregit* (**Ala.**—*Blackburn v. Baker*, 7 Port. 284. **Miss.**—*Elder v. Hiltzheim*, 35 Miss. 231. **N. H.**—*Jarvin v. Scammon*, 29 N. H. 280; *Morrison v. Bedell*, 22 N. H. 234. **N. J.**—*Lott v. Laventhal*, 80 N. J. L. 216, 76 Atl. 328, *following Crane v. Case*, 1 N. J. L. 53; *Cato v. Gill*, 1 N. J. L. 11), or (3) trespass on the case. *Russell v. Louisville & N. R. Co.*, 93 Va. 322, 25 S. E. 99.

[b] That an action for a penalty would fail because no provision was made for removing the cause from the justice court to the common pleas on title to land being drawn in question, is no reason for assuming that the legislature intended to give an action of trespass for penalties growing out of trespass on land where the general statute gives justices jurisdiction of actions of debt for penalties. *Morrison v. Bedell*, 22 N. H. 234.

89. *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608, so a penalty for mining too close to the division line of an adjoining owner may be recovered by such owner in case which is a statutory substitute for trespass.

90. *Hepner v. United States*, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. ed. 720, *quoted* with approval in *Chicago, B. & Q. R. Co. v. United States*, 220

certainable. The matter is regulated by statute in some states,⁹¹ and, as has been pointed out, the nature of the punishment demanded may compel the adoption of criminal procedure.⁹² Therefore the rule is frequently stated to be that in the absence of special provisions fines are recoverable by indictment and pecuniary forfeitures by an action of debt,⁹³ and this distinction will sometimes be found carried into the statutes.⁹⁴

3. **A libel in rem** is not the proper remedy to enforce a penalty unless the statute authorizes it,⁹⁵ but is an appropriate method of enforcing a forfeiture.⁹⁶

4. **Information To Enforce Forfeiture.**—Procedure by information is a proper remedy to enforce a forfeiture even where the statute does not specifically so provide.⁹⁷

5. **Arbitration.**—Under the compulsory arbitration acts it has been held that whether actions for penalties could be arbitrated depends upon whether the purpose of imposing the penalty be strictly punitive or merely compensatory.⁹⁸

VI. MATTERS PRELIMINARY TO RIGHT TO BRING PROCEEDINGS.—A. **NECESSITY OF PREVIOUS CONVICTION.**—Where the

U. S. 559, 31 Sup. Ct. 612, 55 L. ed. 582. See also *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. ed. 1013; *Chaffee v. United States*, 18 Wall. (U. S.) 516, 21 L. ed. 908.

[a] Where the amount of the fine is discretionary with the court debt does not lie. *United States v. Morin*, 4 Biss. 93, 26 Fed. Cas. No. 15,810. See also *People v. Craycroft*, 2 Cal. 243; *City of Hudson v. Granger*, 23 Misc. 401, 52 N. Y. Supp. 9. *Contra*, *Rockwell v. State*, 11 Ohio 130.

91. See the statutes, and *Com. v. Connecticut R. R. Co.*, 15 Gray (Mass.) 447. See also *Levy v. Goudy*, 2 Allen (Mass.) 320, the statute prescribes actions of tort.

92. See *supra*, II, A. Compare also cases distinguishing and defining fines and penalties, *supra*, I.

93. *Minn.*—*State v. Horgan*, 55 Minn. 183, 56 N. W. 688. *Neb.*—*State v. Missouri Pac. R. Co.*, 64 Neb. 679, 90 N. W. 877. *N. H.*—*State v. Marshall*, 64 N. H. 549, 15 Atl. 210.

94. See the statutes, and *State v. Slocum*, 9 R. I. 373. See also *State v. Providence Gas Co.*, 27 R. I. 142, 61 Atl. 44.

95. *United States v. Church*, 1 Woods 275, 25 Fed. Cas. No. 14,762; *The James D. Parker*, 13 Fed. Cas. No. 7,193. See 1 STANDARD PROC. 420, note 50.

96. See 1 STANDARD PROC. 420, note 52, and *The Sarah*, 8 Wheat. (U. S.) 391, 5 L. ed. 644.

97. *The Bolina*, 1 Gall. 75, 3 Fed. Cas. No. 1,608. See *United States v. Twenty-five Barrels of Alcohol*, 28 Fed. Cas. No. 16,562; *United States v. Three Hundred & Ninety-six Barrels Distilled Spirits*, 28 Fed. Cas. No. 16,503.

98. See *infra*, this note.

[a] "A criminal prosecution, whether it be by indictment or action, is not within the purview of the compulsory arbitration act; as in the case of an action to recover a penalty for a breach of the revenue laws. *Buckwalter v. United States*, 11 Serg. & Rawle 193. On the other hand, an action for a penalty which is imposed, not to punish the act as an offense, but to compensate the party aggrieved, as in the case of a penalty for omitting to serve notice of the meeting of arbitrators, which is strictly a private injury, may be referred at the option of either party. The Commonwealth for the use of *Rogers v. Bennett*, 16 Serg. & R. 243." So it was held that a penalty for the taking of illegal fees by the sheriff may be arbitrated. *Mevay v. Edmiston*, 1 Rawle (Pa.) 457.

[b] A voluntary submission to arbitration by one who had not commenced an action would not bar proceedings by some other party. *Middleton v. Wilmington, etc. R. Co.*, 95 N. C. 167.

proceedings are in rem no previous conviction is necessary.⁹⁹ Though the statutes in some instances clearly make conviction a condition precedent,¹ the mere use of the word "convicted" in the statute does not imply that there must have been a previous conviction before the action lies for the penalty imposed.² On the other hand the civil action for the penalty is sometimes made separate and distinct from the criminal prosecution for the same act.³

B. PRELIMINARY COMPLAINT. — An action for a penalty need not be preceded by a formal written preliminary complaint.⁴

VII. PARTIES. — A. INFORMER'S RIGHT TO SUE. — 1. **At Common Law.** — At common law actions to recover penalties were often prosecuted by what were known as "common informers."⁵ At the early common law the informer began the proceeding in his own name,⁶ but by the later common law the action was brought in the name of the sovereign on the relation of the reformer.⁷

2. **Statutory Authority To Sue Necessary.** — It is now settled that to authorize an informer to prosecute in his own name there must be statutory authority either express,⁸ or given by necessary implica-

99. *Dobbins Distillery v. United States*, 96 U. S. 395, 24 L. ed. 637; *The Palmyra*, 12 Wheat. (U. S.) 1, 6 L. ed. 531, *quoted* with approval in *The Three Friends*, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. ed. 897. See also *Jones v. Mason*, 12 Ark. 687.

1. See *Tissot v. Dubuclet*, 33 La. Ann. 703, a previous conviction was held necessary under a statute directed against treasurers who should wilfully neglect to pay warrants which read: "He shall be deemed guilty of a misdemeanor in office, and, upon conviction thereof, shall be fined in a sum not less than five hundred dollars for the use of the State, and shall forfeit and pay to the holder of such warrants fourfold the amount thereof, to be recovered against him and his security on his official bond."

2. Ala.—*Reagh v. Spann*, 3 Stew. Ga.—*Payne v. Coursey*, 20 Ga. 585. Pa.—*Garman v. Gamble*, 10 Watts 382. See also *Agnew v. McElhare*, 18 Pa. 484. Tenn.—*Meaher v. Mayor*, etc. of Chattanooga, 1 Head 74.

3. *People v. Waterbury*, 44 Hun (N. Y.) 493, *cited* with approval in *People v. Snyder*, 86 N. Y. Supp. 415.

4. *Durbin v. People*, 54 Ill. App. 101, a resolution of the board of supervisors directing the state's attorney to bring suit is sufficient on which to base a declaration.

Preliminary complaints in criminal proceedings, see the title "Indictment and Information."

5. *Williams v. Wells, Fargo & Co. Exp.*, 177 Fed. 352, 101 C. C. A. 328, *citing* 3 Bl. Com. (Cooley's ed.) 160. See 12 STANDARD PROC. 87, 233.

6. *O'Kelly v. The Athens Mfg. Co.*, 36 Ga. 51.

7. *O'Kelly v. Athens Mfg. Co.*, 36 Ga. 51, offenders procured their friends to bring the action. "This abuse of the suit producing so much collusion caused the enactment of 4th Henry 7th, ch. 20. After this enactment, suits to recover penalties and forfeitures were brought most usually in the name of the king upon the relation of the informer, and not otherwise, unless by statutory provision."

8. U. S.—*Williams v. Wells, Fargo & Co. Express*, 177 Fed. 352, 101 C. C. A. 328; *Parson v. Hunter*, 2 Sumn. 419, 18 Fed. Cas. No. 10,778. Ill. *People v. Columbian Nat. L. Ins. Co.*, 187 Ill. App. 37. Me.—*Inhabitants of Wiscasset v. Trundy*, 12 Me. 204. Mass. *Smith v. Look*, 108 Mass. 139; *Colburn v. Swett*, 1 Met. 232. N. Y. *Seward v. Beach*, 29 Barb. 239; *Town of Stamford v. Calhoun*, 125 N. Y. Supp. 910. Wis.—*Lynch v. Steamer "Economy"*, 27 Wis. 69. Eng.—*Davis v. Edmonson*, 3 B. & P. 382, 127 Eng. Reprint 209; *Barnard v. Gostling*, 2 East 569, 102 Eng. Reprint 487.

[a] *Compare Megargell v. Hazleton Coal Co.*, 8 Watts & S. (Pa.) 342, where the court says: "A common informer may bring an action in his own name, whether the penalty be

tion.⁹ The fact that one may have a duty to perform in connection with the matter out of which the penalty arises is not sufficient to give him authority to sue.¹⁰ General provisions are found in some states governing the right to sue where the particular statute does not specify,¹¹ but a distinction has been drawn between such statutes and those which merely prescribe the form of action to be adopted,¹² or which provide what official shall act.¹³ The mere recognition in general provisions of the statutes that informers may sue in their own names is not sufficient to authorize doing so under a statute not giving the right.¹⁴

3. Construction of Particular Statutes as Giving Right.—As in other cases of statutory construction the intent of the legislature and not the particular words used, governs.¹⁵ Thus while the mere use of the term "informer" does not of itself imply that he may be the plaintiff,¹⁶ the use of "prosecutor," or "who may prosecute," and the like, has generally been held sufficient to confer the right to sue,¹⁷ as is the use of such words as "sue for" or "to be sued for,"¹⁸ and

given to him in whole or in part, and that without any positive direction in the Act imposing the penalty. But in the Act on which this suit is brought, the penalty is to be recovered by any person suing for the same."

[b] **New Hampshire.**—Right of private person to bring action is abolished by statute. See Laws, 1899, ch. 31; *Bartlett v. Mansfield*, 76 N. H. 582, 85 Atl. 756.

9. *Williams v. Wells, Fargo & Co. Exp.*, 177 Fed. 352, 101 C. C. A. 328, 35 L. R. A. (N. S.) 1034; *Bradlaugh v. Clarke*, L. R. 8 App. Cas. (Eng.) 354.

10. *Matthews v. Offley*, 3 Sumn. 115, 16 Fed. Cas. No. 9,290, a consul cannot prosecute in his own name an action for a penalty against a master for refusing to transport destitute seamen, although the statute makes it the duty of the consul to provide for such seamen.

[a] **Committee charged with duty to prosecute all violations of a statute** could not bring an action for a penalty provided by another section wherein a popular action was to be brought by any inhabitant. *Vinton v. Welsh*, 9 Pick. (Mass.) 87.

11. See the statutes, and *Mo.*—*McFarland v. Mississippi River, etc. R. Co.*, 175 Mo. 422, 75 S. W. 152; *Scott v. Missouri Pac. R. Co.*, 38 Mo. App. 523. **N. C.**—*Carter v. Wilmington, etc. R. Co.*, 126 N. C. 437, 36 S. E. 14; *Goodwin v. Caraleigh Fertilizer Works*, 119 N. C. 120, 25 S. E. 795; *Sutton v. Phillips*, 116 N. C. 502, 21 S. E.

968; *Burrell v. Hughes*, 116 N. C. 430, 21 S. E. 971; *Hodge v. Marietta, etc. R. Co.*, 108 N. C. 24, 12 S. E. 1041; *Middleton v. Wilmington, etc. R. Co.*, 95 N. C. 167; *Norman v. Dunbar*, 53 N. C. 317. **Ohio.**—*Gause v. Lake Shore & M. S. R. Co.*, 4 Ohio Dec. (Reprint) 369.

12. *Colburn v. Swett*, 1 Met. (Mass.) 232.

13. *State ex rel. Clay County v. Wabash, St. & P. R. Co.*, 89 Mo. 562, 1 S. W. 130, "to be sued for by the prosecuting or circuit attorney of the proper circuit" was not so much to point out in whose name the suit should be brought as to declare whose official duty it should be to institute and prosecute the action.

14. *Omaha, etc. R. Co. v. Hale*, 45 Neb. 418, 63 N. W. 849. See also *Seward v. Beach*, 29 Barb. (N. Y.) 239.

15. *Drew v. Hilliker*, 56 Vt. 641.

16. See *McRae v. Keller*, 32 N. C. 398 (where the distinction is clearly shown between giving the informer the right to sue and giving him merely the benefit of the recovery), explaining *Fleming v. Bailey*, 5 East 313, 102 Eng. Reprint 1090.

17. *Phillips v. Bevans*, 23 N. J. L. 373; *Drew v. Hilliker*, 56 Vt. 641, following *Hubbell v. Gale*, 3 Vt. 266 (where the language used was "person or persons who shall inform and prosecute"), and *Nye v. Lamphere*, 2 Gray (Mass.) 295, where the statute recited "who shall prosecute therefor."

18. *McRae v. Keller*, 32 N. C. 398;

there is authority that those words or words of like import must be used.¹⁹

Change of Statute.—Who is the proper party to bring an action for a penalty is determined by the law as it exists when the suit is brought.²⁰

4. Right to the Penalty as Implying the Right To Sue.—The giving of a part of the penalty to a particular person has been held by many authorities to be of itself sufficient authorization to him to prosecute in his own name,²¹ and this rule has been followed even where a general provision of the statute provides for an action by the state.²² The authorities uniformly hold that if the entire penalty be given either to a person or to a public corporation, that person or corporation has the right to sue in his or its own name.²³ On the other hand where only part of the penalty is given to the informer and the statute does not specify which of the parties entitled to share therein shall sue, it has been said that the rule of strict construction forbids the recognition of either,²⁴ while other authorities refuse the right to the informer but grant it to the state on the theory that the state cannot be assumed to have delegated its rights to sue except upon clear and express language.²⁵

Lynch v. Steamer "Economy," 27 Wis. 69.

19. *Gause v. Lake Shore & M. S. R. Co.*, 4 Ohio Dec. (Reprint) 369.

20. *Barker v. Phelps*, 39 Mo. App. 288; *Hibbard v. Parmenter, etc. Co.*, 70 N. H. 156, 46 Atl. 683.

21. *U. S.*—*Williams v. Wells, Fargo & Co. Exp.*, 177 Fed. 352, 101 C. C. A. 328. *Mass.*—*Nye v. Lamphere*, 2 Gray 295. *N. C.*—*Martin v. Martin*, 50 N. C. 346. *Wis.*—*Lynch v. Steamer "Economy,"* 27 Wis. 69.

[a] Any one of a class for whose special benefit a penal statute is enacted has a right of action for injuries resulting to him from its violation. *Pocahontas Consol. Colliers Co. v. Johnson*, 244 Fed. 368, *citing Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. ed. 874.

22. *Toledo, etc. R. Co. v. Foster*, 43 Ill. 480; *Chicago & A. R. Co. v. Howard*, 38 Ill. 414.

23. *Dexter v. Blackden*, 93 Me. 473, 45 Atl. 525; *Rockland v. Farnsworth*, 87 Me. 473, 32 Atl. 1012; *Inhabitants of Wiscasset v. Trundy*, 12 Me. 204; *Colburn v. Swett*, 1 Met. (Mass.) 232, *citing President & College of Physicians v. Salmon*, 1 Ld. Raym. 680, 682, 91 Eng. Reprint 1353.

[a] Where the penalty is given to the person injured or aggrieved by the act or omission complained of, such

person may sue therefor in his own name. *N. Y.*—*Thompson v. Howe*, 46 Barb. 287. *N. C.*—*Katzenstein v. Raleigh & Gaston R. Co.*, 84 N. C. 688. *Tenn.*—*Kelly v. Davis*, 1 Head 71, the provision giving the penalty "one-half to the use of the person who shall sue for the same, the other half to the use of the owner." does not deny to the owner the right of recovery, but merely provides that if a stranger began suit before the owner, still one-half of the penalty should inure to the owner.

24. *Seward v. Beach*, 29 Barb. (N. Y.) 239.

25. *Gause v. Lake Shore & M. S. R. Co.*, 4 Ohio Dec. (Reprint) 369, holding that a statute providing a certain penalty was "to be recovered in an action of debt upon the complaint of any person before a justice of the peace in any county in which such violation may occur; one-half of the penalty shall go to the complainant and the other half to the state of Ohio for the benefit of the common schools," does not give the complainant the right to sue in his own name.

[a] **Informer's Moiety Goes to Him After Recovery by State.**—*Ky.*—*Yocum v. Daniel*, 1 J. J. Marsh. 14. *Me.*—*Dexter v. Blackden*, 93 Me. 473, 45 Atl. 525. *Mass.*—*Smith v. Look*, 108 Mass. 139. See also *Wheeler v. Goulding*, 13 Gray 539. *Neb.*—*Omaha, etc.*

5. Disability To Sue.—One may, of course, be under some personal disability to sue.²⁶

B. RIGHT OF COMMONWEALTH TO BRING SUIT.²⁷—Where no other remedy is provided, the right to prosecute is clearly in the state or commonwealth, even though the penalty in whole or in part may be reserved to the use of others;²⁸ but where the penalty is to go to a particular specified board, the state is not interested therein and cannot sue.²⁹ The state must not be joined where under the statute it clearly is not entitled to be a party,³⁰ but on the other hand where the statute only contemplates the state as a party the suit cannot be brought in the name of an informer.³¹

C. EXCLUSIVENESS OF STATUTORY RIGHT TO SUE.—Whether the provision of the statute giving the right to prosecute is merely permissive, and cumulative, or exclusive, depends upon to whom the penalty belongs.³² That the statute gives a particular officer a right to prosecute does not necessarily imply that a private person may not bring an action,³³ and that the penalty when collected is to be paid into the treasury, does not necessitate bringing suit in the treasurer's name.³⁴ Where different sections of the statute give different officers

R. Co. v. Hale, 45 Neb. 418, 63 N. W. 849.

26. Anonymous, Sayer's Rep. (Eng.) 51; The Guardians of St. Leonard v. Franklin, 3 C. P. D. (Eng.) 378, 39 L. T. 122, 26 W. R. 882 (infancy); Garrett v. Roberts, 10 Ont. App. (Can.) 650.

[a] Non-residence does not constitute such disability. Chaput v. Robert, 14 Ont. App. (Can.) 354.

27. Remedy by indictment where no other procedure provided, see *supra*, V, B, 1.

28. Smith v. Look, 108 Mass. 139; Colburn v. Swett, 1 Met. (Mass.) 232; Hilton v. Morse, 2 Ohio Dec. (Reprint) 292.

[a] This rule is, however, subject to the modification that where there are restrictive statutes prescribing who shall sue depending upon who is entitled to the penalty and no provision is made for the disposition of the particular penalty, there is no means of enforcing it. People v. Belknap, 58 Hun 241, 12 N. Y. Supp. 143; State v. Messner, 9 N. D. 186, 82 N. W. 737. See also Town of Stamford v. Calhoun, 125 N. Y. Supp. 910; People v. Lamb, 32 N. Y. Supp. 584.

29. Mobile & O. R. Co. v. State, 51 Miss. 137.

30. Higby v. People, 5 Ill. 165; Ryder v. Hulseher, 40 Ill. App. 77.

31. McNair v. People, 89 Ill. 441;

People v. Young, 72 Ill. 411, under a statute which did not in terms state in whose name the prosecution should be conducted but declared the offender might be indicted or sued before a justice of the peace.

[a] Where a statute expressly requires a penalty "to be sued for in the name of the State of North Carolina in the Superior Court of Wake County," the penalty must be sued for and recovered by the state, and not by a private person. Hodge v. Marietta, etc. R. Co., 108 N. C. 24, 12 S. E. 1041.

32. Com. v. Fahey, 5 Cush. (Mass.) 408. See also Chicago & A. R. Co. v. Howard, 38 Ill. 414; Com. v. Smith, 111 Mass. 407; Wheeler v. Goulding, 13 Gray (Mass.) 539. Compare Schuyler County v. Mercer County, 9 Ill. 20.

33. Drew v. Hilliker, 56 Vt. 641.

[a] Where a statute gives a right to informers to sue within a specified time and after that time it is made the duty of certain officers to sue, by necessary implication the right of the informers ceases after the time specified. Fagan v. Armistead, 33 N. C. 433.

34. City of Brooklyn v. Nassau Elec. R. Co., 44 App. Div. 462, 61 N. Y. Supp. 33, the statute provides that the penalty thereunder should be "collected by the proper city authorities and placed in the county treasury."

the right to sue, they should be construed to give the right to both.³⁵

D. STATUTORY RIGHT TO SUE IS STRICTLY CONSTRUED.—The privilege of claiming or enforcing the penalty being itself one of statutory appointment, is to be strictly construed.³⁶ Therefore where the statute gives the right to one person a joint action cannot be brought by several,³⁷ though it has been held that a joint action may be brought on the theory that the defendant is not injured thereby.³⁸ Where the statute only gives the right to persons, corporations cannot sue therefor,³⁹ unless the power is given specifically or by general statute.⁴⁰

E. AMENDMENT OR SUBSTITUTION OF PARTIES PLAINTIFF.—Where one has instituted a suit which he had no right to maintain, he cannot cure the error by amendment substituting the proper party plaintiff.⁴¹ Nor can one be substituted as plaintiff who was not himself entitled to bring the action in the first instance.⁴² It is proper to amend to show who are the real parties in interest.⁴³

F. JOINDER OF PARTIES PLAINTIFF.—Where the penalty is only given in part to the informer, by the weight of authority he must sue *qui tam*.⁴⁴ But one charged with the duty of collecting a moiety on the part of the state may himself sue as informer, for the whole penalty.⁴⁵ A private person entitled to the whole penalty may sue for the whole in his own name and need not sue as an informer.⁴⁶

35. *Dukate v. Adams*, 101 Miss. 433, 58 So. 475.

36. *Ferrett v. Atwill*, 1 Blatchf. 151, 8 Fed. Cas. No. 4,747; *Fleming v. Bailey*, 5 East 313, 102 Eng. Reprint 1090.

[a] Subject to the general rule of construction that, if possible, a statute is to be made harmonious in all its parts. *Dukate v. Adams*, 101 Miss. 433, 58 So. 475; *Jones v. Fidelity Loan, etc. Co.*, 7 S. D. 122, 63 N. W. 553, following *Thomas v. Reynolds*, 29 Kan. 304. See also *Deeter v. Crossley*, 26 Iowa 180.

37. *Ferrett v. Atwill*, 1 Blatchf. 151, 8 Fed. Cas. No. 4,747. See also *Vinton v. Welsh*, 9 Pick. (Mass.) 87; *Hill v. Davis*, 4 Mass. 137; *Kent v. Gray*, 53 N. H. 576; *Fowler v. Tuttle*, 24 N. H. 9, 27.

38. *Carter v. Wilmington, etc. R. Co.*, 126 N. C. 437, 36 S. E. 14; *Chaput v. Roberts*, 14 Ont. App. (Can.) 354.

39. *Inhabitants of Wiscasset v. Trundy*, 12 Me. 204 (citing *Bishop of London v. Mercers Co.*, 2 Str. 925, 93 Eng. Reprint 946); *Ancient City Sportsman's Club v. Miller*, 7 Lans. (N. Y.) 412.

40. See the statutes (especially those which provide that "persons" includes "corporations"), and *Inhabitants of Wiscasset v. Trundy*, 12 Me. 204, citing *Bishop of London v.*

Mercer's Co., 2 Str. 925, 93 Eng. Reprint 946.

41. *O'Kelly v. The Athens Mfg. Co.*, 36 Ga. 51. See the titles "New Cause of Action or Defense;" "Parties."

42. *Hodge v. Marietta, etc. R. Co.*, 108 N. C. 24, 12 S. E. 1041, county board of education could not be substituted though the penalty would go to public schools.

43. *Megargell v. Hazleton Coal Co.*, 8 Watts & S. (Pa.) 342, plaintiff should have been permitted to amend by adding "who sues as well for himself as the treasurer of Northampton county." See also *Falk v. Curtis Pub. Co.*, 98 Fed. 989.

44. Conn.—*Dickinson v. Potter*, 4 Day 340. See also *Clark v. Turner*, 1 Root 200. Compare *Blydenburgh v. Miles*, 39 Conn. 484. Mass.—*Vinton v. Welsh*, 9 Pick. 87. N. J.—*Vandeventer v. Vanceourt*, 2 N. J. L. 169.

Contra, *Drake v. Preston*, 34 U. C. Q. B. 257.

[a] It is a proper method of procedure as showing the true situation even though strictly the other person may not be a party. *Winne v. Snow*, 19 Fed. 507; *Inhabitants of Wiscasset v. Trundy*, 12 Me. 204.

45. *Tarde v. Benseman*, 31 Tex. 277.

46. *Blydenburgh v. Miles*, 39 Conn.

Where a statute prohibits an act under a penalty, and gives part to an informer and part to the state, the state may prosecute for the whole unless an informer has commenced a *qui tam* suit.⁴⁷ Where the wrong has been committed against several, any one of them may sue without joining the others as parties plaintiff.⁴⁸

It is not ground for dismissal that the informer and the sovereignty are joined as plaintiffs, though the matter to be decided involves a question as to the respective rights of the informer and the government.⁴⁹

G. PARTIES DEFENDANT.—1. Who May Be Sued.⁵⁰—It has been held that a partnership as such cannot be sued for a penalty under a statute forbidding an act by “any person,”⁵¹ and a partner cannot be sued for a penalty on an act committed by his co-partner.⁵² Corporations, or the members thereof, may be sued to the same extent as for other wrongs and offenses.⁵³ Clearly one may have a penalty imposed upon him though he be not a resident of the municipality which forbids the act.⁵⁴

2. Joinder of Defendants.—Where the wrongful act is itself several as well as joint the action may be brought against any one or more of the defendants,⁵⁵ and bringing suit against one only of joint offend-

484, town need not be joined, the intention of the legislature being “to give the entire penalty to him who should sue for and collect the same.”

[a] **One who had succeeded, by contract,** to the rights of the municipality, may sue in his own name and not *qui tam* as a common informer. *Lewis v. Stein*, 16 Ala. 214.

47. Conn.—*State v. Bishop*, 7 Conn. 181. **Ill.**—*McNair v. People*, 89 Ill. 441. **Me.**—*State v. Smith*, 64 Me. 423. **Mass.**—*Com. v. Howard*, 13 Mass. 221.

[a] **Mention of the name of the informer in the information is not necessary**, as he is not a party to the suit, nor is he entitled to be heard, as such, at any stage of the proceedings. *Confiscation Cases*, 7 Wall. (U. S.) 454, 19 L. ed. 196. See also *State v. Smith*, 64 Me. 423.

48. Phillips v. Bevans, 23 N. J. L. 373.

49. U. S.—*Winne v. Snow*, 19 Fed. 507; *The Emulous*, 1 Gall. 563, 8 Fed. Cas. No. 4,479, it is a mere irregularity. **Ill.**—*Indianapolis, etc. R. Co. v. People*, 91 Ill. 452, it may be treated as surplusage. **Me.**—*Inhabitants of Wiscasset v. Trundy*, 12 Me. 204.

[a] **It is harmless error** for the court will render judgment only to those entitled. *Carter v. Wilmington, etc. R. Co.*, 126 N. C. 437, 36 S. E. 14; *Warrenton v. Arrington*, 101 N. C. 109, 7 S. E. 652.

50. See generally the title “**Parties**,” and other titles dealing with particular parties and relations.

Liability of corporations to criminal prosecution, see 5 STANDARD PROC. 677.

51. Hargo v. Meyers, 4 Ohio Cir. Ct. 275, following *State v. Cincinnati Fertilizer Co.*, 24 Ohio St. 611.

52. Porter v. Vance, 14 Lea (Tenn.) 629, though civilly liable for the misappropriation for which the penalty was imposed.

53. Falk v. Curtis Pub. Co., 98 Fed. 989, a corporation may be sued for a penalty under the copyright law.

54. Whitfield v. Longest, 28 N. C. 268; *City Council v. Pepper*, 1 Rich. L. (S. C.) 364.

55. Conn.—*Curtis v. Hurlburt*, 2 Conn. 309. **Me.**—*Frost v. Rowse*, 2 Me. 130. **Mass.**—*Burnham v. Webster*, 5 Mass. 266; *Boutelle v. Nourse*, 4 Mass. 431; *Hill v. Davis*, 4 Mass. 137. **N. Y.**—*Warren v. Doolittle*, 5 Cow. 678. **Eng.**—*King v. Bleasdale*, 4 T. R. 809, 100 Eng. Reprint 1314; *Rex v. Clark*, 2 Cowp. 610, 98 Eng. Reprint 1267. **Can.**—*Drake v. Preston*, 34 U. C. Q. B. 257.

[a] **Several Prosecution.**—“The rule at common law is universal that every crime, as far as respects the guilt and punishment of the parties engaged in the perpetration of it is several; and that if two or more persons concur in the commission of an offense, each of-

ers has been upheld on the theory that the action is in effect *ex delicto* and so may be brought against any one of the joint tortfeasors,⁵⁶ but of course the plaintiff can have but one satisfaction.⁵⁷ Where the offense is in its nature only several, other offenders cannot be joined.⁵⁸

VIII. PROCESS AND SEIZURE.⁵⁹—A. **SUMMONS OR OTHER PROCESS.**—Where the statute has made no specific provisions it seems clear the process should be as in other like cases.⁶⁰ State statutes governing the process in actions for penalties will be followed by the federal courts under the conformity act.⁶¹

Indorsing and Minuting.—In some jurisdictions, where the complaint is not served with the summons, the copy of the summons delivered to

fender is liable to a several punishment. This principle extends to statute offenses as well as to those which are punishable by the common law; and in general there is no distinction in the application of it between the higher kinds of punishments and fines or mere pecuniary penalties." *Palmer v. Conly*, 4 Denio (N. Y.) 374. This case was followed in *People v. Girard*, 73 Hun 457, 26 N. Y. Supp. 272, judgment affirmed, 145 N. Y. 105, 39 N. E. 823, where it was held proper to bring an action against one of two co-partners to recover a penalty under a statute reading: "If any person by himself or another shall violate . . . this act . . . he shall . . . forfeit and pay a fixed penalty of two hundred dollars for each offense." See also *Ingersoll v. Skinner*, 1 Denio (N. Y.) 540. But see *Warren v. Doolittle*, 5 Cow. (N. Y.) 678.

Joinder in criminal prosecution, see the title "Indictment and Information."

[b] **Joint Action Without License.** In *Barnard v. Gostling*, 2 East 569, 102 Eng. Reprint 487, two persons who had acted jointly as proctors without obtaining a license were held properly joined. Following *Hardyman v. Whitaker*, Bull. N. P. 189, 2 East 573*n*, 102 Eng. Reprint 489.

56. N. H.—*Powers v. Spear*, 3 N. H. 35, one of joint owners of horse suffered to go at large upon highway may be sued. Eng.—*Hardyman v. Whitaker*, Bull. N. P. 189, 2 East 573*n*, 102 Eng. Reprint 489. Can.—*Drake v. Preston*, 34 U. C. Q. B. 257.

Compare *supra*, II, B.

57. *Boutelle v. Nourse*, 4 Mass. 431.

58. N. Y.—*Marsh v. Shute*, 1 Denio 230, as where the penalty is inflicted for an omission of a duty. "The duty

of each is a several duty, which he alone can violate; and the neglect of each, in the nature of things must in such cases also be several." *Tenn. Wilson v. Rogers*, 8 Yerg. 213, "shooting at a mark." *Vt.*—*Slack v. Gibbs*, 14 Vt. 357, grantor and grantee of a fraudulent deed could not be joined in an action to enforce a penalty. "The words of the statute are that 'every of the parties,' etc. These are appropriate words to designate a several offense and a several penalty."

59. As to process in civil suits see the title "Process."

As to seizure, see the title "Search and Seizure."

Requisites of process in criminal proceedings generally, see the title "Warrants."

60. Conn.—*Merriam v. Langdon*, 10 Conn. 460, upholding service of a copy of the information by an indifferent person under order of the court. *N. J. Rider v. Lakewood Market Co.* (N. J. L.), 88 Atl. 194, including in the summons the words "who sues for the use of the state," is at most surplusage. *Pa.*—*Com. v. Nice*, 13 Pa. Dist. 309, 29 Pa. Co. Ct. 607, holding that in a civil action a summons should issue and that it was beyond the jurisdiction of the magistrate to issue a warrant.

61. *Brown v. Pond*, 5 Fed. 31. See also *United States v. Rose*, 14 Fed. 681. Compare *United States v. Bannister*, 70 Fed. 44, where the New Jersey statute regarding process was held not applicable because the statute expressly limited its provisions.

As to conformity of federal to state practice, see generally the title "United States Courts."

[a] Where the penalty is payable to the United States under a federal statute, the state statute does not ap-

the defendant must be indorsed with a reference to the statute under which the penalty is claimed.⁶² Reference in the body of the summons has been held sufficient.⁶³ The statute applies to actions brought by the people.⁶⁴

In other jurisdictions the process must be indorsed with the name of the prosecutor and the title of the statute.⁶⁵ The indorsement is not required where the prosecution is brought by a state official by virtue of his office,⁶⁶ nor in summary proceedings before magistrates.⁶⁷

In still other jurisdictions the writ must be minuted by the officer with the day he signed it.⁶⁸ The minute must be upon the perfected writ and not merely in the body thereof,⁶⁹ and must be made at the

ply. *United States v. Bannister*, 70 Fed. 44.

62. N. Y. Code Civ. Proc., §1897. See also *United States v. Rose*, 14 Fed. 681; *Brown v. Pond*, 5 Fed. 31; *Perry v. Tynen*, 22 Barb. (N. Y.) 137; *Andrews v. Harrington*, 19 Barb. (N. Y.) 343; *Hitchman v. Baxter*, 34 Hun (N. Y.) 271.

[a] It is sufficient if it gives such information as the complaint would have given if served. *Prussia v. Guenther*, 16 Abb. N. C. (N. Y.) 230.

[b] In an action brought by an officer in his official capacity, the office being created and the penalty imposed by the same statute, the character in which the officer sues is a sufficient notification of the nature of the action. *Townsend v. Hopkins*, 9 Civ. Proc. (N. Y.) 257.

[c] If there are several sections of the statute under which the penalty might have been imposed, a mere reference by title would not be sufficient. *Young v. Gregg*, 9 Civ. Proc. (N. Y.) 262, *distinguishing* *Schoonmaker v. Brooks*, 24 Hun (N. Y.) 553.

[d] If the causes of action might properly be joined in one complaint, it has been held that there is no objection to referring to more than one section of the statute in the indorsement. *Ripley v. McCann*, 34 Hun (N. Y.) 112.

[e] **Amendatory Acts.**—Reference not only to certain sections of a particular act but also to "the acts amendatory thereof," is not objectionable. This is simply further matter of description. *Ripley v. McCann*, 34 Hun (N. Y.) 112.

[f] Where a penalty is sought under a city ordinance (1) it is not necessary to print such verbatim. *People v. Justices*, 12 Hun (N. Y.) 65; *Mayor v. Eisler*, 2 Civ. Proc. (N. Y.)

125. (2) Mentioning an ordinance and giving its substance is sufficient. *Mayor v. Wood*, 6 N. Y. Supp. 657.

[g] **Rule Under Statute Requiring "General Reference."**—*Avery v. Slaek*, 17 Wend. (N. Y.) 85; *Marselis v. Seaman*, 21 Barb. (N. Y.) 319.

63. *Schoonmaker v. Brooks*, 24 Hun (N. Y.) 553, the court questions the soundness of this rule but followed the precedent as laid down in *Cox v. New York Cent. & H. R. Co.*, 61 Barb. (N. Y.) 615, and *People v. Bull*, 10 Jones & S. (N. Y.) 19. See also *Young v. Gregg*, 9 Civ. Proc. (N. Y.) 262. *Compare* *People v. Walters*, 7 Civ. Proc. (N. Y.) 406, 15 Abb. N. C. 461.

64. *People v. O'Neil*, 54 Hun 610, 8 N. Y. Supp. 123, *following* *Mayor v. Eisler*, 2 Civ. Proc. (N. Y.) 125, *disapproving* *Townsend v. Hopkins*, 9 Civ. Proc. (N. Y.) 257.

65. *New Jersey Comp. St.*, 1910, p. 4120, §219.

[a] If more than one statute be invoked the titles of both must be endorsed. *Hunter v. Erie R. Co.*, 70 N. J. L. 101, 56 Atl. 139.

66. *Bryant v. Skillman Hdw. Co.*, 76 N. J. L. 45, 69 Atl. 23.

67. *Johnson v. Barclay*, 16 N. J. L. 1, *quoted* with approval in *Minard v. Dover Gas Co.*, 76 N. J. L. 132, 68 Atl. 910. See also *Williamson v. Middlesex Common Pleas*, 42 N. J. L. 386.

68. *Vermont Pub. St.* (1906), §§2354, 2355; *Town of Brighton v. Kelsey*, 77 Vt. 258, 59 Atl. 833; *Bowen v. Fuller*, 2 Tyler (Vt.) 85.

69. *Town of Brighton v. Kelsey*, 77 Vt. 258, 59 Atl. 833, *following* *State v. Perkins*, 58 Vt. 722, 5 Atl. 894, where the minuting in a criminal prosecution was held not to be a part of the complaint but a "substantive

time required by the statute.⁷⁰

Generally the failure to observe these statutory requirements results in a dismissal of the proceedings, on motion seasonably made.⁷¹ A motion to set aside the service of the summons need not be made until the proceedings in the action show that its object is to enforce a penalty.⁷² General appearance cures defects in the process,⁷³ and failure to object to the process adopted waives the right to object to the form thereof.⁷⁴

B. NECESSITY OF SEIZURE.—Generally a seizure is necessary in order that jurisdiction may attach to the res against which the forfeiture is to be enforced,⁷⁵ but, this is subject to the well known rule that the res may be constructively or actually in the possession of the court.⁷⁶ Where a seizure is necessary the jurisdiction is lost by a voluntary restoration by the seizer.⁷⁷

IX. THE PLEADINGS.⁷⁸—A. PLAINTIFF'S PLEADINGS.—1.

and material requirement of the proceedings."

70. *Wheelock v. Sears*, 19 Vt. 559 (made on the return day, it was insufficient), *cited* with approval in *State v. Perkins*, 58 Vt. 722, 5 Atl. 894. See also *Hill v. Morey*, 26 Vt. 178; *Pollard v. Wilder*, 17 Vt. 48; *Montpelier v. Andrews*, 16 Vt. 604.

[a] If not made at that time the defect cannot be cured by amendment. To permit such endorsement "would be in effect to permit him to make a certificate where none had in fact been made." *Pollard v. Wilder*, 17 Vt. 48.

71. See the title "Process;" and see also: **U. S.**—*United States v. Rose*, 14 Fed. 681. **N. Y.**—*Delisser v. New York, N. H. & H. R. Co.*, 1 Bosw. 382, 20 Civ. Proc. 312, 39 N. Y. St. 242. **Vt.**—*School Dist. v. Austin*, 46 Vt. 90; *Wheelock v. Sears*, 19 Vt. 559; *Pollard v. Wilder*, 17 Vt. 48; *Dassance v. Gates*, 13 Vt. 275.

[a] The affidavit in support of such a motion must show the sources of information on which affiant bases his belief that the action is in fact one for a penalty. *Delisser v. New York, N. H. & H. R. Co.*, 1 Bosw. 382, 20 Civ. Proc. 312, 39 N. Y. St. 242.

72. *Delisser v. New York, N. H. & H. R. Co.*, 1 Bosw. 382, 20 Civ. Proc. 312, 39 N. Y. St. 242.

73. **U. S.**—*Brown v. Pond*, 5 Fed. 31. **N. J.**—*Hayes v. Storms*, 64 N. J. L. 514, 45 Atl. 809, the statutory provision as to indorsement is not jurisdictional. **N. Y.**—*Bissell v. New York Cent. & H. R. R. Co.*, 67 Barb. 385; *Prussia v. Guenther*, 16 Abb. N. C. 230; *Vernon v. Palmer*, 16 Jones & S. 231.

[a] It is proper to enter a special

appearance for the purpose of moving to dismiss where the defect is apparent from the process and return. *United States v. Bannister*, 70 Fed. 44, *following* *School Dist. v. Austin*, 46 Vt. 90, and *Bent v. Bent*, 43 Vt. 42.

[b] When the summons does not on its face show the defect one does not waive his right by appearance and demanding a copy of the complaint. *Farmers' & Merchants' State Bank v. Stringer*, 75 App. Div. 127, 77 N. Y. Supp. 410, *reversing* 76 N. Y. Supp. 303. See also *Lassen v. Aronson*, 21 N. Y. Supp. 452.

74. *Merriam v. Langdon*, 10 Conn. 460 (defendant had appeared, made defense and been fully heard); *Rider v. Lakewood Market Co.* (N. J. L.), 88 Atl. 194, defendant went to trial on the merits before the justice and afterwards appealed to the common pleas.

75. *Dobbins' Distillery v. United States*, 96 U. S. 395, 24 L. ed. 637, *citing* "The Brig Ann," 9 Cranch (U. S.) 289, 3 L. ed. 734.

76. "The Brig Ann," 9 Cranch (U. S.) 289, 3 L. ed. 734. See also *United States v. Snowdrop*, 30 Fed. 79; *The Missouri*, 3 Ben. 508, 17 Fed. Cas. No. 9,652; and 14 STANDARD PROC. 147; 17 STANDARD PROC. 683, 685, 688, 691.

77. "The Brig Ann," 9 Cranch (U. S.) 289, 3 L. ed. 734.

[a] Restoration under invalid order does not deprive the court of jurisdiction. *The Rio Grande*, 23 Wall. (U. S.) 458, 23 L. ed. 158. Compare also "The Young America," 30 Fed. 789.

78. See titles dealing with particular penalties or forfeitures.

Pleading in criminal cases generally,

In General.—While it has been held that a greater strictness is required in an action for a penalty than in other proceedings,⁷⁹ or, as it is sometimes stated, the same strictness as is required in indictments,⁸⁰ the better rule seems to be that the same strictness is demanded as in other causes founded upon statute,⁸¹ and where the proceedings are civil in nature, the rules of civil proceedings govern.⁸² It is clear that no greater particularity is required in an information for a forfeiture than in an indictment for statutory crime.⁸³ The sufficiency of the complaint is determined by the rules of pleading and not by indorsements on the summons.⁸⁴

2. Recitals of Statute.—A direct recital of the statute or a conclusion “*contra formam statuti*” is necessary under the strict rules of common law pleading,⁸⁵ but a more liberal rule prevails under the more

see the titles “*Arraignment and Plea*,” “*Indictment and Information*.”

In admiralty, see the title “*Admiralty*,” and particularly 1 STANDARD PROC. 458.

Violation of customs laws, see 6 STANDARD PROC. 356.

Death by wrongful act, see 6 STANDARD PROC. 457.

Pleadings to enforce game and fish laws, see 8 STANDARD PROC. 311.

Penalty or forfeiture for gambling, see 8 STANDARD PROC. 329, 334.

Peddling without a license, see 8 STANDARD PROC. 975.

Violation of health regulations, see 8 STANDARD PROC. 984, 994.

Obstructing or encroaching on highway, see 11 STANDARD PROC. 123, 163, 168.

79. *Manz v. St. Louis, etc. R. Co.*, 87 Mo. 278.

[a] The rule as to particulars is to be more strictly applied in favor of a defendant to a penal action than to an action *ex contractu* or *ex delicto*. *Patriquin v. Covert*, 42 Nova Scotia 66.

80. *Ala.*—*Prigmore v. Thompson*, Minor 420. *N. Y.*—*Levy v. Cohen*, 19 N. Y. Supp. 912. *N. C.*—*Harrington v. McFarland*, 1 N. C. 476. *Tex.*—*Kansas City, etc. R. Co. v. Cole* (Tex. Civ. App.), 149 S. W. 753.

81. *Seaboard Air Line Ry. v. Nims*, 61 Fla. 420, 54 So. 779 (no greater strictness is required); *State v. Zillmann*, 121 Wis. 472, 98 N. W. 543, explaining that the rule laid down in *State v. Citizens Ins. Co.*, 71 Wis. 411, 37 N. W. 348, goes no further than to lay down the rule applicable to all civil actions; that all the facts neces-

sary to constitute the cause of action must be alleged.

82. See 14 STANDARD PROC. 149, 150.

[a] **Rules in Civil Proceedings Govern.**—In *Fish v. Manning*, 31 Fed. 340, the court in an action for a penalty under the patent laws, says: “The sufficiency of the complaint is to be determined according to the rules applicable to civil actions, and according to the state practice in similar or analogous actions at common law, and not according to the analogies of criminal procedure.”

83. *United States v. Brig Neurea*, 19 How. (U. S.) 92, 15 L. ed. 931. See also *United States v. Three Hundred and Ninety-Six Barrels Distilled Spirits*, 3 Int. Rev. Rec. 123, 28 Fed. Cas. No. 16,503, and cases there cited.

84. *Ripley v. McCann*, 34 Hun (N. Y.) 112.

Generally as to indorsements on summons, see *supra*, VIII, A.

85. *U. S.*—*Sears v. United States*, 1 Gall. 257, 21 Fed. Cas. No. 12,592. *Cal.*—*Chipman v. Emeric*, 5 Cal. 239. *Fla.*—*Atlantic Coast Line R. Co. v. State*, 74 So. 595. *Ky.*—*Bell v. Norris*, 79 Ky. 48. *Mass.*—*Read v. Chelmsford*, 16 Pick. 128; *Reed v. Northfield*, 13 Pick. 94; *Peabody v. Hayt*, 10 Mass. 36. *N. D.*—*Greenberg v. Union Nat. Bank*, 5 N. D. 483, 67 N. W. 597. See also *Sheets v. Prosser*, 16 N. D. 180, 112 N. W. 72; *Erickson v. Citizens' Nat. Bank*, 9 N. D. 81, 81 N. W. 46. *Pa.*—*Hall v. Pennsylvania R. Co.*, 257 Pa. 54, 100 Atl. 1035.

[a] **Indictments and Criminal Complaints Distinguished.**—“Since the opinion in *Lee v. Clarke*, 2 East's R. 333, pronounced in 1802, it has been in-

modern system of pleading, so that now it is frequently held sufficient to allege merely the facts constituting the cause of action.⁸⁶ By statute in some jurisdictions a mere reference to the statute sought to be enforced is sufficient.⁸⁷

Sufficiency of Recital.—Where specific counting on the statute is necessary no particular set form of words is required,⁸⁸ but the wording must be such as to make it clearly appear that a statute and not merely the common law is relied upon.⁸⁹ Where there are several statutes involved the reference must not be in the singular,⁹⁰ and a mere general reference to a statute has been held not sufficient where there are several sections forbidding different acts,⁹¹ and different

variably held by subsequent decisions, both *English* and *American*, that in an action on a penal statute the declaration must allege the fact to be done *contra formam statuti* or in language equivalent thereto; unless the same facts would constitute an offense or ground of action at common law. . . . A recent statute has rendered those words immaterial, in *indictments* and *complaints*, but *penal* statutes, not being therein mentioned, still retain that one attribute of legal strictness." Penley v. Whitney, 48 Me. 351.

86. See Leone v. Kelly, 77 Conn. 569, 60 Atl. 136; Broschart v. Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33. Compare Blydenburgh v. Miles, 39 Conn. 484; Town of Griswold v. Gallup, 22 Conn. 208. **Mass.**—Levy v. Goudy, 2 Allen 320. **Mo.**—Emerson v. St. Louis, etc. R. Co., 111 Mo. 161, 19 S. W. 1113; Reynolds v. Chicago & A. R. Co., 85 Mo. 90. **Mont.**—State v. Owsley, 17 Mont. 94, 42 Pac. 105. **N. Y.** In People v. McCann, 67 N. Y. 506, the court *cites* Nellis v. New York Cent. R. Co., 30 N. Y. 505, as settling the question that the statute need not be specifically pleaded. Compare *supra*, VIII, on the necessity of reciting statute in the process. **N. C.**—Carson v. Bunting, 154 N. C. 530, 70 S. E. 923. See also Currie v. Raleigh & A. Air Line R. Co., 135 N. C. 535, 47 S. E. 654; London v. Headen, 76 N. C. 72. See also Harshaw v. Crow, 33 N. C. 240; Duffy v. Averitt, 27 N. C. 455. **S. D.**—See Kirby v. Western Union Tel. Co., 4 S. D. 463, 57 N. W. 202.

[a] **Texas.**—"Courts take judicial cognizance of general laws, and under our system of pleading it is only necessary to allege the facts upon which the recovery is sought. The provisions of general statutory law governing the rights of the parties upon such a state

of fact need not be alleged." Martin v. Johnson, 11 Tex. Civ. App. 628, 33 S. W. 306. Compare Kansas City, etc. R. Co. v. Cole (Tex. Civ. App.), 149 S. W. 753.

[b] **Sherman Anti-Trust Act.**—Strout v. United Shoe Mach. Co., 195 Fed. 313.

[c] **Rule under particular penal statutes** has been changed, but the general common law doctrine has not been changed by statute. Atlantic Coast L. R. Co. v. State (Fla.), 74 So. 595.

87. See the statutes, and City of Goshen v. Croxton, 34 Ind. 239. See also Green v. City of Indianapolis, 25 Ind. 490; State v. Prosser, 16 N. D. 180, 112 N. W. 72, construing Code (1905), §7396, as requiring at least a reference to the statute.

88. Barkhamsted v. Parsons, 3 Conn. 1. See also Town of Griswold v. Gallup, 22 Conn. 208; Scroter v. Harrington, 8 N. C. 192, followed in Buncombe Tpk. Co. v. McCarson, 18 N. C. 306.

89. Smith v. United States, 1 Gall. 261, 22 Fed. Cas. No. 13,122 (following Com. v. Morse, 2 Mass. 138), a conclusion "contrary to the law in such case made and provided" is not sufficient, since "law" might refer to the common law and is not the same as "act" or "statute."

[a] It is sufficient to recite the facts and follow with a reference to the act itself. Hall v. Pennsylvania R. Co., 257 Pa. 54, 100 Atl. 1035, following Rees v. Emerick, 6 Serg. & R. (Pa.) 286.

90. Drake v. Preston, 34 U. C. Q. B. 257.

91. Benalleck v. People, 31 Mich. 200.

statutes should not be referred to without specifying which is relied upon.⁹²

Effect of Recital.—That the statute has been recited may be considered in determining whether the action is for a statutory penalty or for a common law liability.⁹³

3. Alleging the Offense.—In Words of Statute.—It is generally held sufficient to allege the act in the words of the statute,⁹⁴ subject, of course, to the rule that the statute must itself sufficiently describe the offense.⁹⁵ All the necessary ingredients of the offense must be specifically set forth,⁹⁶ and nothing must be left to implication or intend-

92. See *Fish v. Manning*, 31 Fed. 340, which says: "The common law rule was the same." See also *Erickson v. Citizens' Nat. Bank*, 9 N. D. 81, 81 N. W. 46.

[a] *Compare Blydenburgh v. Miles*, 39 Conn. 484, where a general reference "contrary to the form of the statutes" was held proper. The pleader, being uncertain which of several statutes the particular acts were forbidden by, "framed his declaration so as to meet the proof as it might appear."

93. *St. Louis, A. & T. H. R. Co. v. Hill*, 11 Ill. App. 248.

94. **U. S.**—*United States v. Brig Neurea*, 19 How. 92, 15 L. ed. 931; *Winne v. Snow*, 19 Fed. 507, explaining *United States v. Morris*, 2 Bond 23, 26 Fed. Cas. No. 15,814, following *Oliphant v. Salem Flouring Mills*, 5 Sawy. 128, 18 Fed. Cas. No. 10,486. **Ark.** *Kirkpatrick v. Stewart*, 19 Ark. 695. **Conn.**—*Merriam v. Langdon*, 10 Conn. 460. **Ill.**—*Gebhart v. Adams*, 23 Ill. 345. **Me.**—*Berry v. Stinson*, 23 Me. 140. **Tenn.**—*Greer v. Bumpass*, Mart. & Y. 94. **Va.**—*Sims v. Alderson*, 8 Leigh (35 Va.) 479. **Can.**—*Church v. Richards*, 6 U. C. Q. B. 562.

See 12 STANDARD PROC. 447.

95. *The Mary Ann*, 8 Wheat. (U. S.) 380, 5 L. ed. 641. See also *Brig Caroline v. United States*, 7 Cranch (U. S.) 496, 3 L. ed. 417; *Schooner Hoppet v. United States*, 7 Cranch (U. S.) 389, 3 L. ed. 380; *United States v. Three Hundred and Ninety-Six Barrels Distilled Spirits*, 3 Int. Rev. Rec. 123, 28 Fed. Cas. No. 16,503 (and cases there cited); *Duch v. The Chief Burgess*, 7 Watts (Pa.) 181.

[a] "If there is nothing in the context or in other parts of the statute, or in statutes in *pari materia*, to control or modify the sense and mean-

ing of the terms in which the offense is defined, then it may be presumed that the terms in the complaint are used in the same sense with those in the statute and whatever that prohibits the complaint charges. In such case the offense may be described and charged in the words of the statute. Otherwise it may be necessary to frame the complaint in such terms as to designate the offense intended with precision." *Com. v. Bean*, 14 Gray (Mass.) 52. See also *Com. v. Bean*, 11 Cush. (Mass.) 414.

96. **U. S.**—*The Bolina*, 1 Gall. 75, 3 Fed. Cas. No. 1,608. See *Jacob v. United States*, 1 Brock. 520, 13 Fed. Cas. No. 7,157. **Ala.**—*Reagh v. Spann*, 3 Stew. 100. **Ill.**—*Sexton v. School Comrs.*, 19 Ill. 51; *Pace v. Vaughn*, 6 Ill. 30, followed in *Camp v. Ganley*, 6 Ill. App. 499. See also *Russell v. Hamilton*, 3 Ill. 56; *Hamilton v. Wright*, 2 Ill. 582. **Me.**—*Maine v. Androscoggin R. Co.*, 76 Me. 411. **Miss.** *Dukate v. Adams*, 101 Miss. 433, 58 So. 475. **Mo.**—*Manz v. St. Louis*, etc. R. Co., 87 Mo. 278; *State v. Wabash, St. L. & P. R. Co.*, 83 Mo. 144; *Wood v. Western Union Tel. Co.*, 59 Mo. App. 236.

[a] **Must clearly and specifically allege** the grounds upon which the statutory penalty is sought. *Dunlap v. Chicago, M. & St. P. Ry. Co.*, 32 S. D. 581, 144 N. W. 226.

[b] "Certainty to a 'certain intent in general' is required, so that the words used may not mislead either by their natural or artificial sense." *Fairbanks v. Antrim*, 2 N. H. 105.

[c] **Need Only State Such Facts as Clearly Bring It Within the Statute.** *State ex rel. Mo., etc. Co. v. Nolte* (Mo. App.), 187 S. W. 896, following *Emerson v. St. Louis & H. R. Co.*, 111 Mo. 161, 19 S. W. 1113.

ment.⁹⁷ The facts, and not mere conclusions, must be alleged.⁹⁸

Negating Exceptions.—The familiar rule of pleading applies that exceptions or limitations in the same section must be pleaded, but these in another section or statute need not be.⁹⁹

Defects Not Cured by Verdict.—If the petition does not state the facts to bring the party liable under the statute by its very terms, the defects therein are not cured by the verdict.¹

4. Allegations as to Right to Penalty and Capacity To Sue.—It is not necessary to aver the uses to which the forfeiture is to be applied.² So it is not necessary to specifically allege that one is suing not alone for himself.³ There must be averments showing the existence of persons capable of taking.⁴ The wording of the statute may be such as to require allegations showing plaintiff's capacity to bring the suit.⁵

5. Allegations as to Damages.—Actual damages need not be alleged,⁶ and it has been held incorrect to make such demand.⁷ It is

97. *People v. Mutual Life Ins. Co.*, 72 Ill. App. 569; *Everts v. Allen*, 1 D. Chip. (Vt.) 116.

98. *Ala.*—*Blackburn v. Baker*, 7 Port. 284. *Conn.*—*Broschart v. Tuttle*, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33; *Larabee v. Tracy*, 1 Root 273. *Ill.* *People v. Mutual Life Ins. Co.*, 72 Ill. App. 569. *La.*—*New Orleans v. Gordon*, 12 La. Ann. 749. *N. Y.*—*Bigelow v. Johnson*, 13 Johns. 428; *Cole v. Smith*, 4 Johns. 193; *People v. Joline*, 65 Misc. 394, 121 N. Y. Supp. 857. *S. D.*—*Kirby v. Western Union Tel. Co.*, 4 S. D. 463, 57 N. W. 202. *Tenn.* *Greer v. Bumpass*, Mart. & Y. 94. *Vt.* *Ellis v. Hull*, 2 Aik. 41.

99. *U. S.*—*Chicago, B. & Q. R. Co. v. United States*, 195 Fed. 241, 115 C. C. A. 193, affirming judgment, 184 Fed. 984. *Fla.*—*Seaboard, etc. R. Co. v. Nims*, 61 Fla. 420, 54 So. 779. *Ill.* *Chicago, B. & Q. R. Co. v. Carter*, 20 Ill. 390. *Me.*—*Berry v. Stinson*, 23 Me. 140; *Smith v. Moore*, 6 Greenl. 274. *Mass.*—*Williams v. Hingham & Quiney Tpk. Corp.*, 4 Pick. 341. *N. J.*—*Lott v. Laventhal*, 80 N. J. L. 216, 76 Atl. 328; *Vandegrift v. Meihle*, 66 N. J. L. 92, 49 Atl. 16. *N. Y.*—*Hart v. Cleis*, 8 Johns. 41. *Pa.*—*Com. v. Davenger*, 10 Phila. 478. *S. C.*—*Mills v. Kennedy*, 1 Bailey 17. *Eng.*—*The President & College of Physicians v. Salmon*, 1 Ld. Raym. 680, 91 Eng. Reprint 1353.

See the title "Indictment and Information."

1. *Bradshaw v. Western Union Tel. Co.*, 150 Mo. App. 711, 131 S. W. 912, criticising *Wood v. Western Union Tel. Co.*, 59 Mo. App. 236. See 12 STAND-ARD PROC. 697.

2. *U. S.*—*Seers v. United States*, 1 Gall. 257, 21 Fed. Cas. No. 12,592. *Me.*—*State v. Thrasher*, 79 Me. 17, 7 Atl. 814; *State v. Willis*, 78 Me. 70, 2 Atl. 848. *N. C.*—*Martin v. Martin*, 50 N. C. 346.

3. *Levy v. Gowdy*, 2 Allen (Mass.) 320, while a proper and usual allegation it is not necessary for the court will give a judgment which will secure a proper disposal of the penalty. Compare *supra*, VII, A and B.

4. *State v. Grand Trunk R. Co.*, 60 Me. 145; *State v. Cottle*, 15 Me. 473.

5. *Barker v. Phelps*, 39 Mo. App. 283, so where a suit can only be instituted by a taxpayer, the petition must show plaintiff is a taxpayer.

[a] It is not necessary to allege in the complaint that the action was caused to be brought by the officer charged with the duty of so doing, where the penalty is only given to the people and such officer is the only person who can bring the suit. *People v. Lamb*, 32 N. Y. Supp. 584, distinguishing *People v. Belknap*, 58 Hun 241, 12 N. Y. Supp. 143, holding that where it does not appear that the action was commenced by someone having authority it cannot be maintained.

6. *Ark.*—*Little Rock, Tel. Co. v. Davis*, 41 Ark. 79. See also *Western Union Tel. Co. v. Cobbs*, 47 Ark. 344, 1 S. W. 558. *Ill.*—*Galena & Chicago, etc. R. Co. v. Appleby*, 28 Ill. 283. *Eng.*—*Pemberton v. Shelton, Cro. Jac.* 498, 79 Eng. Reprint 425.

7. *Barkhamsted v. Parsons*, 3 Conn. 1.

[a] But Seems Not To Be Reversible Error.—*Dowd v. Seawell*, 14

proper to claim only nominal damages.⁸ It is not necessary to aver that the penalty is unpaid.⁹

6. Joinder.—The general rules of joinder apply in this class of cases.¹⁰ Whether a cause of action for a penalty can be joined with some other cause growing out of the same act will depend largely upon whether the penal action be considered civil or criminal, *ex contractu* or *ex delictu*,¹¹ and joinder is often permitted to avoid multiplicity of suits.¹² Where several distinct acts of the same nature are committed by the same defendant against the same plaintiff, and for each of which a separate penalty is imposed there need be but one suit.¹³ Where the statute gives only one penalty for several acts, but one action can be brought.¹⁴ Where the penalty is claimed for a continuing offense, it is not necessary to plead in separate counts for each day's acts.¹⁵ In some jurisdictions the general provisions of

N. C. 185. See *Ely v. Van Beuren*, 3 Caines (N. Y.) 218; *Pemberton v. Shelton*, Cro. Jac. 498, 79 Eng. Reprint 425.

8. *Indiana Millers, etc. Ins. Co. v. People*, 65 Ill. App. 355, the damages were alleged to be one cent.

9. *Western Union Tel. Co. v. Young*, 93 Ind. 118, the purpose of such an allegation in an action on a contract is to show a breach by non-payment, but in actions on torts or for penalties there is no necessity for showing a failure to pay the damages or the penalty.

10. See the titles "Indictment and Information;" "Joinder of Actions;" "Several Counts."

11. See *supra*, II, and *Washington-Alaska Bank v. Stewart*, 184 Fed. 673, 108 C. C. A. 273; *Gruber v. First Nat. Bank*, 87 Pa. 465, action for excess interest and for penalty for usury.

[a] **Cutting Down Trees.**—Cause of action for penalty and for damages may be joined. One count asks for the *real value* of the trees and the other count asks for the *statute value*. The same plea could be made to both counts and the same judgment would be proper to either. *Elder v. Hiltzheim*, 35 Miss. 231. Compare *Morrison v. Bedell*, 22 N. H. 234.

[b] **Money had and received** may be joined with cause of action for penalty for exacting excessive fees. *Spence v. Thompson*, 11 Ala. 746. But compare *People ex rel. Drew v. Judges*, Dougl. (Mich.) 434, where amendment was refused which joined action for debt for penalty with one for money had and received.

12. *Washington-Alaska Bank v. Stew-*

art, 184 Fed. 673, 108 C. C. A. 273; *Snow v. Mast*, 65 Fed. 995; *Wolverton v. Lacey*, 18 Law Rep. 672, 30 Fed. Cas. No. 17,932. See also *Barkhamsted v. Parsons*, 3 Conn. 1; *Cincinnati, etc. R. Co. v. Cook*, 37 Ohio St. 265.

13. *Snow v. Mast*, 65 Fed. 995 (infringements of same copyright); *Indiana Millers, etc. Ins. Co. v. People*, 65 Ill. App. 355 (writing three illegal policies of insurance); *following Byars v. Mt. Vernon*, 77 Ill. 467; and *Hensholdt v. Town of Petersburg*, 63 Ill. 111, where it was held that several fines for illegal sale of liquor contrary to ordinance could be collected in one suit. But see *Wolverton v. Lacey*, 18 Law Rep. 672, 30 Fed. Cas. No. 17,932, where it is held not a misjoinder to sue for separate penalties in one count where the matters were set out with such particularity that the defendant could not have been misled.

[a] **So in action for penalty for cutting trees**, penalties for the cutting and carrying away of any number of trees may be embraced in one count. Many trees may be cut or carried away by one act of trespass. *People v. M'Fadden*, 13 Wend. (N. Y.) 396.

[b] **Declaring for four different penalties at different times** in the same count is demurrable, but where only one penalty was found by the jury it must be presumed after verdict that the jury convicted defendant of the offense properly laid. *Burnham v. Webster*, 5 Mass. 266.

14. *Clark v. Lisbon*, 19 N. H. 286.

15. *Toledo, St. L. & K. C. R. Co. v. Stephenson*, 131 Ind. 203, 30 N. E. 1082.

statutes regulating joinder of actions have been held not to apply to actions for penalties,¹⁶ and, a code provision permitting any person injured by the violation of a statute to recover damages, does not warrant joining a cause for such damages with one for a penalty,¹⁷ but a general provision permitting joinder where the causes arise from injuries to person or property, has been construed as permitting joinder where a railroad company was liable to several penalties for overcharging.¹⁸

7. Minuting and Indorsing.¹⁹ — In some jurisdictions complaints, informations and the like must be minuted or indorsed, showing when the proceedings were commenced.²⁰ It has been held that this must be done on the day the action was commenced and not that on which the process was returned,²¹ and where required on the day the information was "exhibited," indorsement on the day of filing is sufficient.²² The entry in a justice's docket should show what the penalty was for, or under what statute it accrued.²³

8. Treating Indictment as Compliant. — Where a proceeding was begun by indictment which should have been by complaint in a civil action, it has been held that the court may retain jurisdiction by treating the indictment as a complaint, where defendant was not prejudiced.²⁴

B. DEFENDANT'S PLEADINGS.²⁵ — The defendant's pleadings are governed by the general rules appropriate to the particular sort of an action or proceeding employed to enforce the penalty, forfeiture or fine.²⁶ In a penal action to recover a fine defendant cannot be compelled to file an answer, though the proceedings are civil in form.²⁷ "Not guilty" has been recognized as a proper plea where the action is debt,²⁸ but the more appropriate plea is "nil debit."²⁹ It has been held that it

16. *Louisville & N. R. Co. v. Com.*, 102 Ky. 300, 43 S. W. 458, 53 L. R. A. 149. See also *Brown v. Rice*, 51 Cal. 489.

17. *Maple v. John*, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800.

18. *Cincinnati etc. R. Co. v. Cook*, 37 Ohio St. 265.

19. *Minuting and indorsing of indictments, informations and complaints in criminal prosecutions*, see the title "*Indictment and Information*."

Indorsement of process, see *supra*, VIII, A.

20. See the statutes and cases in following notes.

21. *Griffith v. West*, 10 N. J. L. 301; *Ackerson v. Zabriskie*, 7 N. J. L. 167.

22. *State v. Brainerd*, 57 Vt. 369, the filing imports an exhibition. *Compare* also *State v. Bartlett*, 11 Vt. 650, where a "mere verbal departure from the precise requirements of the statute" was not fatal since no misapprehension was possible.

23. *Ackerson v. Zabriskie*, 7 N. J.

L. 167. *Compare Dallas v. Hendry*, 3 N. J. L. 973.

24. *Kansas City, etc. R. Co. v. State*, 63 Ark. 134, 37 S. W. 1047. See also *Railway Co. v. State*, 55 Ark. 200, 17 S. W. 806.

25. *Necessity of affidavit of defense*, see 1 STANDARD PROC. 664.

26. See *Com. v. Standard Oil Co.*, 129 Ky. 546, 112 S. W. 632, and generally the titles "*Answers*;" "*Arraignment and Plea*;" "*Denials*;" and other titles dealing with particular pleas.

[a] A plea of "not guilty" traverses every material allegation of the petition. *Com. v. Standard Oil Co.*, 129 Ky. 546, 112 S. W. 632; *Louisville & N. R. Co. v. Com.*, 112 Ky. 635, 66 S. W. 505.

27. *Louisville & N. R. Co. v. Com.*, 112 Ky. 635, 66 S. W. 505.

28. *Stilson v. Tobey*, 2 Mass. 521; *Hitchcock v. Munger*, 15 N. H. 97.

29. *Burnham v. Webster*, 5 Mass. 266; *Stilson v. Tobey*, 2 Mass. 521.

is not sufficient to plead the general issue as to the whole of an information for a forfeiture.³⁰

The pleading the statute of limitations depends largely on whether the proceeding be considered criminal, or civil in nature.³¹ In criminal prosecutions it is a question of local construction whether the bar of the statute may be raised by the plea of not guilty,³² or may be by demurrer to the indictment,³³ or is ground for quashing.³⁴ In civil cases, subject to the qualifications elsewhere stated,³⁵ the general rule obtains that the defense being affirmative should be pleaded by defendant.³⁶

C. AMENDMENT.—It is proper to permit amendment as in other civil suits, in actions for penalties,³⁷ or forfeiture.³⁸

X. ABATEMENT AND REVIVAL.—In the absence of statute expressly so providing, the right of action for a penalty does not survive.³⁹ Whether the common law rule has been changed by gen-

See also *Hitchcock v. Munger*, 15 N. H. 97.

[a] Not proper in action of debt *sur amercement*—because this would have the effect of bringing the trial of a record before the jury. *Canfield v. Allen*, 1 N. J. L. 203. Compare *Wadsworth v. Parsons*, 6 Ohio 449.

30. Commander in Chief, 1 Wall. (U. S.) 43, 17 L. ed. 609; *United States v. Twenty-five Barrels of Alcohol*, 28 Fed. Cas. No. 16,562. See the titles "Admiralty;" "Internal Revenue."

31. See *supra*, II, A.

32. See 2 STANDARD PROC. 917. And see *Com. v. Washington*, 1 Dana (Ky.) 446; *Com. v. Ruffner*, 28 Pa. 259.

33. See 12 STANDARD PROC. 652, and *United States v. Cook*, 17 Wall. (U. S.) 168, 21 L. ed. 538.

34. See 12 STANDARD PROC. 1054, and *Com. v. Washington*, 1 Dana (Ky.) 446.

35. See the title "Limitation of Actions." And see 6 STANDARD PROC. 881, 918, 926, 931.

36. Ill.—*Gebhart v. Adams*, 23 Ill. 345, must be specially pleaded and not raised by general demurrer. Ky.—*Estill v. Fox*, 7 Mon. 552, 18 Am. Dec. 213, general issue is sufficient. Me. *State v. Thrasher*, 79 Me. 17, 7 Atl. 814 (should be pleaded or given in evidence and not raised by motion in arrest of judgment); *Frohook v. Pattee*, 38 Me. 103 (may be by general issue or special plea); *Moore v. Smith*, 5 Greenl. 490, may be by general issue. N. H.—*Pike v. Jenkins*, 12 N. H. 255, may be by plea "nil debit."

[a] Where the statute giving the penalty limits the time, the time is

of the essence of the right of action, so the statute need not be pleaded by defendant though it is not error to do so. *Atchison, T. & S. F. Ry. Co. v. Tanner*, 19 Colo. 559, 36 Pac. 541.

[b] If it appears on the record or at the trial that the suit on a penal statute has not been brought in time, effect must be given to the limitation though not pleaded. *Mewburn v. Street*, 21 U. C. Q. B. 498.

37. Mo.—*Adcox v. Western Union Tel. Co.*, 171 Mo. App. 331, 157 S. W. 989. N. Y.—*Low v. Little*, 17 Johns. 346. See also *Barber v. McHenry*, 6 Wend. 516. Tenn.—*Childress v. Mayor*, etc., 3 Sneed 347.

[a] Must Not Set Up a Different Cause of Action.—*Rosenbach v. Dreyfuss*, 1 Fed. 391; *Higdon v. Kennemer*, 120 Ala. 193, 24 So. 439. See the title "New Cause of Action or Defense."

[b] Amendment Not Allowed After Case Fully Heard.—*The African Prince*, 212 Fed. 552.

38. The *Mary Ann*, 8 Wheat. (U. S.) 380, 5 L. ed. 641; *Brig Caroline v. United States*, 7 Cranch (U. S.) 496, 3 L. ed. 417; *Merriam v. Langdon*, 10 Conn. 460.

39. U. S.—*Schreiber v. Sharpless*, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. ed. 65, affirming 17 Fed. 589. Ala.—*Willis v. Byrne*, 106 Ala. 425, 17 So. 332. Conn.—*Mitchell v. Hotchkiss*, 48 Conn. 9. Ill.—*Diversey v. Smith*, 103 Ill. 378. Ind.—*Davis v. State*, 119 Ind. 555, 22 N. E. 9. Ky.—*Cowan v. Campbell's Admr.*, 17 B. Mon. 522. Mass.—*Yarter v. Flagg*, 143 Mass. 280, 9 N. E. 649. N. Y.—*Stokes v. Stickney*, 96 N. Y. 323; *People v. Newcomb*, 75 Misc. 258,

eral provisions regarding abatement and the survival of causes of action is one of local construction.⁴⁰ As in other criminal cases the death of the defendant abates the proceedings.⁴¹

XI. DISCONTINUANCE AND DISMISSAL.⁴²—An action for a penalty may be discontinued, notwithstanding a statute forbidding compounding.⁴³ Want of authority to prosecute is not ground for dismissal,⁴⁴ nor is failure of the defendant to appear.⁴⁵ Where the statute gives but a single penalty for several acts, separate suits on each of such acts may be dismissed on motion.⁴⁶

XII. RIGHT TO JURY TRIAL.⁴⁷—Where the procedure is

135 N. Y. Supp. 151. **N. C.**—Fite v. Lander, 52 N. C. 247. **Pa.**—Reed v. Cist, 7 Serg. & R. 183. **R. I.**—Moies v. Sprague, 9 R. I. 541. **S. C.**—Butler v. Butler, 62 S. C. 165, 40 S. E. 138, following Allen v. Petty, 58 S. C. 240, 36 S. E. 586. **Tenn.**—Governor v. McManus, 11 Humph. 152. **Tex.**—State v. Schuenemann, 18 Tex. Civ. App. 485, 46 S. W. 260. See Nolan v. Tennyson, 21 Tex. Civ. App. 332, 50 S. W. 1028. **Vt.**—Benson v. Egerton, Brayt. 21. **Wis.**—Cotter v. Plumer, 72 Wis. 476, 40 N. W. 379. See also Killen v. Barnes, 106 Wis. 546, 82 N. W. 536. **Eng.**—Hambly v. Trott, Cowp. 372, 98 Eng. Reprint 1136; Kirkham v. Wheely, 3 Salk. 282, 91 Eng. Reprint 825.

40. See the following cases: **U. S.** Town of Waterford v. Elson, 149 Fed. 91, 78 C. C. A. 675, affirming 140 Fed. 800. **Conn.**—Bartram v. Sharon, 71 Conn. 686, 43 Atl. 143, 46 L. R. A. 144, construing Gen. Sts., 1902, §2020, giving damages for injuries from defective highways. **Ind.**—Davis v. State, 119 Ind. 555, 22 N. E. 9, following Western Union Tel. Co. v. Scirele, 103 Ind. 227, 2 N. E. 604. **Me.**—Prescott v. Knowles, 62 Me. 277. **Mo.**—Wiener v. Peacock, 31 Mo. App. 238, following a line of Missouri cases from Higgins v. Breen, 9 Mo. 497, to Baker v. Crandall, 78 Mo. 584. Compare State v. Atchison, 173 Mo. 164, 72 S. W. 1075; Carrollton v. Rhomborg, 78 Mo. 547. **N. C.**—Fite v. Lander, 52 N. C. 247, Revisal of 1905, §415.

41. **U. S.**—United States v. Mitchell, 173 Fed. 254, 97 C. C. A. 420, affirming 163 Fed. 1014; United States v. Pomeroy, 152 Fed. 279. **Ind.**—Blackwell v. State, 184 Ind. 227, 113 N. E. 723. **Ore.**—State v. Martin, 30 Ore. 108, 47 Pac. 196.

And see generally the title "Survival."

42. See generally the title "Dis-

missal, Discontinuance and Nonsuit."

Dismissal for failure to properly minute the writ, see *supra*, VIII, A.

43. Haskins v. Newcomb, 2 Johns. (N. Y.) 405, another suit might be brought by some other informer and the discontinuance could not be pleaded in bar.

[a] **Whether Action Be by Private Party or Public Officer.**—In a strictly *qui tam* action the party bringing same may abandon or discontinue it. In an action for a penalty to be prosecuted by a certain city officer named, "one-half to the use of the town and the other half for the use of the person furnishing the necessary evidence in the case," such officer has, as against such person and except so far as he may be bound to act under the orders of the city government, a right to discontinue the suit. Wheeler v. Goulding, 13 Gray (Mass.) 539.

44. Comrs. of Excise v. Purdy, 36 Barb. (N. Y.) 266, at most it is only ground for an order to stay the proceedings, or for compelling a bond for cost to be given. See also Thayer v. Lewis, 4 Denio (N. Y.) 269. Compare Ninety-Nine Plaintiffs v. Vanderbilt, 1 Abb. Pr. (N. Y.) 193.

[a] **Question Cannot Be Raised After Acquiescence by Proper Official.** Com. v. Connecticut River R. Co., 15 Gray (Mass.) 447.

45. Maguire v. Xenia, 54 Ill. 299, for the court can render judgment in his absence.

46. Clark v. Lisbon, 19 N. H. 286, though probably a plea in abatement as to all but one would be proper.

47. See generally the title "Juries and Jurors."

In admiralty, see 1 STANDARD PROC. 538.

Where seizure made on land the procedure is in accordance with the com-

strictly a civil action it is clear the right to a jury trial will be governed by the rules governing other civil actions.⁴⁸ Where the procedure is strictly criminal and for the enforcement of state laws, the right to a jury trial cannot be denied,⁴⁹ but it must be remembered that even at the common law many petty offenders could be punished without trial by jury,⁵⁰ and hence the question is usually one of construction of the particular statutes and constitutions.⁵¹

XIII. SUMMARY FORFEITURE.—Forfeiture of property as a means of enforcing an ordinance or statute regulating the use of the thing forfeited, can only be had under some form of judicial determination.⁵² For where the forfeiture of the property is designed as a penalty for disobedience of law, it is not due process of law to deprive the offender of his property without a hearing.⁵³ Notice either express or implied must be given that the owner may have an opportunity to come in and be heard before judgment of condemnation.⁵⁴ A statute granting to the aggrieved party the right to enter and take forfeited property will not be construed to permit him to do so without judicial proceedings.⁵⁵

mon law rather than admiralty. See 1 STANDARD PROC. 538, note 63.

48. *Shawnee Nat. Bank v. United States* (C. C. A.), 249 Fed. 583 (procedure to forfeit property used as means of committing crime is properly a law action and hence parties are entitled to jury trial); *People v. Hoffman*, 3 Mich. 248, though defendant might have been indicted for same act. See generally 16 STANDARD PROC. 877, 909.

[a] Harmless error to give jury trial, where the trial should have been by the court, especially where defendant did not object at the time. *Casey v. Briant*, 1 Stew. & P. (Ala.) 51.

49. See 16 STANDARD PROC. 909-913.

Whether the proceedings are criminal or civil, see *supra*, II, A.

50. *Ex parte Kiburg*, 10 Mo. App. 442; *Johnson v. Barclay*, 16 N. J. L. 1. See 16 STANDARD PROC. 910.

51. See the following cases: *Ala.* *Reagh v. Spann*, 3 Stew. 100. *Ga.* *Williams v. City Council*, 4 Ga. 509. See also *Floyd v. Comrs.*, 14 Ga. 354. *Idaho.*—*Stevens v. Home Sav. Assn.*, 5 Idaho 741, 51 Pac. 779, 986. *N. J.* *Harman v. State Board*, 67 N. J. L. 117, 50 Atl. 662; *Carter Bros. v. Camden Dist. Court*, 49 N. J. L. 600, 10 AH. 108. See also *Howe v. Treasurer of Plainfield*, 37 N. J. L. 145; *McGear v. Barduff*, 23 N. J. L. 213; *Johnson v. Barclay*, 16 N. J. L. 1. *N. Y.* *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302. *Pa.*—*Wendt v. Craig*, 67 Pa. 424;

Van Swartow v. Com., 24 Pa. 131. *S. C.* *City Council v. Stelges*, 10 Rich. L. 438.

52. Ill.—*Darst v. People*, 51 Ill. 286; *Poppen v. Holmes*, 44 Ill. 360, 92 Am. Dec. 186. *Ky.*—*Varden v. Mount*, 78 Ky. 86; *Gallagher v. Wooster*, 4 Ky. L. Rep. 256. *Miss.*—*Donovan v. Mayor, etc. of Vicksburg*, 29 Miss. 247. *Ohio.*—*Rosebaugh v. Saffin*, 10 Ohio 31. *Ore.*—*Nicklas v. Rathburn*, 69 Ore. 483, 139 Pac. 567.

[a] But see *Whitfield v. Longest*, 28 N. C. 268, where the court says: "As to the objection, that there is no judicial decision condemning the property to be sold, we think it insufficient, since the owner may, if he chooses, have a full investigation of the case by bringing an action of replevin, as in any other case of distress."

53. *N. J.*—*Berry v. DeMaris*, 76 N. J. L. 301, 70 Atl. 337; *Haney & Scattergood v. Compton*, 36 N. J. L. 507. *N. Y.*—*Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302. *Ore.*—*Nicklas v. Rathburn*, 69 Ore. 483, 139 Pac. 567.

54. *Ark.*—*Jones v. Mason*, 12 Ark. 687. *Ohio.*—*Rosebaugh v. Saffin*, 10 Ohio 31. *Pa.*—*Wendt v. Craig*, 67 Pa. 424; *Craig & Blanchard v. Kline*, 65 Pa. 399.

55. *Gear v. Bullerdick*, 34 Ill. 74.

[a] Power to fine owner for keeping, or to remove gunpowder would not warrant municipality in declaring it forfeited, or withholding it from

XIV. PROVINCE OF COURT OR JURY.—Findings of fact are for the jury as in other cases.⁵⁶ The question of defendant's good faith, as affecting the right to impose a penalty upon him, is for the jury.⁵⁷

Directing Verdict.—Where the proceeding is by civil suit the court may under proper circumstances direct a verdict as in other civil actions.⁵⁸

XV. VERDICT, FINDINGS AND JUDGMENT.—A. IN GENERAL.⁵⁹—Though technically a judgment should have been criminal in form, for a fine, defendant cannot complain where he is not prejudiced by a civil judgment.⁶⁰ Where a forfeiture is sought the judgment should be one of forfeiture and not one for the value of the thing forfeited.⁶¹ The usual rule obtains that immaterial variances between the verdict or judgment, and the pleadings or writ, are not fatal.⁶² In some jurisdictions the judgment may provide for imprisonment to enforce the payment.⁶³

B. DEFAULT JUDGMENT.⁶⁴—The right to proceed in the absence of defendant turns upon whether the proceedings be considered civil or criminal in their nature.⁶⁵ So far as the proceedings are civil in nature judgment may be taken by default as in other civil suits,⁶⁶ but if they are criminal the rule applicable thereto applies.⁶⁷ On defendant's failure to plead it is not necessary to empanel a jury where the statute fixes a definite fine.⁶⁸ So in a suit for a statutory penalty judgment on default may be for the statutory amount without any assessment of damages.⁶⁹

C. ASSESSMENT OF PENALTY.—In an action of debt to enforce a

the owner. *Cotter v. Doty*, 5 Ohio 394.

56. *Sumrell v. Atlantic Coast A. L. R. Co.*, 152 N. C. 269, 67 S. E. 585. See generally the title "**Province of Judge and Jury.**"

57. *Haley v. Taylor*, 77 Miss. 867, 28 So. 752.

58. *Hepner v. United States*, 213 U. S. 103, 29 Sup. Ct. 474, 53 L. ed. 720. See also *Four Packages v. United States*, 97 U. S. 404, 24 L. ed. 1031 (where jury was directed to bring in verdict of forfeiture); *United States v. Thompson*, 41 Fed. 28; *People v. Croot*, 20 Colo. App. 256, 78 Pac. 310; and the title "**Verdict.**"

59. See generally the titles "**Findings and Conclusions;**" "**Judgments;**" "**Sentence and Judgment;**" "**Verdict.**"

60. *Goldsmith v. City of Huntsville*, 120 Ala. 182, 24 So. 509.

61. *Boles v. Lynde*, 1 Root (Conn.) 195.

62. *Sears v. United States*, 1 Gall. 257, 21 Fed. Cas. No. 12,592 (failing to add "of America" to plaintiff

"United States"); *Railway Co. v. State*, 55 Ark. 200, 17 S. W. 806, describing defendant as railway instead of railroad.

63. *People v. Zito*, 237 Ill. 434, 86 N. E. 1041; *Kettles v. People*, 221 Ill. 221, 77 N. E. 472; *People v. Brod*, 197 Ill. App. 358.

As to the right to imprison to compel payment, see *infra*, XVIII, B, 2.

64. Necessity for affidavit of defense, see the title "**Affidavits of Merits and Defense.**"

65. *Grant v. Com.*, 33 Pa. Co. Ct. 43. See *supra*, II, A.

66. *Railway Co. v. State*, 55 Ark. 200, 17 S. W. 806; *Maguire v. Town of Xenia*, 54 Ill. 299. See generally the title "**Judgments.**"

67. See the titles "**Sentence and Judgment;**" "**Trial.**"

68. *Com. v. Neat*, 89 Ky. 241, 12 S. W. 256.

69. *Tennessee Mut. B. & L. Assn. v. State*, 99 Ala. 197, 13 So. 687; *Garey v. Edwards*, 15 Ala. 105; *Cullum v. Casey & Co.*, 9 Port. (Ala.) 131, 33 Am. Dec. 304.

penalty the amount should be assessed by a jury as in other civil cases,⁷⁰ but where the amount is fixed by statute it should be assessed by the court.⁷¹ Where the penalty is by way of double or treble damages the proper practice is for the jury to find the single damages and the court to double or treble in the judgment.⁷² In trespass by co-tenants the damages must be jointly assessed though a question of penalty is involved and only part of the co-tenants are entitled thereto.⁷³

D. AMOUNT OF JUDGMENT OR VERDICT.—Where the statute gives a definite penalty it clearly cannot be made either greater or less by either the court or jury.⁷⁴ The amount is not affected by the damages actually sustained,⁷⁵ nor can conditions be imposed which are not found in the statute.⁷⁶ A mere general verdict without stating the amount of the penalty will be upheld where the statute fixes the amount,⁷⁷ but a judgment “for the penalty” and naming no amount has been held erroneous.⁷⁸ When it keeps within the limit prescribed by law the amount of a fine is discretionary with the tribunal which imposes it.⁷⁹ Where the statute provides for awarding either part or all of the penalty the tribunal may award such as is deemed proportionate to the offense.⁸⁰ Where the penalty is measured by something of uncertain value, less may be given than is asked for.⁸¹

E. SPECIFYING PARTICULAR PENALTY FOR WHICH RECOVERY IS GIVEN.—A general verdict of “not guilty” is responsive to the issues

70. **U. S.**—United States *v.* Allen, 4 Day 474, 24 Fed. Cas. No. 14,431. **Conn.**—Broschart *v.* Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33. **Ill.** People *v.* Hartford Life Ins. Co., 252 Ill. 398, 96 N. E. 1049, *distinguishing* Armstrong *v.* People, 37 Ill. 459, as having been a criminal prosecution for an offense punishable by imprisonment and fine.

Necessity of assessment on default, see *supra*, XV, B.

71. Morrill *v.* Title Guaranty & Surety Co., 94 Wash. 258, 162 Pac. 360, 163 Pac. 733; Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800.

72. Cross *v.* United States, 1 Gall. 26, 6 Fed. Cas. No. 3,434; Warren *v.* Doolittle, 5 Cow. (N. Y.) 678.

[a] Judgment in double the amount of the verdict is correct. Seaboard Air Line Ry. Co. *v.* Nims, 61 Fla. 420, 54 So. 779.

73. Haley *v.* Taylor, 77 Miss. 867, 28 So. 752.

74. **U. S.**—Standard Oil Co. *v.* Missouri, 224 U. S. 270, 32 Sup. Ct. 406, 56 L. ed. 760. **Ark.**—Graham *v.* State, 1 Ark. 171. **Conn.**—Taff *v.* State, 39 Conn. 82. **Nev.**—State *v.* Lawry, 4

Nev. 164. **N. J.**—Broadnell *v.* Conger, 2 N. J. L. 210. **Pa.**—Worth *v.* Peck, 7 Pa. 268; Macklin *v.* Taylor, Add. 212. **Wis.**—Taylor *v.* State, 35 Wis. 298.

[a] Judge may correct the verdict (1) and give judgment for the correct amount. See Mo. Rev. St. (1909), §5254; State *v.* McQuaig, 22 Mo. 319. (2) If he fails to do so, the judgment may be remanded and correction made. See State *v.* Gordon, 153 Mo. 576, 55 S. W. 76.

75. Russell *v.* Louisville & N. R. Co., 93 Va. 322, 25 S. E. 99, “the verdict does not sound in damages; but is a sum eo nomine and in numero.”

76. *Ex parte* Steed, 6 Okla. Crim. 183, 117 Pac. 887, that defendant pay in instalments.

77. Cotten *v.* Rutledge, 33 Ala. 110.

78. Mayor *v.* Harkins, 1 Phila. (Pa.) 518.

79. Greenville *v.* Kemmis, 58 S. C. 427, 36 S. E. 727; State *v.* Sheppard, 54 S. C. 178, 32 S. E. 146.

80. See City of Buffalo *v.* Geo. P. Ray Mfg. Co., 124 N. Y. Supp. 913; N. Y. Code Civ. Proc., §1898.

81. Perrin *v.* Sikes, 1 Day (Conn.) 19; Dowd *v.* Seawell, 14 N. C. 185.

though several distinct causes for penalties were properly pleaded.⁸² Where judgment or verdict is against defendant, the particular offenses on which the conviction is had should be specified,⁸³ but particular specification is not necessary where only one penalty is sued for.⁸⁴

F. IN WHOSE FAVOR JUDGMENT SHOULD RUN.—In a *qui tam* action the judgment should be for the plaintiff setting out the moiety to his use and that to the use of others entitled thereto,⁸⁵ or should be to the informer for the uses expressed in the statute,⁸⁶ and should run to the particular officer who brings the suit, rather than to the one who is to receive the fund.⁸⁷ Failure to recite how the penalty shall be distributed is harmless error,⁸⁸ though there is authority holding the error to be material.⁸⁹ Where plaintiff is entitled to the whole penalty the judgment may be in his favor generally without further recitations concerning his title.⁹⁰ If the statute makes a definite and specific disposal of the penalty, the judgment of conviction need not contain an express award,⁹¹ but if the court is to exercise any discretion it must appear that it has done so.⁹² Where a fine is recovered by indictment it is proper to give judgment in the name of the state though an informer may be interested therein.⁹³

G. JUDGMENT AGAINST JOINT OFFENDERS.—Where an action is brought jointly against principal and agent for the commission of a particular act the judgment must be joint,⁹⁴ but, being in substance an action *ex delicto*, the judgment may be against some defendants and in favor of others where all have not participated in the wrongful act.⁹⁵

82. *Hannibal, etc. R. Co. v. Bowling*, 53 Mo. 311.

83. *Westbrook v. Van Auken*, 5 N. J. L. 550; *Bloodgood v. Vanderveer*, 3 N. J. L. 928; *Dixon v. Freeman*, 3 N. J. L. 411; *Whitlock v. Tompkins*, 2 N. J. L. 273.

[a] Judgment should show for what penalty it was rendered. *Manayunk v. Davis*, 2 Pars. Eq. Cas. (Pa.) 289.

[b] Magistrate's finding must describe or define the offense so as to individuate it. *Com. v. Foulkrod*, 17 Pa. Dist. 360. See also *Com. v. Cochran Creamery Co.*, 4 Pa. Co. Ct. 253.

84. *Parke v. Adams*, 3 N. J. L. 675.

85. *Bradley v. Baldwin*, 5 Conn. 288; *Illinois Cent. R. Co. v. Tait*, 50 Ill. 48.

86. *Doss v. State*, 6 Tex. 433.

87. *Tarde v. Benseman*, 31 Tex. 277, a judgment in a *qui tam* action by an assessor brought on behalf of himself and the state for the collection of a penalty double the amount of a license tax should direct payment to the assessor, who in turn accounts to the state, and not to the state treasurer.

88. *Ark.—Railway Co. v. State*, 55 Ark. 200, 17 S. W. 806. *Conn.—Bradley v. Baldwin*, 5 Conn. 288, is a mere clerical error which the clerk will be ordered to amend. *Tex.—Tarde v. Benseman*, 31 Tex. 277.

89. See *Jones v. Pitman*, 12 N. J. L. 93, and *Illinois Cent. R. Co. v. Tait*, 50 Ill. 48, in both of which cases the defect appears to have been considered fatal. But there seems to have been other grounds on which the judgment was reversed.

90. *Dallas v. Hendry*, 3 N. J. L. 973.

91. *N. J.—Vandegrift v. Meihle*, 66 N. J. L. 92, 49 Atl. 16. *Pa.—Grant v. Com.*, 33 Pa. Co. Ct. 43. *Eng. In re Boothroyd*, 15 Mees. & W. 1.

92. *In re Boothroyd*, 15 Mees. & W. (Eng.) 1.

93. *State v. Stanford*, 20 Ark. 145.

94. *Indiana Millers', etc. Ins. Co. v. People*, 65 Ill. App. 355.

95. *Chaffee v. United States*, 18 Wall. (U. S.) 516, 21 L. ed. 908. See also *Wright v. Sample*, 162 Ala. 222, 50 So. 268. Compare *supra*, II, B.

XVI. COSTS.—A. **RIGHT TO TAX.**—It has been said in some jurisdictions that where the statute giving the penalty does not prescribe costs none can be imposed,⁹⁶ and though the right to tax them against the informer has been questioned as a matter of public policy,⁹⁷ by the weight of authority the informer is liable if the suit fails,⁹⁸ and the defendant may be taxed with costs if he is found guilty.⁹⁹ Costs may be taxed as a condition on granting a favor.¹ The general provisions regulating costs will in some instances be found to expressly exclude actions for penalties,² and statutes sometimes prescribe who shall pay the costs of unsuccessful suits and prosecutions.³

B. **AMOUNT TAXABLE.**—The various items of costs taxable depend upon local statutes.⁴ It has been held full costs may be taxed where the prosecution was necessarily brought in a superior court, though the recovery was below the jurisdictional amount of that court.⁵

C. **SECURITY FOR COSTS.**—It seems clear that where the informer is liable to be charged with the costs he may be required to give security therefor as would an ordinary plaintiff.⁶ But where the penalty is given only to the aggrieved person, and he alone can sue therefor, he may bring his suit in forma pauperis.⁷

XVII. REVIEW.—A. **NEW TRIAL.**—Where the action is considered as civil in its nature there can be no question as to the right to a new trial on proper cause shown as in other civil actions even though the verdict was in defendant's favor.⁸ In *qui tam* actions it

Several sentence against defendants jointly indicted, see the title "Sentence and Judgment."

96. *Heard v. Faris*, 1 Litt. (Ky.) 245; *Taylor v. State*, 35 Wis. 298.

97. *O'Driscoll v. M'Cants*, 2 Bay (S. C.) 323.

98. **U. S.**—*United States v. The Planter*, Newb. 262, 27 Fed. Cas. No. 16,054. **Ala.**—*Casey v. Briant*, 1 Stew. & P. 51. **Colo.**—*People v. Braisted*, 13 Colo. App. 532, 58 Pac. 796, in action on behalf of a town, costs may be taxed against it, though the statute does not specifically give costs against the people. **Conn.**—*Reynolds v. Stevens*, 2 Root 136.

99. *United States v. Southern Pac. Co.*, 172 Fed. 909, either on the theory that the government is the successful party in a civil suit; or the defendant is liable under the statute relating to criminal proceedings. See *Blydenburgh v. Miles*, 39 Conn. 484.

1. *Rex v. Ives*, *Draper* (U. C.) 440. See also *United States v. Kitty*, Bee 252, 26 Fed. Cas. No. 15,537, where the court acting under a statutory discretion dismissed a suit for forfeiture because it believed the claimant while technically guilty of the offense had offended unintentionally, yet taxed the

costs to claimant, since the seizing officer had only done his duty.

2. See the statutes, and *Indianapolis*, etc. **R. Co. v. People**, 91 Ill. 452; *Clark v. Dewey*, 5 Johns. (N. Y.) 251.

3. See the statutes, and **Mo.**—*In re Green*, 40 Mo. App. 491. **N. Y.**—*People v. Alden*, 112 N. Y. 117, 19 N. E. 516. See *People v. Hodnett*, 81 Hun 137, 30 N. Y. Supp. 735; *People v. Rosendale*, 76 Hun 112, 27 N. Y. Supp. 825, affirmed in 142 N. Y. 670, 37 N. E. 571. **Wis.**—*Ives v. Supervisors*, 18 Wis. 166.

4. *Gipps Brew. Co. v. City of Virginia*, 32 Ill. App. 518. See the title "Costs."

5. *Chesley v. Brown*, 11 Me. 143.

6. *United States v. The Planter*, Newb. 262, 27 Fed. Cas. No. 16,054; *In re Green*, 40 Mo. App. 491. See 14 STANDARD PROC. 473, and the title "Security for Costs."

7. See *Kirby v. Rice*, 8 Yerg. (Tenn.) 442, where the court says in effect that to refuse to permit him so to do would be to deprive a poor person of his rights.

8. *United States v. Halberstadt*, Gilp. 262, 26 Fed. Cas. No. 15,276 (quoting with approval and following *Wilson v. Rastall*, 4 T. R. 753, 100

has been held that there may be a new trial even considering the prosecution as criminal, where the acquittal was procured by fraud or malpractice.⁹ It has been said that the new trial will seldom be granted,¹⁰ and that it can only be granted for errors of law,¹¹ or for fraud in procuring the verdict.¹²

B. APPEAL. — Generally an appeal lies in actions for penalties, as in other civil actions, where the proceedings are civil in nature,¹³ though there is authority that an appeal after defendant's acquittal amounts to putting him in second jeopardy.¹⁴ That the prosecution might have been by criminal proceedings does not take away the right to appeal.¹⁵ Whether an appeal does lie in any particular action or prosecution and to what particular court is a matter of local statutory construction,¹⁶ as are questions of practice as between civil and criminal procedure.¹⁷ An appeal lies in defendant's favor.¹⁸

Eng. Reprint 1283, wherein Lord Kenyon says "there is not a single instance on record where a new trial has been refused in a case where the verdict has proceeded on the mistake of the Judge"; *Pettis v. Dixon*, 1 Kirby (Conn.) 179. See also the title "New Trial."

9. *Hylliard v. Nickols*, 2 Root (Conn.) 176, acquittal obtained by forgery and perjury. See also *Hannaball v. Spalding*, 1 Root (Conn.) 86, holding that in the absence of fraud there can be no new trial as to the civil part alone.

10. *Steel v. Roach*, 1 Bay (S. C.) 63, on the ground that penal actions are "hard and rigorous." See also *Bleeker v. Meyers*, 6 U. C. Q. B. 134.

11. **Ky.**—*Clay v. Swett*, 4 Bibb 255. **N. Y.**—*Decker v. Stauring*, 57 How. Pr. 495. **Tenn.**—*Martin v. M'Night*, 1 Overt. 330. **Eng.**—*Brook v. Middleton*, 10 East 269, 103 Eng. Reprint 777.

[a] **Misconduct of Jury.**—In *Ranston v. Etteridge*, 2 Chitty 273, 18 E. C. L. 333, it is said that positive misconduct on the part of the jury must be shown where they have been properly directed by the court.

12. *Martin v. M'Night*, 1 Overt. (Tenn.) 330.

13. **Colo.**—*City of Greeley v. Hamman*, 12 Colo. 94, 20 Pac. 1. **Ill.** *People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923; *Town of Partridge v. Snyder*, 78 Ill. 519. **Ky.**—*International Harvester Co. v. Com.*, 161 Ky. 49, 170 S. W. 660. **Md.**—*State v. Mace*, 5 Md. 337. **Mo.**—*Pearce v. Myers*, 3 Mo. 31; *Springfield v. Starke*, 93 Mo. App. 70.

14. *Coit v. Geer*, 1 Kirby (Conn.)

269. See also *Houghton v. Havens*, 6 Conn. 305.

[a] **Minnesota.**—In *Kennedy v. Raught*, 6 Minn. 235, it is said that although a penalty is recoverable in a civil action by an informer in his own name that does not change its penal nature, and therefore when defendant has been acquitted no appeal can be taken against him as that would put him again in jeopardy. This does not seem to have been overruled, but see *State v. Shevlin-Carpenter Co.*, 99 Minn. 158, 108 N. W. 935, *reaffirmed* in 102 Minn. 470, 113 N. W. 634, 114 N. W. 738, where it is said that the rule as to former jeopardy applies only to criminal prosecutions.

15. *People v. Merritt*, 91 Ill. App. 620.

16. See the following cases: *Johnson v. McGregor*, 157 Ill. 350, 41 N. E. 558; *Tully v. Town of Northfield*, 6 Ill. App. 356; *Bosworth v. Wayne Pike Co.*, 101 Ind. 175; *Bogart v. New Albany*, 1 Ind. 38; *Greensburg v. Cleveland, etc. R. Co.*, 23 Ind. App. 141, 55 N. E. 46 (*citing Ex parte Sweeney*, 126 Ind. 583, 27 N. E. 127); *Ridge v. Crawfordsville*, 4 Ind. App. 513, 31 N. E. 207.

17. *International Harvester Co. v. Com.*, 161 Ky. 49, 170 S. W. 660, construing the statutes as giving the same time to take an appeal in a penal action by the state, as in a civil action.

18. *Burnham v. Barker*, 2 Root (Conn.) 526.

[a] Where the statute prescribes a civil suit for the enforcement of a penalty the state officials cannot deprive defendant of his right to appeal by prosecuting by indictment. State

Where a penalty is imposed on summary conviction or before a magistrate or court not of record, an appeal lies on behalf of either party under some statutes.¹⁹ This right is not absolute but is on cause shown.²⁰

C. WRIT OF ERROR.—It is settled that writ of error lies on behalf of the United States to review an action of debt for a penalty.²¹

XVIII. ENFORCEMENT OF JUDGMENT.—A. CIVIL PROCEEDINGS.—Where the procedure to enforce a fine, penalty or forfeiture is by an action recognized as being civil in its nature, the collection of the judgment proceeds as in other civil actions and is not within the scope of this title.²²

B. CRIMINAL PROCEEDINGS.—1. **Execution.**—The right to proceed by execution either against the goods or the body of defendant, to collect a fine is recognized at common law,²³ and though there is authority to the contrary,²⁴ this right has many times been upheld even in the absence of any statute specifically so providing,²⁵ subject to such limitations as may have been placed on execution against the body.²⁶ The statutes in many states specifically provide that execu-

v. Linton, 3 Rob. (La.) 55. Compare *supra*, V, A.

19. *Com. v. McCann*, 174 Pa. 19, 34 Atl. 299; *Colwyn Borough v. Brink*, 24 Pa. Dist. 40; *City of Seranton v. Frothingham*, 5 Pa. Dist. 639.

20. *Com. v. Eichenberg*, 140 Pa. 158, 21 Atl. 258; *McGuire v. Shenandoah*, 109 Pa. 613; *Colwyn Borough v. Brink*, 24 Pa. Dist. 40; *Thompson v. Preston*, 5 Pa. Super. 154; *Com. v. Johnston*, 1 Pa. Co. Ct. 22, 16 W. N. C. 349.

21. *United States v. Illinois Cent. R. Co.*, 170 Fed. 542, 95 C. C. A. 628. See also *United States v. New York Cent. & S. L. R. Co.*, 168 Fed. 699, 94 C. C. A. 76.

[a] **Reasons.**—In *United States v. Baltimore & O. S. W. R. Co.*, 159 Fed. 33, 86 C. C. A. 223, the court after holding that a writ of error lies because the action is civil gives as an additional reason that the rule against the government having a writ of error is one of the common law and not the subject of constitutional guaranty, hence subject to legislative modification. Therefore where congress has provided a civil remedy it may be assumed that the incidents of such remedy, including the right to review, appertain thereto.

22. See the titles "Judgments and Decrees, Enforcement of;" "Supplementary Proceedings."

23. *N. Y.*—*Kane v. People*, 8 Wend. 203. *W. Va.*—*Gill v. State*, 39 W. Va. 479, 20 S. E. 568, 26 L. R. A. 655, need not resort to chancery to enforce recovery. *Eng.*—*King v. Woolf*, 2 B. &

Ald. 609, 106 Eng. Reprint 488; *King v. Wade, Skinner* 12, 90 Eng. Reprint 6, T. Jones 185, 84 Eng. Reprint 1209; *King v. Wolfe*, 1 Chitty 583, 18 E. C. L. 171.

24. *State v. Robinson*, 17 N. H. 263.

[a] In *New York* the rule seems settled that there is no way of enforcing the payment of a fine imposed in a criminal case other than by imprisonment. See *People v. Sage*, 13 App. Div. 135, 43 N. Y. Supp. 372; *Colon v. Lisk*, 13 App. Div. 195, 43 N. Y. Supp. 364; *Harrington v. City of New York*, 40 Misc. 165, 81 N. Y. Supp. 667; *City of Hudson v. Granger*, 23 Misc. 401, 52 N. Y. Supp. 9.

25. *Ga.*—*McMeekin v. State*, 48 Ga. 335. *N. Y.*—*Kane v. People*, 8 Wend. 203; *People v. Van Eps*, 4 Wend. 387. *Pa.*—*McNamara v. Earley*, 2 Pa. Co. Ct. 491. *P. R.*—*People v. La Compania*, 16 Porto Rico 479. *Va.*—*Pifer v. Com.*, 14 Gratt. (55 Va.) 710; *Com. v. Webster*, 8 Gratt. (49 Va.) 702. *W. Va.*—*Gill v. State*, 39 W. Va. 479, 20 S. E. 568, 26 L. R. A. 655, a judgment for fine "has become a debt of record payable *instantly*."

[a] May be against infant where he could be fined. *Beasley v. State*, 2 Yerg. (Tenn.) 481.

[b] Every court having power to pronounce judgment has power to award execution thereon. *Hicks v. McCown*, 144 Mo. App. 544, 129 S. W. 76; *Cleaver v. Jenkins*, 84 Neb. 565, 121 N. W. 992.

26. *McNamara v. Earley*, 2 Pa. Co. Ct. 491. But compare *Gill v. State*, 39

tion may issue on the judgment for a fine as on ordinary judgments in civil actions.²⁷ Where part of a sentence is void it has been held that execution may issue on the part which is valid.²⁸ Imprisonment for the offense does not prevent collection of the fine by execution,²⁹ but it has been said that one imprisoned until he shall pay the fine cannot also have execution issued against him.³⁰ The judgment for a fine cannot be enforced against the estate of a deceased defendant.³¹ The sufficiency of the writ and the proceedings thereupon are not within the scope of this title.³²

2. Imprisonment of Defendant To Compel Payment.³³

The ordinary common law practice, where not changed by statute, is to order the defendant committed until the fine be paid.³⁴ The statutory

W. Va. 479, 20 S. E. 568, 26 L. R. A. 655. And see *infra*, XVIII, B, 2.

27. **U. S.**—Rev. St., §1041. See *Fink v. O'Neil*, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. ed. 196; *Clark v. Allen*, 114 Fed. 374, 117 Fed. 699; *In re Teuscher*, 23 Fed. Cas. No. 13,846. **Ala.**—Code, 1907, §7633. **Ark.**—Kirby's St., 1904, §2463; *Cheaney v. State*, 36 Ark. 74; *Hall v. Doyle*, 35 Ark. 445. **Cal.**—Penal Code, §1206, makes the judgment a lien, and §1214 provides for execution thereon as in civil actions. See *Ex parte Karlson*, 160 Cal. 378, 117 Pac. 447; *People v. Brown*, 113 Cal. 35, 45 Pac. 181; *Grady v. Superior Court*, 64 Cal. 155, 30 Pac. 613. **Idaho.**—Rev. Codes, §8006. See *Ex parte Schuster*, 25 Idaho 465, 138 Pac. 135. **Ill.**—Hurd's St., 1908, p. 828, §453. See *Heagle v. Wheeland*, 64 Ill. 423. **Ind.**—Burns' St., 1908, §2186. **Ia.**—Code, 1897, §5446. See *Dupont v. Downing*, 6 Iowa 172. **Ky.**—Crim. Code, §301. See *Claryville, etc. v. Com.*, 32 Ky. L. Rep. 1157, 107 S. W. 327; *Farris v. Dozier*, 26 Ky. L. Rep. 892, 82 S. W. 615; *Com. v. Merrigan*, 8 Bush 131. **Minn.**—Rev. St., 1905, §4031. See *In re Shaw*, 31 Minn. 44, 16 N. W. 461. Compare *Rev. St.*, 1905, §5411, making it the duty of the clerk to deliver a transcript to the sheriff "to execute such sentence and he shall execute the same accordingly." **Mo.**—Rev. St., 1909, §5280. See *Hicks v. McCown*, 144 Mo. App. 544, 129 S. W. 76; *Betterton v. O'Dwyer*, 124 Mo. App. 306, 101 S. W. 628. **Ore.**—Lord's Laws, 1910, §1589; *State v. Munds*, 7 Ore. 80; *Whitley v. Murphy*, 5 Ore. 328. **Pa.**—Purd. Dig., p. 636, §91, as construed by *McNamara v. Earley*, 2 Pa. Co. Ct. 491. See also *Com. v. Lord*, 21 Pa. Dist. 559, 39 Pa. Co. Ct. 334, citing many cases. **Tenn.**—Shannon's Code, §7216. **Tex.**

Code Crim. Proc., 1908, arts. 845, 853. See *Ex parte Dickerson*, 30 Tex. App. 448, 17 S. W. 1076; *Terry v. State*, 30 Tex. App. 408, 17 S. W. 1075. **Utah.** **Comp. Laws**, 1908, §4925; *Roberts v. Howells*, 22 Utah 389, 62 Pac. 892. **Va.**—Code, 1904, §719. **W. Va.**—Code, 1906, §1169; *Gill v. State*, 39 W. Va. 479, 20 S. E. 568, 26 L. R. A. 655; *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439.

28. *Grady v. Superior Court*, 64 Cal. 155, 30 Pac. 613.

29. *Cheaney v. State*, 36 Ark. 74; *Hall v. Doyle*, 35 Ark. 445; *In the Matter of Albert Beall*, 26 Ohio St. 195.

30. See *O'Conner v. State*, 40 Tex. 27.

[a] But the present statute seems to give that right. See **Code Crim. Proc.**, 1908, art. 845.

31. **U. S.**—United States *v. Mitchell*, 163 Fed. 1014, *affirmed*, United States *v. Dunne*, 173 Fed. 254, 97 C. C. A. 420; United States *v. Pomeroy*, 152 Fed. 279. **Ind.**—Blackwell *v. State*, 184 Ind. 227, 113 N. E. 723. **Okl.** *Sharp v. State*, 13 Okla. Crim. 59, 161 Pac. 1178; *Boyd v. State*, 3 Okla. Crim. 684, 108 Pac. 431. **Ore.**—State *v. Martin*, 30 Ore. 108, 47 Pac. 196.

And see generally the title "Survival."

32. See the title "Judgments and Decrees, Enforcement of."

33. Discharge of prisoner because illegally imprisoned, see the title "Habeas Corpus."

34. **U. S.**—*Ex parte Watkins*, 7 Pet. 568, 8 L. ed. 786; *Delaware, L. & W. Ry. Co. v. Frank*, 230 Fed. 988, 145 C. C. A. 182; *Fischer v. Hayes*, 6 Fed. 63; United States *v. Robbins*, 27 Fed. Cas. No. 16,171. **Fla.**—*Ex parte Peacock*, 25 Fla. 478, 6 So. 475; *Ex parte Bryant*, 24 Fla. 278, 4 So. 854. **Ga.**—Shiver

right to proceed by execution as in civil cases does not take away the common law right to enforce by imprisonment.³⁵

By statutes in most states defendant may be imprisoned until the fine is paid and an order to that effect is usually included either in the judgment or sentence.³⁶ In some jurisdictions the statutes speci-

v. State, 22 Ga. 230. See also *Brock v. State*, 22 Ga. 98. **Mich.**—*Brown-bridge v. People*, 38 Mich. 751. **N. J.** *Dodge v. State*, 24 N. J. L. 455. **N. M.** *In re Roe Chung*, 9 N. M. 130, 49 Pac. 952. **Okla.**—*Ex parte Bowes*, 8 Okla. Crim. 201, 127 Pac. 20. **Tenn.**—*Hill v. State*, 2 Yerg. 247.

[a] **Uniform Common Law Practice.** In *Ex parte Karlson*, 160 Cal. 378, 117 Pac. 447, the court says this "was the uniform practice of the common law courts in England, time out of mind, as may be seen by a perusal of the decisions of the Court of King's Bench."

[b] "A reasonable exercise of the power is inherent in the court." *State v. Peterson*, 38 Minn. 143, 36 N. W. 443, *distinguishing* *Mims v. State*, 26 Minn. 494, 5 N. W. 369, where the imprisonment under the sentence as imposed would have exceeded the statutory limit. See also *City of Jordan v. Nicolin*, 84 Minn. 367, 87 N. W. 915.

[c] **Common Law and Statutory Offenses Distinguished.**—In *Brown v. State*, 11 Ohio 276, it is said: "When common law jurisdiction is entertained, and courts proceed according to its course, this power exists; but when offenses are statutory, punishments regulated by statute, and no such authority of commitment is declared, it is a power not conferred, does not exist, and cannot be exercised; though it is equally clear, the court, after sentence, may direct the detention of a prisoner until he can be charged in execution." See also *Lougee v. State*, 11 Ohio 68; *Bonsal v. State*, 11 Ohio 72; Gen. Code. 1910, §§13,717, 13,718. See also review of these Ohio cases in *United States v. Robbins*, 27 Fed. Cas. No. 16,171.

[d] **Imprisonment for payment of a penalty** has been recognized in Newfoundland. See *Kean v. Winsor*, *Newf. Rep.* 1904-1911, pp. 183, 185.

35. **U. S.**—*Ex parte Barclay*, 153 Fed. 669. **Cal.**—*Ex parte Karlson*, 160 Cal. 378, 117 Pac. 447. **Tex.**—*Ex parte Cook* (*Tex. Crim.*), 188 S. W. 979.

But compare *People v. La Compania*, 16 Porto Rico 479.

36. **Ala.**—*Bowen v. State*, 98 Ala.

83, 12 So. 808; *Ex parte Joice*, 88 Ala. 128, 7 So. 3; *Ex parte Long*, 87 Ala. 46, 6 So. 328; *Morgan v. State*, 47 Ala. 34; *Nelson v. State*, 46 Ala. 186. **Ark.**—See *Ex parte Brady*, 70 Ark. 376, 68 S. W. 34; *Cheaney v. State*, 36 Ark. 74. **Cal.**—See *Ex parte Karlson*, 160 Cal. 378, 117 Pac. 447. **Ind.**—*Burns' St.*, 1908, §2188. See *Dinckerlocker v. Marsh*, 75 Ind. 548. **Ia.**—See *State v. Boynton*, 75 Iowa 753, 38 N. W. 505; *State v. Myers*, 44 Iowa 580; *State v. Jordan*, 39 Iowa 387. **Ky.**—*Crim. Code*, §304. **La.**—*Rev. St.*, 1904, §980. See *State v. Hyland*, 36 La. Ann. 709; *State v. Ryder*, 36 La. Ann. 294. **Minn.** *City of Jordan v. Nicolin*, 84 Minn. 367, 87 N. W. 915; *State v. Framness*, 43 Minn. 490, 45 N. W. 1098; *State v. Peterson*, 38 Minn. 143, 36 N. W. 443. **Mo.**—*State v. Ulrich*, 96 Mo. App. 689, 70 S. W. 933; *Ex parte Alexander*, 39 Mo. App. 108. **Mont.**—*Petelin v. Kennedy*, 29 Mont. 466, 75 Pac. 82; *State ex rel. Poindexter v. District Court*, 51 Mont. 186, 149 Pac. 958. **Neb.**—*Crim. Code*, §§497, 500; *Comp. St.*, 1911, §§8243, 8245. **Nev.**—*State v. District Court*, 16 Nev. 76. **N. H.** *Pub. St.*, 1901, ch. 256, §7. **N. Y.** *People v. Sage*, 13 App. Div. 135, 43 N. Y. Supp. 372. **N. D.**—*State v. Fleming*, 20 N. D. 105, 126 N. W. 565; *State v. Hogan*, 8 N. D. 301, 78 N. W. 1051, 45 L. R. A. 166. **Ohio.**—*In re Beall*, 26 Ohio St. 195; *In re McAdams*, 21 Ohio C. C. 450. **Okla.**—*Ex parte Bowes*, 8 Okla. Crim. 201, 127 Pac. 20; *Ex parte Roller*, 3 Okla. Crim. 384, 106 Pac. 548. **Ore.**—*Ex parte McGee*, 33 Ore. 165, 54 Pac. 1091; *State v. Shepard*, 15 Ore. 598, 16 Pac. 483. **P. R.** *People v. Collazo*, 20 Porto Rico 190; *People v. Torres*, 13 Porto Rico 201; *People v. Lavrose*, 13 Porto Rico 203. **Tenn.**—*Shannon's Code*, §7215. **Tex.** *Code Crim. Proc.*, 1908, arts. 845, 848-850. **Utah.**—See *Logan City v. Steadman*, 47 Utah 611, 155 Pac. 445. **Va.** *Shiflett v. Com.*, 90 Va. 386, 18 S. E. 838. **W. Va.**—*Code*, 1906, §1167, as amended by Acts, 1909, ch. 33. **Wyo.** *Fisher v. McDaniel*, 9 Wyo. 457, 64 Pac. 1056.

[a] In Mississippi No Order of

fically provide for a conditional sentence by which defendant is required to pay the fine within a specified time or be committed.³⁷

The constitutional prohibition of imprisonment for debt does not affect the right to imprison to compel the payment of a fine.³⁸

Where both fine and imprisonment are imposed by the same judgment or sentence, the weight of opinion is that defendant can be imprisoned an additional length of time for the non-payment,³⁹ though there is authority to the contrary.⁴⁰

Court Is Necessary.—The statute provides that imprisonment follows the failure to pay without any order. *Buck v. State*, 103 Miss. 276, 60 So. 321.

37. Mass.—Rev. Laws, 1902, ch. 220. §9. See *Com. v. Briggs*, 5 Met. 559; *Wilde v. Com.*, 2 Met. 408; *Harris v. Com.*, 23 Pick. 280. **Mich.**—Comp. Laws, 1897, §11,971. See *Brownbridge v. People*, 38 Mich. 751. **Vt.**—Pub. St.. 1906, §6019. See *In re Sammon*, 79 Vt. 521, 65 Atl. 577; *In re Rogers*, 75 Vt. 329, 55 Atl. 661.

38. Ind.—*Norris v. State*, 95 Ind. 73, 48 Am. Rep. 291. **N. M.**—*In re Roe Chung*, 9 N. M. 130, 49 Pac. 952. **Ohio.**—*In re Beall*, 26 Ohio St. 195. **Okla.**—*Ex parte Roller*, 3 Okla. Crim. 384, 106 Pac. 548. **Pa.**—Poor Food Penalties, 34 Pa. Co. Ct. 349.

[a] **Even when costs are included**, since they are incident to the fine. *McCool v. State*, 23 Ind. 127. See also *Smith v. State*, 23 Ind. 132.

[b] **The theory generally advanced** is that fines are not "debts" in the sense used in the constitution. **Ill.** *People v. Zito*, 237 Ill. 434, 86 N. E. 1041. **Md.**—*State v. Mace*, 5 Md. 337. **N. M.**—*In re Roe Chung*, 9 N. M. 130, 49 Pac. 952.

[c] **Constitution expressly excepts** in some jurisdictions. *Ex parte Hollwedell*, 74 Mo. 395. See also *Ex parte Kiburg*, 10 Mo. App. 442.

39. U. S.—*Fischer v. Hayes*, 6 Fed. 63, 19 Blatchf. 13; *United States v. Robbins*, 27 Fed. Cas. No. 16,171. **Ariz.** *Matter of Application of Morris*, 17 Ariz. 537, 155 Pac. 299. **Ga.**—*Shiver v. State*, 23 Ga. 230; *Brock v. State*, 22 Ga. 98. **Ill.**—*Berkenfield v. People*, 191 Ill. 272, 61 N. E. 96. **Ind.**—*Ex parte Tongate*, 31 Ind. 370. **Ia.**—*State v. Meyers*, 44 Iowa 580. **La.**—*State v. Hyland*, 36 La. Ann. 709; *State v. Ryder*, 36 La. Ann. 294. **Mich.**—*Brownbridge v. People*, 38 Mich. 751. **Minn.** *State v. Peterson*, 38 Minn. 143, 36 N. W. 443. **N. Y.**—*People v. Sage*, 13 App. Div. 135, 43 N. Y. Supp. 372,

affirming 17 Misc. 712, 41 N. Y. Supp. 531. **Okla.**—*Files v. State*, 9 Okla. Crim. 512, 132 Pac. 509; *Ex parte Bowes*, 8 Okla. Crim. 201, 127 Pac. 20. **Wyo.**—*Fisher v. McDaniel*, 9 Wyo. 457, 64 Pac. 1056. **Eng.**—*Beecher's Case*, 8 Coxe 58a, 77 Eng. Reprint 559.

[a] **The discharge of the defendant by pardon** of so much of his sentence as adjudged imprisonment does not prevent the collection of the fine by proper process. *Wilkerson v. Allan*, 23 Gratt. (64 Va.) 10.

[b] **Imprisonment for definite term on default of payment of fine** cannot exceed the time stated though under the statute the prisoner might be imprisoned for one day for every dollar of fine unpaid. *People v. Collazo*, 20 Porto Rico 190. See also *People v. Daniel*, 17 Porto Rico 318, and *People v. Lopez*, 17 Porto Rico 501.

[c] **Suspension during good behavior**, of the imprisonment and of part of the fine, does not prevent imprisonment to compel payment of the balance of the fine. *Buck v. State*, 103 Miss. 276, 60 So. 321.

[d] **Oklahoma courts refuse to follow the California construction**, though the Oklahoma code was originally taken from the California code. *Ex parte Bowes*, 8 Okla. Crim. 201, 127 Pac. 20. See *Matter of Application of Morris*, 17 Ariz. 537, 155 Pac. 299.

40. See *infra*, this note.

[a] **The leading case is** *Ex parte Rosenheim*, 83 Cal. 388, 23 Pac. 525, *overruling* *People v. Righetti*, 66 Cal. 184, 4 Pac. 1063-1185. The theory is that the Penal Code by its provisions has provided for "cases of fine, cases of imprisonment, and cases of fine and imprisonment until the fine is paid," but the code "nowhere expressly provides for imprisonment and fine coupled with imprisonment until the fine be paid, after the expiration of the fixed term of imprisonment." See also *People v. Brown*, 113 Cal. 35, 45 Pac. 181; *Lowery v. Hogue*, 85 Cal. 600, 24 Pac.

What Courts May Imprison. — As indicated above, the general rule is that all courts which have the power to inflict the fine have the power to imprison for the failure to pay,⁴¹ though the right has been questioned as to inferior courts,⁴² and the statutes sometimes draw a distinction,⁴³ while some statutes have been construed as giving the justice court no other remedy than by imprisonment.⁴⁴ The power extends to tribunals which have no power to imprison as a punishment,⁴⁵ and may be inflicted under general statutes though the effect would be to extend the time of imprisonment beyond the court's ordinary jurisdictional limit.⁴⁶

It is not necessary to proceed against defendant's property before imprisoning him to compel payment,⁴⁷ but where execution has been levied on his property it has been held that the operation of processes simultaneously issued and directed at his body will be suspended until it be seen whether the fine can be made out of the property,⁴⁸ and clearly the defendant cannot complain of the sheriff's first proceeding against his property.⁴⁹

Necessity of Presence of Defendant. — Where an order of imprison-

995, 16 L. R. A. (N. S.) 984; *People v. Hamburg*, 84 Cal. 468, 24 Pac. 298; *Logan City v. Steadman*, 47 Utah 611, 155 Pac. 445; *Reese v. Olsen*, 44 Utah 318, 139 Pac. 941; *Roberts v. Howells*, 22 Utah 389, 62 Pac. 892.

[b] **Subsidiary imprisonment** in case of insolvency or non-payment of fine which was recognized by the Spanish Penal Code, does not apply to crimes defined and punished by the Philippine Commission. *United States v. Lineses*, 5 Phil. Isl. 631; *United States v. Glefonea*, 5 Phil. Isl. 570; *United States v. Hutchinson*, 5 Phil. Isl. 343.

41. See cases and statutes cited in preceding notes under this section.

42. *State v. Sheppard*, 15 Ore. 598, 16 Pac. 483.

43. See *People v. Laviosa*, 13 Porto Rico 203; *People v. Torres*, 13 Porto Rico 201.

44. *Ex parte Marx*, 86 Va. 40, 9 S. E. 475. See also *Wells v. Com.*, 107 Va. 834, 57 S. E. 588, construing Va. Code, §§712, 717 and 2939.

45. *Ex parte Bollig*, 31 Ill. 88, the order of imprisonment till the fine be paid does not inflict a punishment but only provides a means of collecting the fine. See also *Brown v. People*, 19 Ill. 612.

[a] **Where punishment by imprisonment for a first offense is forbidden**, the court may nevertheless imprison as a means of enforcing the judgment for a fine. *State ex rel. Poindexter v. Dis-*

trict Court, 51 Mont. 186, 149 Pac. 958.

46. *Ex parte McGee*, 33 Ore. 165, 54 Pac. 1091. See also *State v. Sheppard*, 15 Ore. 598, 16 Pac. 483. To same effect, see *In re Roe Chung*, 9 N. M. 130, 49 Pac. 952.

47. *Ex parte Bollig*, 31 Ill. 88 (a summary mode of dealing with cases arising from breaches of town ordinances is necessary to the preservation of good order); *Elsner v. Shingley*, 80 Iowa 30, 45 N. W. 393.

[a] **Capias Pro Fine May Issue Either Before or After the Return of the Fieri Facias.**—*Shiflett v. Com.*, 90 Va. 386, 18 S. E. 838, construing Code, §726, as so directing. See also *Ex parte Cook* (Tex. Crim.), 188 S. W. 979, holding that capias pro fine may issue at any time before the judgment is paid.

[b] **Capias Ad Satisfaciendum May Issue Before Fieri Facias Issued and Returned.**—The provision of the statute is directory merely. "The practice for a long time has been very general to issue the *ca. sa.* in the first instance." *Attorney-General v. Baker*, 9 Rich. Eq. (S. C.) 521.

48. *Faris v. Com.*, 3 B. Mon. (Ky.) 79, but the suspension is removed where after levy the defendant secretly obtains and conceals the property levied upon. See also *Leavison v. Rosenthal*, 5 Ky. L. Rep. 132; *Steele v. Com.*, 3 Dana (Ky.) 84.

49. *In Luther v. State*, 85 Neb. 674, 124 N. W. 117.

ment is made separate from the sentence the defendant need not be present.⁵⁰

Process To Bring in Defendant. — It is not necessary to issue any process where defendant is in court when sentence is pronounced.⁵¹ Where the prisoner is absent when sentence is pronounced, the proper practice is to bring him in on *capias pro fine*.⁵²

3. Distinction Between Capias Pro Fine, Capias ad Satisfaciendum, and Fieri Facias. — There are technical distinctions between *capias pro fine* and *capias ad satisfaciendum* to collect a fine, but these have to do principally with the mode of imprisonment and manner of discharge.⁵³ It follows that the abolition of *capias ad satisfaciendum* has not abolished the *capias pro fine*,⁵⁴ and it is still found mentioned in some statutes.⁵⁵

50. *State v. Baxter*, 41 Kan. 516, 21 Pac. 650, it is not an order for punishment but simply provides a means for enforcing the penalty.

51. *Edwards v. State*, 22 Ark. 303; *Faris v. Com.*, 3 B. Mon. (Ky.) 79; *Steele v. Com.*, 3 Dana (Ky.) 84.

52. *Steele v. Com.*, 3 Dana (Ky.) 84; *Dodge v. State*, 24 N. J. L. 455.

[a] See *State v. Johnston*, 2 N. C. 293, where the court says: "The proper process to compel payment of a fine, is *capiatur pro fine*, which is issued when the party is not in court at the time the fine is laid; but when he is in court, and is ordered into custody, it is like being in custody upon a *capias ad satisfaciendum*, and then a discharge from them by the plaintiff's consent, will discharge the party from any other execution." See also *Ex parte Watkins*, 7 Pet. (U. S.) 568, 8 L. ed. 786.

[b] In Texas this is the procedure under Code Crim. Proc., 1908, arts. 849, 850. See also *State v. Boren*, 21 Tex. 591; *Ex parte Dickerson*, 30 Tex. App. 448, 17 S. W. 1076; *Terry v. State*, 30 Tex. App. 408, 17 S. W. 1075; *Ex parte Cook* (Tex. Crim.), 188 S. W. 979.

[a] Return that defendant cannot be found cannot be impeached by showing that he could have been found and so release his surety. *Lyon v. Com.*, 7 Ky. Op. 709.

53. See *infra*, this note.

[a] **Distinction Between Capias Pro Fine and Capias ad Satisfaciendum.** Lomax, J., in *Com. v. Webster*, 8 Gratt. (49 Va.) 702, says: "For the recovery of fines to the king, the usual process was against the person of the offender by *capias pro fine*, if he did not pay

the fine which had been assessed, and against the goods and profits of the lands by *levari facias*. 2 Gab. 606; 1 Chit. Cr. L. 660. It is stated in the latter of these authorities that the imprisonment under the *capias pro fine* was, in respect of such fine, not as a debt but a punishment for the crime, until the fine was paid. It is true that a *capias pro fine* is an execution to compel the payment of the fine, as the *capias ad satisfaciendum* is to compel the payment of the debt. Notwithstanding that point of resemblance, these two species of process were never confounded in practice." See also *Wilkerson v. Allan*, 23 Gratt. (64 Va.) 10.

[b] **Capias Pro Fine Not Applicable to Civil Proceedings.**—"A *capias pro fine* was not at common law, and is not under our statute, a process for enforcing judgments recovered by individuals." *Leavison v. Rosenthal*, 5 Ky. L. Rep. 132.

54. *Wilkerson v. Allan*, 23 Gratt. (64 Va.) 10; *Com. v. Webster*, 8 Gratt. (49 Va.) 702.

[a] The statutory proceeding by *scire facias* to recover fines does not interfere with the common law remedies. *Dodge v. State*, 24 N. J. L. 455.

[b] The power of the court to commit defendants until the fine is paid has not been taken away by the abolishment of the *capias ad satisfaciendum*. *Cagle v. State*, 6 Humph. (Tenn.) 391.

55. **Ky.**—Rev. St., 1899, §4245. **Tex.** Code Crim. Proc., 1908, arts. 849, 850. See *Ex parte Cook* (Tex. Crim.), 188 S. W. 979. **Va.**—Code, 1904, §§726-728.

4. Confessing Judgment and Giving Security Thereupon.—In some jurisdictions there is a statutory proceeding by which the defendant is permitted to confess judgment for the amount of the fine and give security for its payment.⁵⁶ While it has been said that the procedure is purely statutory and unknown at common law,⁵⁷ it has on the other hand been held that the state may permit judgment to be so confessed as might any private individual.⁵⁸ The statute has been construed as giving the defendant an absolute right; not dependent on the discretion of the court.⁵⁹ It is not sufficient for defendant to merely confess without offering security.⁶⁰

No particular form of judgment is required so long as it is sufficiently specific so that execution may issue thereon.⁶¹ Where the judgment was against a surety alone the execution should not join the defendant.⁶²

Effect of the Confession.—The confession prevents the imposition of the alternative sentence of imprisonment until the fine be paid,⁶³ and amounts to a satisfaction of the original judgment,⁶⁴ and operates as a

[a] In Kentucky (1) the scope of *capias pro fine* has been widened by statute so that in effect it fulfils the office of an ordinary execution against property. *Com. v. Merrigan*, 8 Bush (Ky.) 131. See also *Louisville & N. R. Co. v. Com.*, 112 Ky. 635, 66 S. W. 505; *Farris v. Dozier*, 26 Ky. L. Rep. 892, 82 S. W. 615. (2) It seems an order of court specifically directing that *capias pro fine* issue is not necessary. *Long v. Wood*, 78 Ky. 392.

56. See cases in following notes, and see Ala. Code, 1907, §7632; *Hurd's* (Ill.) St., 1909, p. 828, §454; *Shannon's* Code (Tenn.), §7214.

[a] Defendant's attorney is a proper surety in such cases, notwithstanding a general statute forbidding attorneys to enter into security for the appearance of defendants in criminal cases. *Halfacre v. State*, 112 Tenn. 609, 79 S. W. 132, construing Acts 1903, ch. 48, p. 89.

[b] A married woman cannot become surety where she is incapable of contracting without her husband's consent. *Tanner v. State*, 92 Ala. 53, 9 So. 531.

[c] Tender of a single surety is insufficient where the statute prescribes "sureties." *Halfacre v. State*, 112 Tenn. 609, 79 S. W. 132.

57. *Lambert v. People*, 43 Ill. App. 223.

58. *State v. Love*, 23 N. C. 264. See also *State v. Cooley*, 80 N. C. 398. And see *Flemming v. Dayton*, 30 N. C. 453.

[a] By the present practice in North Carolina the judgment for a fine is docketed and becomes a lien on the real estate of defendant in the same manner as judgments in civil actions. See Rev., 1905, §3282.

59. *Halfacre v. State*, 112 Tenn. 609, 79 S. W. 132, the contention was that defendant's only remedy after tender of security and refusal to accept was to sue out writ of habeas corpus. But the order refusing is a final appealable order.

60. *Bowen v. State*, 98 Ala. 83, 12 So. 808.

61. *Lambert v. People*, 43 Ill. App. 223.

[a] Where defendants have been jointly indicted, the judgment of confession should be entered separately for the separate fines assessed. *McLeod v. State*, 35 Ala. 395. Compare *Boyken v. State*, 3 Yerg. (Tenn.) 426.

[b] Where there are several judgments rendered against several defendants and several fines are assessed, a joint judgment by confession will not support several executions. *Boyken v. State*, 3 Yerg. (Tenn.) 426.

62. *Flemming v. Dayton*, 30 N. C. 453.

63. *Burke v. State*, 71 Ala. 377.

64. *Hamilton v. State*, 9 Baxt. (Tenn.) 355, the bond having been given, the only remedy is execution thereon. Defendant cannot be again imprisoned on failure to make the fine out of his and his sureties' goods, at

release or waiver of errors.⁶⁵ On subsequent proceedings to enforce the confessed judgment, against the defendant and his sureties, they are estopped to question the validity of the original judgment of conviction.⁶⁶

5. Application of Prisoner's Funds in Court's Possession. — Cash bail deposited may be applied to any fine imposed,⁶⁷ as may moneys found on the prisoner's person.⁶⁸

XIX. PARDON, REMISSION AND COMPOUNDING. — **A. PARDON OR REMISSION.** — The practice of permitting the secretary of the treasury to remit forfeitures incurred through disobedience of the revenue and customs laws has existed from a very early day.⁶⁹ The forfeiture may be remitted at any time before the property has actually been sold and the proceeds distributed and that notwithstanding the interest of other parties, as informers and customs officials.⁷⁰ But where an informer brought a *qui tam* action at his own expense and recovered final judgment, it was held the secretary had no right to compromise as to the informer's share.⁷¹

The legislature may release one from a judgment for a penalty though a county be interested therein.⁷² The effect of a pardon or remission is to restore the property to defendant except in so far as

least where no fraud has been practised upon the court.

[a] It operates "as a satisfaction of the original judgment as effectually as a discharge of a debtor in a civil suit with the consent of the creditor would extinguish the judgment in that case." *State v. Cooley*, 80 N. C. 398, following *State v. Simpson*, 46 N. C. 80.

65. *Lambert v. People*, 43 Ill. App. 223, where the court says: "No appeal or writ of error could be prosecuted from the judgment of conviction, for the reason that the judgment by confession would be a release or waiver of errors." But see *Burke v. State*, 74 Ala. 399, holding that Code, 1876, §3945 (Code, 1907, §2892) which reads, "a confession of judgment is in law a release of errors," applies only to civil proceedings. See also *Burke v. State*, 71 Ala. 377.

66. *Lambert v. People*, 43 Ill. App. 223. See also *Hearn v. State*, 62 Ala. 218.

67. *Wills v. Neiland*, 88 Iowa 548, 55 N. W. 527 (holding also that though the sentence was in the alternative the prisoner could not elect to go to jail, and thus avoid payment); *People v. Laidlaw*, 102 N. Y. 588, 7 N. E. 910, though deposit was by a third person.

68. *McCann v. Barr*, 6 Pa. Dist. 721, 19 Pa. Co. Ct. 669, moneys found on intoxicated person retained, and pris-

oner cannot insist upon going to jail under alternative sentence, to avoid payment.

69. *The Laura*, 114 U. S. 411, 5 Sup. Ct. 881, 29 L. ed. 147, affirming 8 Fed. 612, 5 Fed. 133.

70. *United States v. Morris*, 10 Wheat. (U. S.) 246, 6 L. ed. 314, cited with approval in *Confiscation Cases*, 7 Wall. (U. S.) 454, 19 L. ed. 196.

[a] After condemnation and notwithstanding interest of customs officer. *United States v. Morris*, 10 Wheat. (U. S.) 246, 6 L. ed. 314, affirming 1 Paine 209, 26 Fed. Cas. No. 15,816. See also *United States v. Lancaster*, 4 Wash. C. C. 64, 26 Fed. Cas. No. 15,557.

[b] After suit has been brought by an informer to enforce it. *The Laura*, 114 U. S. 411, 5 Sup. Ct. 881, 29 L. ed. 147, affirming 8 Fed. 612, 5 Fed. 133.

[c] Includes the Authority To Discharge the Cause of Action.—*Murray v. Arthur*, 13 Blatchf. 429, 17 Fed. Cas. No. 9,956.

[d] May Dismiss After Appeal. *Confiscation Cases*, 7 Wall. (U. S.) 454, 19 L. ed. 196.

71. *United States v. Griswold*, 30 Fed. 762, affirming 24 Fed. 361.

72. In *Conner v. Bent*, 1 Mo. 235, judgment was made up in part of tax collections and in part a penalty for failure to pay same over.

third parties' rights have intervened,⁷³ and one who has fulfilled the conditions of a remission cannot have his property again taken from him for the same act.⁷⁴ On the other hand where one fails to observe the conditions of a conditional pardon the original judgment remains in full force and effect and he may be forced to pay a fine imposed.⁷⁵

B. COMPOUNDING.⁷⁶ — In England, by statute, the compounding of a penal action was itself made an offense at an early day,⁷⁷ and is only permitted by order of court and with consent of the crown.⁷⁸ Permission to compound is not a matter of right but purely discretionary with the court.⁷⁹ The English practice calls for a motion to be permitted to compound which cannot be made until defendant has pleaded,⁸⁰ and the order is made only on payment of the sovereign's share.⁸¹ This procedure has been followed to some extent in some of the states.⁸² It has been held that the statute applies only to informers and does not prevent public officers from discharging the cause of action, when they act in good faith,⁸³ but where private persons have begun an action in the name of a public official on his neglect to bring the same, he has no right to interfere.⁸⁴ After one has recovered a judgment he may release that part which belongs to him as informer, but not the balance.⁸⁵

73. *Kirk v. Lewis*, 9 Fed. 645. See also *United States v. Lancaster*, 4 Wash. C. C. 64, 26 Fed. Cas. No. 15,557; *Brown v. United States*, 1 Woolw. 198, 4 Fed. Cas. No. 2,032, no vested right in informer before proceeds paid over to him.

74. *Murray v. Arthur*, 13 Blatchf. 429, 17 Fed. Cas. No. 9,956.

75. *Ex parte Brady*, 70 Ark. 376, 68 S. W. 34.

76. Prosecutions for compounding crime, see 5 STANDARD PROC. 189, et seq.

77. 18 Eliz., ch. 5.

78. *Sheldon v. Mumford*, 5 Taunt. 268, 128 Eng. Reprint 693; *Howard v. Sowerby*, 1 Taunt. 103, 127 Eng. Reprint 770 (even before verdict); *Maughan v. Walker*, 5 T. R. 98, 101 Eng. Reprint 56.

79. *Crowder v. Wagstaff*, 1 Bos. & P. 18, 126 Eng. Reprint 753; *Howell v. Morris*, 1 Wils. K. B. 79, 95 Eng. Reprint 503.

80. *Rex v. Collier*, 2 Dowl. P. C. (Eng.) 581.

81. *Wood v. Cassin*, 2 Black W. 1157, 96 Eng. Reprint 682.

[a] **Same Rule in Canada.**—*May v. Dettrick*, 5 U. C. Q. B. (O. S.) 77.

82. *Raynham v. Rounseville*, 9 Pick. (Mass.) 44 (must have leave of court); *Burley v. Burley*, 6 N. H. 200, must have consent of court and of county attorney.

[a] **Consent of Court Required by Statute.**—N. Y. Code Civ. Proc., §1894; *Minton v. Woodworth*, 11 Johns. (N. Y.) 474; *Bradway v. Le Worthy*, 9 Johns. (N. Y.) 251.

83. *Bellinger v. Birge*, 54 Hun 511, 7 N. Y. Supp. 695, 8 N. Y. Supp. 174; *Record v. Messenger*, 8 Hun (N. Y.) 283; *Olp v. Leddick*, 14 N. Y. Supp. 41.

84. *Record v. Messenger*, 8 Hun (N. Y.) 283.

85. *Wardens of the Poor v. Cope*, 24 N. C. 44.

PENDENCY OF ACTION. — See **Another Action Pending; Lis Pendens.**

PENITENTIARY. — See **Prisons and Prisoners.**

PENSIONS AND BOUNTIES

By the Editorial Staff.

I. PENSIONS, 306

A. *Proceedings To Proceed*, 306

1. *Generally*, 306
2. *Review of Proceedings Before Commissioner*, 306

B. *Prosecutions Under Pension Laws*, 307

1. *Procuring or Presenting False Affidavits or Claims*, 307
2. *For Making False Oath*, 308
3. *Receiving Excessive Fees*, 308
4. *Retaining Pension Money*, 308

II. PROCEEDINGS TO RECOVER BOUNTIES, 309

A. *For Enlistment in Army or Navy*, 309

1. *Form of Action*, 309
2. *Pleadings*, 309
3. *Province of Court and Jury*, 310

B. *For Performance of Other Acts*, 310

CROSS-REFERENCES:

Exemption of pension and bounty money, see 16 STANDARD PROC. 27, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PENSIONS. — A. PROCEEDINGS TO PROCEED. — 1. **Generally.** An application for a pension is the first regular step to be taken by a claimant seeking to obtain one.¹ The commissioner of pensions, acting under the department of the interior, has jurisdiction to ascertain and adjudicate all the facts relative to the allowing of pensions.²

1. 19 Op. Atty. Gen. 190, application may be amended.

[a] Literal adherence to form or strict pleading of courts of law is not required. 19 Op. Atty. Gen. 190.

[b] Application Should Be Proper-

ly Verified.—U. S. Rev. St., §4714; United States v. Boggs, 31 Fed. 337, justice of peace may administer oath for applicant.

2. In re McLean, 37 Fed. 648 (pension bureau is not a court, nor can any

Examinations relative to pension claims are not secret proceedings.³ A district court of the United States will not issue a subpoena to compel the attendance of a witness before the pension bureau.⁴

2. Review of Proceedings Before Commissioner.—The applicant for a pension may appeal from the ruling of the commissioner of pensions to the secretary of the interior,⁵ but not to the president.⁶ The commissioner of pensions may himself review an award made by his predecessor.⁷ The court of claims has no jurisdiction to review the action of the interior department in granting or denying a pension;⁸ nor will the supreme court of the District of Columbia on mandamus review the exercise of discretion by the pension bureau.⁹ The decision of the commissioner of pensions in granting a pension does not preclude the government from recovering money paid under a pension procured by improper or fraudulent testimony.¹⁰

B. PROSECUTIONS UNDER PENSION LAWS.¹¹ — **1. Procuring or Presenting False Affidavits or Claims.**—An indictment charging perjury in the making of an affidavit in support of a pension claim need not allege the special authority of the officer before whom the affidavit was sworn to;¹² but should allege that the affidavit was transmitted with relation to or in support of a pension claim against the United States.¹³ When the prosecution is for presenting a fraudulent claim, the indictment should aver the fraud with sufficient certainty to enable the defendant to prepare his defense and plead the judgment as a bar to a subsequent prosecution.¹⁴ An indictment for pro-

officer thereof be vested with judicial functions; the proceeding is an executive examination); *United States v. Scott*, 25 Fed. 470 (speaking of it as a judicial or quasi-judicial tribunal); *United States v. Schindler*, 10 Fed. 547, 18 Blatchf. 227; *Davidson v. United States*, 21 Ct. Cl. 298; *United States ex rel. Miller v. Raum*, 7 Mackey (D. C.) 556; 17 Op. Atty. Gen. 339; 4 Op. Atty. Gen. 238. See also *Stokely v. De Camp*, 2 Grant Cas. (Pa.) 17.

[a] **Commissioner of Pensions Is Not a Judicial Officer.**—(1) *United States v. Lalone*, 44 Fed. 475. (2) But he is exclusive judge of facts and law in all cases, subject to appeal to secretary of interior. See *Stokely v. De Camp*, 2 Grant Cas. (Pa.) 17. As to appeal, see *infra*, I, A, 2.

3. In re O'Shea, 166 Fed. 180, so a witness subpoenaed to testify may have his attorney present at his examination.

[a] **Witnesses are subject to cross-examination by the pension claimant.** *In re O'Shea*, 166 Fed. 180, hence pension claimants must be given notice of examinations as to merits of pension claims to enable them to attend such examinations.

4. In re McLean, 37 Fed. 648.

5. Lochren v. United States, 6 App. Cas. (D. C.) 486.

6. 4 Op. Atty. Gen. 515.

7. Lochren v. United States, 6 App. Cas. (D. C.) 486.

8. Davidson v. United States, 21 Ct. Cl. (U. S.) 298. *Daily v. United States*, 17 Ct. Cl. (U. S.) 144; 2 Op. Atty. Gen. 309.

9. United States ex rel. Miller v. Raum, 7 Mackey (D. C.) 556. See also *Stokely v. De Camp*, 2 Grant Cas. (Pa.) 17; and generally the title "**Mandamus.**"

10. Lalone v. United States, 164 U. S. 255, 17 Sup. Ct. 74, 41 L. ed. 425; *United States v. Lalone*, 44 Fed. 475.

11. As to indictments generally, see the title "**Indictment and Information.**"

12. United States v. Boggs, 31 Fed. 337, sufficient to allege that the officer "was then and there a person having competent authority to administer said oath."

13. United States v. Van Leuven, 62 Fed. 69; *United States v. Kessel*, 62 Fed. 59.

14. United States v. Goggin, 1 Fed. 49.

curing the presentation of a false affidavit must allege the name of the person procured to present it or that his name is unknown,¹⁵ and must state the manner of presentation;¹⁶ but it need not allege that the acts charged were done with intent to defraud the United States government.¹⁷ Such an indictment must allege that the affidavit in question was false.¹⁸

2. For Making False Oath.—An indictment for making a false affidavit must allege wherein it was false.¹⁹ But it need not allege that the false deposition was ever used or attempted to be used.²⁰ It is sufficient to allege the offense of false swearing under the pension act in the language of the statute; and it will not be vitiated by a conclusion which calls the offense by a wrong name.²¹

3. Receiving Excessive Fees.—An indictment for receiving an excessive fee for obtaining a pension may merely use the language of the statute;²² it need not allege how the defendant was instrumental or what he did in procuring the pension.²³ Such an indictment need not allege the receipt of any money by the person on whose behalf the pension claim was prosecuted;²⁴ nor is it defective because it describes the defendant as a lawyer and as an agent or attorney.²⁵ The omission to allege that the offense charged was "contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States" will be disregarded.²⁶

4. Retaining Pension Money.—An indictment for wrongfully withholding from a pensioner²⁷ the whole or any part of the pension

15. *Miller v. United States*, 136 Fed. 581, 69 C. C. A. 355.

16. *Miller v. United States*, 136 Fed. 581, 69 C. C. A. 355.

17. *United States v. Van Leuven*, 62 Fed. 69, gist of offense is not effort to defraud, but knowingly procuring the making or presentation of a false or fraudulent affidavit.

[a] **Felonious Intent.**—An indictment for procuring and presenting a false affidavit in support of a pension claim need not charge that such act was committed feloniously or with a felonious intent, where such an intent does not constitute a part of the crime under the statute. *United States v. Staats*, 8 How. (U. S.) 41, 12 L. ed. 979.

18. *United States v. Adler*, 49 Fed. 733.

[a] But it need not allege that the pension claim was false. *United States v. Adler*, 49 Fed. 733.

19. *United States v. Medina*, 15 N. M. 204, 103 Pac. 976, insufficient to charge merely that defendant made a false affidavit. See the title "Perjury."

20. *United States v. Rhodes*, 30 Fed. 431.

21. *United States v. Elliott*, 3 Mason 156, 25 Fed. Cas. No. 15,044, conclusion in indictment, "And so the jurors say, etc., that the party did commit wilful and corrupt perjury," will not vitiate indictment.

Following language of statute generally, see 12 STANDARD PROC. 447, *et seq.*

22. *United States v. Reynolds*, 48 Fed. 215; *United States v. Wilson*, 29 Fed. 286. See generally 12 STANDARD PROC. 447, *et seq.*

23. *United States v. Koch*, 21 Fed. 873.

24. *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657.

25. *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657.

26. *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. ed. 657, such an allegation is a mere conclusion of law, not of the substance of the charge, and its omission cannot prejudice the defendant. See generally the title "Indictment and Information."

27. *United States v. Chaffee*, 4 Ben. 330, 25 Fed. Cas. No. 14,771.

allowed must allege a withholding from the person or persons entitled to the pension.

On such a prosecution, the court will not inquire whether the pension was properly allowed, the decision of the commissioner of pensions being conclusive in this regard.²⁸

II. PROCEEDINGS TO RECOVER BOUNTIES.—A. FOR ENLISTMENT IN ARMY OR NAVY.—1. **Form of Action.**—An action at law will lie to collect bounty money;²⁹ and depending on the nature of the claim, it may be in the form of a count for money had and received,³⁰ or for money paid.³¹ Generally mandamus will not lie to compel the payment of bounty money where there is an adequate remedy by a civil action.³² But it is proper under some circumstances.³³

2. **Pleadings.**—Plaintiff must allege a contract or at least an offer to pay the bounty,³⁴ and state facts which clearly bring him within the terms of the act under which he claims the bounty.³⁵ It is sufficient if he states a prima facie case entitling him to the benefit of the statute.³⁶ There must be an allegation that plaintiff's enlist-

28. *United States v. Scott*, 25 Fed. 470; *United States v. Schindler*, 10 Fed. 547, 18 Blatchf. 227.

Conclusiveness of judgment of pension bureau, see *supra*, I, A, 2.

29. *State v. Howard County Court*, 39 Mo. 375.

30. *Wilkinson v. Martin*, 29 Wis. 471, action by substitute against principal who had collected bounty money. See also *Decker v. Saltzman*, 59 N. Y. 275.

31. *Hickok v. Shelburne*, 41 Vt. 409, wherein action was by one who furnished and paid a substitute against a town offering the bounty.

32. *State v. Howard County Court*, 39 Mo. 375; *People ex rel. Perkins v. Hawkins*, 46 N. Y. 9; *Northrup v. Pittsfield*, 2 Thomp. & C. (N. Y.) 108.

33. See *infra*, this note, and generally the title "Mandamus."

[a] In absence of adequate remedy by civil action, see *Smith v. Auditor-General*, 80 Mich. 205, 45 N. W. 136, wherein writ could not issue because no funds in hands of respondent to pay claim from, but no question raised as to propriety of remedy.

[b] Where town officers are required to issue bonds as bounties, mandamus, rather than a civil action is the proper remedy on their refusal to issue a bond. *Dayton v. Rounds*, 27 Mich. 82; *People ex rel. Vanderlinden v. Martin*, 58 Barb. (N. Y.) 286.

[c] Where an officer or board re-

fuses or fails to audit a proper claim for a bounty, mandamus is proper. *Ind.*—*State v. Buckles*, 39 Ind. 272. *Md.*—*Eichelberger v. Sifford*, 27 Md. 320. *Mich.*—*Dayton v. Rounds*, 27 Mich. 82; *People v. Woodhull*, 14 Mich. 28. *N. Y.*—*People ex rel. Vanderlinden v. Martin*, 58 Barb. 286; *People ex rel. Lowell v. Westford*, 53 Barb. 555, 38 How. Pr. 23. *Va.*—*Milliner's Admr. v. Harrison*, 32 Gratt. (73 Va.) 422, only where relator's right clearly appears.

[d] To compel the levy of a tax for the payment of bounties, writ will lie. *State v. Harris*, 17 Ohio St. 608. See also the title "Taxation."

34. *Cole v. Economy*, 13 Pa. Co. Ct. 549.

[a] If contract was parol, sufficient to plead legal effect of agreement. *Madison v. Miller*, 87 Ind. 257.

35. *Rockwell v. Foster*, 1 Root (Conn.) 532; *Vermillion v. Hammond*, 83 Ind. 453; *Grant v. Wood*, 69 Ind. 356 (facts held to be sufficiently stated); *Moore v. Monroe*, 59 Ind. 516; *Young v. Franklin County*, 25 Ind. 295.

[a] Petition for mandamus must state facts bringing relator within terms of the act. *People v. Woodhull*, 14 Mich. 28.

36. *Hawthorne v. Hoboken*, 32 N. J. L. 172, plaintiff need not remove in his pleading every objection with which his adversary may intend to oppose him.

ment was credited to the quota of the particular town or county.³⁷

3. Province of Court and Jury.—On conflicting evidence, the question, whether an oral offer of bounty was made and the terms thereof, are properly left to jury.³⁸

B. FOR PERFORMANCE OF OTHER ACTS.—Mandamus will issue to compel the drawing of a warrant in payment of a bounty allowed by statute for the destruction of animals.³⁹ In some states, by special statute, a civil action will lie against the state to recover a bounty due.⁴⁰

37. *Greenwood v. DeKalb*, 90 Ill. 600.

38. *Andrews v. Moretown*, 45 Vt. 1; *Poquet v. North Hero*, 44 Vt. 91; *Leet v. Shedd*, 42 Vt. 277. See also *Sparrow v. Grove*, 31 Md. 214; and generally the title "**Province of Judge and Jury.**"

39. **Fla.**—*Johns v. Orange*, 28 Fla. 626, 10 So. 96. **Mont.**—*State v. Rickards*, 17 Mont. 440, 43 Pac. 504. **S. D.** *Meade County Bank v. Reeves*, 13 S. D. 193, 82 N. W. 751.

See generally the title "**Mandamus.**"

[a] **Before it will issue, it must appear** that there is available some fund from which the warrant can be lawfully drawn. *State v. Rickards*, 17 Mont. 440, 43 Pac. 504.

[b] **Relator must show** that he has complied with all the conditions of the statute allowing the bounty. *DeVaughn v. Jackson*, 31 Fla. 60, 12 So. 212; *Johns v. Orange*, 28 Fla. 626, 10 So. 96.

40. *San Francisco Law, etc., Co. v. State*, 141 Cal. 354, 74 Pac. 1047.

PEONAGE.—See **Master and Servant.**

PERCOLATING WATERS.—See **Waters and Watercourses.**

PERFORMANCE.—See **Implied and Express Agreements.** See also **Specific Performance.**

PERJURY

By the Editorial Staff.

I. JURISDICTION AND VENUE, 312

II. INDICTMENT OR INFORMATION FOR PERJURY OR FALSE SWEARING, 313

A. *Generally*, 313

B. *Particular Averments*, 315

1. *Time of Offense*, 315
2. *Describing Proceedings in Which Oath Administered*, 315
 - a. *In General*, 315
 - b. *Setting Out Proceedings and Record*, 316
3. *Jurisdiction and Right To Administer Oath*, 317
 - a. *In General*, 317
 - b. *Mode of Acquiring Jurisdiction*, 318
 - c. *Authority To Administer Oath*, 318
4. *Describing Court or Officer Administering Oath*, 319
5. *Administering Oath and Form Thereof*, 320
6. *Setting Out Alleged False Matter*, 321
7. *Materiality of Evidence, Oath, etc.*, 322
 - a. *Necessity for Averment of Materiality of Testimony*, 322
 - b. *Necessity for Alleging Materiality of Oath*, 324
 - c. *Necessity for Alleging Competency of Testimony*, 325
8. *Assignment of Perjury*, 325
 - a. *Negating Truth of Alleged False Statements*, 325
 - b. *Averring Knowledge of Falsity*, 326
 - c. *Averring Intent To Commit*, 327
 - d. *Joining Assignments*, 328

C. *Conclusion*, 328

III. INDICTMENT OR INFORMATION FOR SUBORNATION OF PERJURY OR ATTEMPT, 328

A. *Subornation of Perjury*, 328

B. *Attempt To Suborn Perjury*, 330

IV. JOINDER AND ELECTION OF OFFENSES, 330

V. JOINDER OF PARTIES, 330**VI. TRIAL, 330**

- A. *Variance*, 330
- B. *Questions of Law and Fact*, 330
- C. *Instructions*, 332
 - 1. *In General*, 332
 - 2. *Necessity for Particular Instructions*, 332
- D. *Verdict*, 333

VII. NEW TRIAL, 334**VIII. REVIEW, 334****CROSS-REFERENCES:****Oath and Affirmation.**

Bills to impeach judgments and decrees for perjury, see 4 STANDARD PROC. 476.

Instructing on doctrine "Falsus in Uno," see 13 STANDARD PROC. 913, et seq.

Surprise by perjury of witness as ground for new trial, see the title "New Trial."

For forms, see 9 STANDARD PROC. 960, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. JURISDICTION AND VENUE. — The court having jurisdiction over prosecutions for the offense of perjury or false swearing may depend upon local statute.¹ In accordance with the general rule that state courts have no jurisdiction over offenses against the United States,² a prosecution for perjury committed in a proceeding authorized by statutes of the United States cannot be had in the state courts; jurisdiction thereof belongs exclusively to the federal courts.³ But

1. See the statutes, and *State v. Davidson*, 40 Conn. 281, justice of the peace and not superior court had jurisdiction of offense under statutes of 1870.

2. See 17 STANDARD PROC. 822.

3. See the cases cited in 17 STANDARD PROC. 822, note 26 [a], and *infra*, this note.

[a] It has accordingly been held that the courts of a state have no jurisdiction of the crime of perjury committed (1) in an examination before a commissioner under the United States Bankruptcy Act (*State v. Pike*, 15 N. H. 83); (2) in testifying before a commissioner of the circuit court of the United States (*U. S.—Ex Parte*

a prosecution for perjury is properly in a state court where the perjury is committed in a proceeding in a state court though it is in session at the time in a federal building.⁴

Venue. — Prosecutions for perjury should be in the county or district in which the offense was committed.⁵

II. INDICTMENT OR INFORMATION FOR PERJURY OR FALSE SWEARING. — A. **GENERALLY.** — The general rules governing the form and sufficiency of indictments or informations obtain in prosecutions for perjury or false swearing.⁶ The indictment or information for perjury must set forth with certainty and particularity every fact essential to the gravamen of the offense.⁷ The particularity requisite in an indictment for perjury at common law is not generally required under modern statutes defining the offense, however.⁸

Bridges, 2 Woods 428, 4 Fed. Cas. No. 1,862. **Ga.**—Ross v. State, 55 Ga. 192, 21 Am. Rep. 278. **Tenn.**—State v. Shelley, 11 Lea 594; (3) in making an affidavit under the acts of congress relating to the sale of public lands. **Ark.**—State v. Kirkpatrick, 32 Ark. 117. **Cal.**—People v. Kelly, 38 Cal. 145, 99 Am. Dec. 360. **Ind.**—State v. Adams, 4 Blackf. 146.

[b] Though perjury committed in naturalization proceeding in state court, prosecution properly in federal court. Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. ed. 861, 19 Ann. Cas. 778; People v. Sweetman, 3 Park. Crim. (N. Y.) 358. But see State v. Whittemore, 50 N. H. 245, 9 Am. Rep. 196; Rump v. Com., 30 Pa. 475. Compare United States v. Severino, 125 Fed. 949, holding that prosecution for perjury in connection with affidavit required by state statute in naturalization proceedings, but not required by federal statute, was not properly in federal court. ,

4. Exum v. State, 90 Tenn. 501, 17 S. W. 107, 25 Am. St. Rep. 700, 15 L. R. A. 381, state court held in federal building pending repairs to its own court-room.

5. State v. Bunker, 38 Kan. 737, 17 Pac. 651. See generally the title "Venue."

6. See *infra*, this section, and generally the title "Indictment and Information."

7. See the following: **U. S.**—Markham v. United States, 160 U. S. 319, 16 Sup. Ct. 288, 40 L. ed. 441; United States v. Pettus, 84 Fed. 791. **Ark.**—Harp v. State, 59 Ark. 113, 26 S. W. 714; Thomas v. State, 54 Ark. 584, 16 S. W. 568. **Fla.**—Humphreys v. State,

17 Fla. 381. **Ill.**—People v. Miller, 264 Ill. 148, 106 N. E. 191, Ann. Cas. 1915B, 1240; Morrell v. People, 32 Ill. 499. **Ia.**—State v. Schill, 27 Iowa 263. **Ky.**—Tudor v. Com., 134 Ky. 186, 119 S. W. 816. **Me.**—State v. Mace, 76 Me. 64, 5 Am. Crim. Rep. 588. **Md.**—State v. Bixler, 62 Md. 354. **Miss.**—Copeland v. State, 23 Miss. 257. **N. C.**—State v. Gallimon, 24 N. C. 372. **P. I.**—United States v. Go Chanco, 23 Phil. Isl. 641. **Tex.**—Robertson v. State, 68 Tex. Crim. 243, 150 S. W. 893. **Vt.**—State v. Rowell, 72 Vt. 28, 47 Atl. 111, 82 Am. St. Rep. 918, 15 Am. Crim. Rep. 567; State v. McCone, 59 Vt. 117, 7 Atl. 406. **Wash.**—State v. Roberts, 22 Wash. 1, 60 Pac. 65; State v. See, 4 Wash. 344, 30 Pac. 327, 746. **W. Va.**—Stofer v. State, 3 W. Va. 689. **Can.**—Rex v. Cohn, 6 Can. Cr. Cas. 386, 36 Nova Scotia 240.

See generally 12 STANDARD PROC. 327, *et seq.*

8. United States v. Pettus, 84 Fed. 791; Allen v. State, 42 Tex. 12; Brown v. State, 9 Tex. App. 171.

[a] "There are no pleadings known to the criminal law which require greater precision, certainty, and particularity than those relating to the crime of perjury. 2 Russ. Crimes, p. 631. To such an extent had this requirement of particularity gone that at one time it was almost impossible to draw an indictment for perjury which would stand that scrutiny of courts in respect of its precision; and therefore statutes have been passed, both in England and the American states, for the purpose of eliminating all that which was considered unnecessarily exacting in this regard. Yet there remains, in the substantial aver-

It is sufficient that the indictment or information sets forth in ordinary language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended, the substance of the controversy in which the oath was taken, in what court the oath alleged to be false was taken, that the court before which the oath was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned.⁹

Where the statute sufficiently defines the offense, a description thereof in the language of the statute is sufficient.¹⁰ Where the common law and statutory definitions of the crimes of perjury are substantially the same, an indictment or information good at common law is good under the statute.¹¹

Statutory Form. — Statutes sometimes prescribe the form of the indictment, and such form is to be followed provided it is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged.¹²

ments of an indictment for perjury, a requirement for accuracy, certainty, and particularity that cannot be avoided by even the most liberal of these statutes." *United States v. Pettus*, 84 Fed. 791.

9. See the following: **Ala.**—*Barnett v. State*, 89 Ala. 165, 7 So. 414. **Ark.**—*State v. Green*, 24 Ark. 591. **Cal.**—*People v. Ah Bean*, 77 Cal. 12, 18 Pac. 815. **Fla.**—*Jarvis v. State*, 74 So. 794; *Bennett v. State*, 65 Fla. 84, 61 So. 127. **Ill.**—*Kimmel v. People*, 92 Ill. 457. **Ind.**—*State v. Hopper*, 133 Ind. 460, 32 N. E. 878. **Kan.**—*State v. Gregory*, 46 Kan. 290, 26 Pac. 747. **Minn.**—*State v. Madigan*, 57 Minn. 425, 59 N. W. 490. **Miss.**—*State v. Jolly*, 73 Miss. 42, 18 So. 541. **Mo.**—*State v. Rhodes*, 220 Mo. 9, 119 S. W. 391. **N. C.**—*State v. Thompson*, 113 N. C. 638, 18 S. E. 211. **Ore.**—*State v. Ah Lee*, 18 Ore. 540, 23 Pac. 424. **P. I.**—*United States v. Go Chanco*, 23 Phil. Isl. 641. **Tex.**—*Brown v. State*, 9 Tex. App. 171. **Vt.**—*State v. Webber*, 78 Vt. 463, 62 Atl. 1018. **Wash.**—*State v. Eaid*, 55 Wash. 302, 104 Pac. 275, 33 L. R. A. (N. S.) 946.

[a] **Matter of inducement** (1) may be pleaded in general terms. *Williams v. State* (Okla. Crim.), 167 Pac. 763. (2) Introductory matter, by way of predicate for the averments of the facts which constitute the offense are not regarded as so essential as to require the same particularity of detail in averment as at common law prior to the statute of 23 Geo. II, ch. 11.

Allen v. State, 42 Tex. 12; *Brown v. State*, 9 Tex. App. 171.

10. See the following: **Ala.**—*Walker v. State*, 96 Ala. 53, 11 So. 401. **Cal.**—*People v. Ross*, 103 Cal. 425, 37 Pac. 379. **Ind.**—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138. **Ia.**—*State v. Porter*, 105 Iowa 677, 75 N. W. 519. **La.**—*State v. Matlock*, 48 La. Ann. 663, 19 So. 669. **Md.**—*State v. Bixler*, 62 Md. 354. **Minn.**—*State v. Thomas*, 19 Minn. 484. **N. C.**—*State v. Thompson*, 113 N. C. 638, 18 S. E. 211. **Ohio.**—*Crusen v. State*, 10 Ohio St. 258. **Okla.**—*Stanley v. United States*, 1 Okla. 336, 33 Pac. 1025. **P. I.**—*United States v. Go Chanco*, 23 Phil. Isl. 641. **Tex.**—*State v. Peters*, 42 Tex. 7.

11. *State v. Eaid*, 55 Wash. 302, 104 Pac. 275, 33 L. R. A. (N. S.) 946.

[a] It is otherwise where offense as defined by statute is different from that at common law. *Wile v. State*, 60 Miss. 260.

12. See the statutes, and the following: **U. S.**—*United States v. Cuddy*, 39 Fed. 696. **Ala.**—*Smith v. State*, 103 Ala. 57, 15 So. 866; *Walker v. State*, 96 Ala. 53, 11 So. 401; *Thomas v. State*, 13 Ala. App. 421, 69 So. 413. **Ky.**—*Com. v. Combs*, 30 Ky. L. Rep. 1300, 101 S. W. 312. **Me.**—*State v. Mace*, 76 Me. 64. **Miss.**—*State v. Jolly*, 73 Miss. 42, 18 So. 541. **Mo.**—*State v. Huckleby*, 87 Mo. 414. **N. C.**—*State v. Cline*, 146 N. C. 640, 61 S. E. 522; *State v. Thompson*, 113 N. C.

B. PARTICULAR AVERMENTS. — 1. Time of Offense. — In the absence of a contrary statute, the time when the offense was committed should be stated in the indictment or information.¹³ Statutes, however, generally obviate the necessity for alleging the precise time, and an indictment is not defective which imperfectly states the time or omits entirely to state it.¹⁴

2. Describing Proceeding in Which Oath Administered. — a. *In General.* — The indictment must describe the occasion of the alleged perjury.¹⁵ Except where the necessity of alleging the nature of the proceeding in which the perjury was committed is obviated by statute,¹⁶ the character of the proceeding in which the perjury or false swearing occurred must be stated, unless that fact appears from the description thereof in the indictment or information.¹⁷ That the perjury or false swearing was committed in a judicial proceeding,¹⁸ or

638, 18 S. E. 211. **Ore.**—*State v. Ah Lee*, 18 Ore. 540, 23 Pac. 424. **Tenn.** *State v. Stillman*, 7 Coldw. 341. **Vt.** *State v. Webber*, 78 Vt. 463, 62 Atl. 1018. **Eng.**—*Reg. v. Child*, 5 Cox Cr. Cas. 197. **Can.**—*Rex v. Hinman*, 7 Terr. L. Rep. 186; *Rex v. Legros*, 17 Ont. L. R. 425, 12 Ont. W. R. 983.

13. U. S.—*United States v. Law*, 50 Fed. 915; *United States v. Bowman*, 2 Wash. C. C. 328, 24 Fed. Cas. No. 14,631. **Me.**—*State v. Fenlason*, 79 Me. 117, 8 Atl. 459 (alleging that the perjury was committed at a certain term of court not sufficient); *State v. Hanson*, 39 Me. 337. **Miss.**—See *Saucier v. State*, 95 Miss. 226, 48 So. 840. **Ore.**—*State v. Ah Lee*, 18 Ore. 540, 23 Pac. 424. **Va.**—*Rhodes v. Com.*, 78 Va. 692.

Necessity for averment generally, see 12 STANDARD PROC. 411, *et seq.*

[a] **Use of "on or about"** is permitted. *State v. Perry*, 117 Iowa 463, 91 N. W. 765.

14. Shell v. State, 148 Ind. 50, 47 N. E. 144. But see *State v. Offutt*, 4 Blackf. (Ind.) 355. Compare *Com. v. Nailor*, 29 Pa. Super. 275.

[a] **Except when necessary** to identify a record, deposition or affidavit in which the oath was taken. *State v. Perry*, 117 Iowa 463, 91 N. W. 765.

15. Ala.—*Hicks v. State*, 86 Ala. 30, 5 So. 425; *Jacobs v. State*, 61 Ala. 448. **Ga.**—*Sistrunk v. State*, 18 Ga. App. 42, 88 S. E. 796. **Ky.**—*Com. v. Kane*, 92 Ky. 457, 18 S. W. 7. **Mo.** *State v. Koslowsky*, 228 Mo. 351, 128 S. W. 741; *State v. Moran*, 216 Mo. 550, 115 S. W. 1126. **Can.**—*Reg. v. Kennedy*, 7 Newf. 91.

[a] **Sufficient Indictment.** — *People v. Hill* (Cal. App.), 172 Pac. 1114.

16. See the statutes, and *Cope v. Com.*, 20 Ky. L. Rep. 721, 47 S. W. 436. See also *infra*, II, B, 2, b.

17. Ala.—*Bradford v. State*, 134 Ala. 141, 32 So. 742; *Jacobs v. State*, 61 Ala. 448. **Mass.**—*Com. v. Wright*, 166 Mass. 174, 44 N. E. 129. **Miss.** See *State v. Kelly*, 113 Miss. 461, 74 So. 325.

[a] **When the perjury occurred in a criminal prosecution**, (1) it is sometimes necessary to allege specifically whether the crime charged was a common law or statutory felony. *Hinch v. State*, 2 Mo. 158. (2) But it is usually sufficient to describe a criminal offense in general terms, such as "murder," "burglary," and the like. *Jones v. State*, 100 Ala. 35, 14 So. 98; *Davis v. State*, 79 Ala. 20; *Thomas v. State*, 13 Ala. App. 421, 69 So. 413; *Etheridge v. State*, 76 Tex. Crim. 198, 173 S. W. 1031.

18. U. S.—*Hogue v. United States*, 184 Fed. 245, 106 C. C. A. 387; *United States v. Wood*, 44 Fed. 753. **Ill.**—*Morrell v. People*, 32 Ill. 499. **Kan.**—*State v. Ayer*, 40 Kan. 43, 19 Pac. 403. **Ky.** *Thomas v. Com.*, 175 Ky. 33, 193 S. W. 653. **Md.**—*State v. Mercer*, 101 Md. 535, 61 Atl. 220. **N. C.**—*State v. Peters*, 107 N. C. 876, 12 S. E. 74. **Ohio.**—*Crusen v. State*, 10 Ohio St. 258. **Okla.**—*Peters v. United States*, 2 Okla. 116, 33 Pac. 1031. **Vt.**—*State v. Chamberlin*, 30 Vt. 559. **Wash.** *State v. McLain*, 43 Wash. 124, 86 Pac. 388. **Wis.**—*State v. Lloyd*, 77 Wis. 630, 46 N. W. 898; *State v. Lamont*, 2 Wis. 437. **Eng.**—*Reg. v. Overton*, 4 Q. B. 83, 3 G. & D. 133, 7 Jur.

otherwise in due course of justice,¹⁹ should appear.

Ordinarily it is not necessary to allege the specific issue joined, it being sufficient to allege that a certain issue was joined in the proceeding set forth in the indictment or information.²⁰ Nor need the grounds of the action be stated.²¹ It is not necessary to allege that there was a final determination of the proceeding in which the perjury was committed, or that final judgment was entered therein.²²

b. *Setting Out Proceedings and Record.*—Statutes dispense with the necessity of setting out in the indictment or information the pleading or any part of the record or proceedings in which the perjury was committed,²³ and require only that the substance of the proceeding or matter in respect to which the crime was committed be

196, 12 L. J. M. C. 61, 45 E. C. L. 83, 114 Eng. Reprint 828.

But see *Thompson v. State*, 120 Ga. 132, 47 S. E. 566; *Urban v. State*, 77 Tex. Crim. 261, 178 S. W. 514.

[a] **Specific allegation of that fact unnecessary.** *Kizer v. People*, 211 Ill. 407, 71 N. E. 1035; *State v. McLain*, 43 Wash. 124, 86 Pac. 388. See also *United States v. Mau Sing*, 3 Hawaii Fed. 385.

[b] **Facts showing pendency of proceeding in court** (1) at time the oath was taken and the false statement made should appear, when perjury committed in judicial proceeding charged. **Me.**—*State v. Hanson*, 39 Me. 337. **Tex.**—*State v. Oppenheimer*, 41 Tex. 82. **Eng.**—*Reg. v. Pearson*, 8 Car. & P. 119, 34 E. C. L. 642. (2) But when the false swearing occurred in an affidavit required to be filed before a writ of summons in the action is issued, it is unnecessary to allege that an action was pending. *King v. Reg.*, 14 Q. B. 31, 3 Cox Cr. Cas. 561, 18 L. J. Q. B. 253, 68 E. C. L. 31, 117 Eng. Reprint 13.

19. **Ill.**—*Morrell v. People*, 32 Ill. 499. **Mich.**—*People v. Gaige*, 26 Mich. 30. **Mo.**—*State v. Hamilton*, 7 Mo. 300. **N. Y.**—*People v. Robertson*, 3 Wheel. Cr. Cas. 180.

[a] **If the perjury was committed in an affidavit** it must appear that the affidavit was used or to be used in a judicial proceeding. *People v. Fox*, 25 Mich. 492; *State v. Lloyd*, 77 Wis. 630, 46 N. W. 898.

[b] **If the perjury was not committed on the trial of an action**, the indictment should so allege. *State v. Peters*, 107 N. C. 876, 12 S. E. 74.

[c] **Perjury Before Grand Jury.** (1) When the perjury is alleged to have been committed in a grand jury

investigation, it is not necessary to allege that the person there under investigation was or was not guilty of the crime charged against him; nor need the facts constituting the offense be alleged. *State v. Schill*, 27 Iowa 263. (2) Neither is it necessary to allege the specific offense being investigated. *Dennison v. State* (Ala. App.), 72 So. 589. But see *People v. Gillette*, 126 App. Div. 665, 111 N. Y. Supp. 133; *People v. Morrison*, 98 Misc. 555, 164 N. Y. Supp. 712. (3) But the allegations must show that the matter under investigation was the violation of some criminal law. *Alt v. State* (Tex. Crim.), 203 S. W. 53; *Carpenter v. State* (Tex. Crim.), 195 S. W. 199.

20. **Miss.**—*State v. Silberberg*, 78 Miss. 858, 29 So. 761. **N. J.**—*State v. Voorhis*, 52 N. J. L. 351, 20 Atl. 26. **N. Y.**—*People v. Grimshaw*, 33 Hun 505, 2 N. Y. Crim. 390. **R. I.**—*State v. Miller*, 26 R. I. 282, 58 Atl. 882. **Tex.**—*Francis v. State*, 57 Tex. Crim. 555, 123 S. W. 1114; *Covey v. State*, 23 Tex. App. 388, 5 S. W. 283.

[a] **That there had been a joinder of issue in the cause** need not be alleged. *State v. Nelson*, 146 Mo. 256, 48 S. W. 84.

21. *Markey v. State*, 47 Fla. 38, 37 So. 53; *Peters v. United States*, 2 Okla. 138, 37 Pac. 1081.

22. **Me.**—*State v. Keene*, 26 Me. 33. **Okla.**—*Finch v. United States*, 1 Okla. 396, 33 Pac. 638. **Pa.**—*Com. v. Moore*, 9 Pa. Co. Ct. 501.

23. See the statutes, and **Ala.**—*Cowan v. State* (Ala. App.), 72 So. 578. **N. C.**—*State v. Hoyle*, 28 N. C. 1; *State v. Gallimon*, 24 N. C. 372. **Tenn.** *State v. Argo*, 118 Tenn. 377, 100 S. W. 106; *Woods v. State*, 14 Lea 460.

set forth.²⁴ At common law it was necessary to set forth the pleadings, records, and proceedings, including the evidence.²⁵

3. Jurisdiction and Right To Administer Oath.—a. *In General.* By the common law rule, the jurisdiction of the court to hear and determine the proceedings in which the perjury was committed is required to be affirmatively shown.²⁶ The statutes, however, have largely modified this rule, and make an allegation that the court or tribunal had authority to administer the oath sufficient.²⁷ When the

24. Ala.—*Jacobs v. State*, 61 Ala. 448; *Cowan v. State* (Ala. App.), 72 So. 578. **Ark.**—*State v. Green*, 24 Ark. 591. **Cal.**—*People v. Ah Bean*, 77 Cal. 12, 18 Pac. 815. **Ind.**—*Burk v. State*, 81 Ind. 128; *State v. Walls*, 54 Ind. 407. **Ia.**—*State v. Booth*, 88 N. W. 344. **La.**—*State v. Gibson*, 26 La. Ann. 71. **Mo.**—*State v. Moran*, 216 Mo. 550, 115 S. W. 1126; *State v. Gordon*, 196 Mo. 185, 95 S. W. 420; *State v. Keel*, 54 Mo. 182. **Ore.**—*State v. Luper*, 49 Ore. 605, 91 Pac. 444; *State v. Witham*, 6 Ore. 366. **Tenn.**—*Woods v. State*, 14 Lea 460. **Tex.**—*Kelley v. State*, 51 Tex. Crim. 507, 103 S. W. 189. **Wyo.**—See *Dickerson v. State*, 18 Wyo. 440, 111 Pac. 857, 116 Pac. 448. **Eng.**—*Rex v. Dowlin*, 5 T. R. 311, 101 Eng. Reprint 174.

[a] The substance of the proceeding embraces the style of the cause and the court where the proceeding was pending. *Dennison v. State* (Ala. App.), 72 So. 589; *Cowan v. State* (Ala. App.), 72 So. 578; *Maddox v. State*, 2 Ala. App. 244, 57 So. 95.

[b] Only so much of the proceedings need be set forth as will make manifest the materiality of the oath taken. *State v. Argo*, 118 Tenn. 377, 100 S. W. 106; *Lamden v. State*, 5 Humph. (Tenn.) 83. See also *State v. Ela*, 91 Me. 309, 39 Atl. 1001.

[c] Vagueness or incompleteness of description must be excepted to before trial; it is not cause for arresting judgment. *Pennaman v. State*, 58 Ga. 336.

25. See the following. **Ala.**—*Jacobs v. State*, 61 Ala. 448. **N. C.**—*State v. Gallimon*, 24 N. C. 372. **Tenn.**—*State v. Stillman*, 7 Coldw. 341. **Va.**—*Com. v. Lodge*, 2 Gratt. (43 Va.) 579.

26. See the following: **Fla.**—*Bexley v. State*, 59 Fla. 6, 51 So. 278. **Ky.**—*Roundtree v. Roundtree*, Ky. Dec. 56. **Me.**—*State v. Plummer*, 50 Me. 217. See also *State v. Aenspacker*, 130 La. 717, 58 So. 520.

[a] When the perjury was committed before a special tribunal, its jurisdiction must be set forth with certainty. *State v. McCone*, 59 Vt. 117, 7 Atl. 406.

[b] This may be done (1) either by alleging in words that jurisdiction existed (**Ga.**—*Franklin v. State*, 91 Ga. 712, 17 S. E. 987. **La.**—*State v. Aenspacker*, 130 La. 717, 58 So. 520. **Tex.**—*State v. Oppenheimer*, 41 Tex. 82; *Anderson v. State*, 18 Tex. App. 17. But see *Carpenter v. State* [Tex. Crim.], 195 S. W. 199), or (2) by stating facts from which in law it results. **Ark.**—*Loudermilk v. State*, 110 Ark. 549, 162 S. W. 569. **Cal.**—*People v. Howard*, 111 Cal. 655, 44 Pac. 342. **Ga.**—*Franklin v. State*, 91 Ga. 712, 17 S. E. 987. **La.**—*State v. Aenspacker*, 130 La. 717, 58 So. 520. **S. C.**—*State v. Farrow*, 10 Rich. L. 165. **Tex.**—*State v. Webb*, 41 Tex. 67; *State v. Oppenheimer*, 41 Tex. 82; *Anderson v. State*, 18 Tex. App. 17.

[c] When the perjury was committed in the same court in which the indictment is filed, and the facts sufficiently appear, the court may take judicial notice of its jurisdiction and it need not be alleged. *State v. Thibodeaux*, 49 La. Ann. 15, 21 So. 127.

27. See the statutes, and **Ala.**—*Thomas v. State*, 13 Ala. App. 421, 69 So. 413. **Ark.**—*Beavers v. State*, 124 Ark. 38, 186 S. W. 300; *Loudermilk v. State*, 110 Ark. 549, 162 S. W. 569. **Cal.**—*People v. De Carlo*, 124 Cal. 462, 57 Pac. 383. **Colo.**—*Thompson v. People*, 26 Colo. 496, 59 Pac. 51. **Ill.**—*Kizer v. People*, 211 Ill. 407, 71 N. E. 1035; *Maynard v. People*, 135 Ill. 416, 25 N. E. 740. **Ia.**—*State v. Newton*, 1 G. Gr. 160, 48 Am. Dec. 367. **Mass.**—*Com. v. Knight*, 12 Mass. 274, 7 Am. Dec. 72. **Mo.**—*State v. Keel*, 54 Mo. 182. **N. Y.**—*Eighmy v. People*, 79 N. Y. 546. **N. C.**—*State v. Green*, 100 N. C. 419, 5 S. E. 422; *State v. Roberson*, 98 N. C. 751, 4 S. E. 511. **Ohio.**

perjury is charged to have been committed before a ministerial officer while exercising judicial functions, it is not necessary to set out the special facts which gave him jurisdiction, provided it is alleged that he had competent authority to try the cause and administer the oath.²⁸ Nor need such jurisdiction be alleged when judicial notice can be taken of the fact that he possessed jurisdiction of the proceeding in which the perjury is charged to have been committed.²⁹

b. *Mode of Acquiring Jurisdiction.*—When the perjury is charged to have been committed in a criminal prosecution, the indictment need not allege whether jurisdiction of the offense was obtained by indictment or information.³⁰

c. *Authority To Administer Oath.*—The indictment or information for perjury or false swearing must allege the authority of the officer to administer the oath.³¹ The allegation may be either an

Halleck v. State, 11 Ohio 400. **Okla.** Gray v. State, 4 Okla. Crim. 292, 111 Pac. 825. **Utah.**—People v. Greenwell, 5 Utah 112, 13 Pac. 89. **Va.**—Fitch v. Com., 92 Va. 824, 24 S. E. 272. **Wash.**—State v. Douette, 31 Wash. 6, 71 Pac. 556. **Eng.**—Lavey v. Reg., 17 Q. B. 496, 5 Cox Cr. Cas. 269, 2 Den. C. C. 504, 16 Jur. 36, 21 L. J. M. C. 10, 79 E. C. L. 495, 117 Eng. Reprint 1372; Rex v. Callanan, 6 B. & C. 102, 9 D. & R. 97, 5 L. J. M. C. (O. S.) 39, 13 E. C. L. 57, 108 Eng. Reprint 390.

Necessity for averring authority to administer oath, see *infra*, I, B, 3, c.

[a] When the perjury was committed in a police court created by city ordinance, it was held sufficient to refer to the ordinance by number and its general tenor. State v. Dineen, 203 Mo. 628, 102 S. W. 480.

[b] An indictment for perjury before a grand jury, need not allege that such grand jury was selected at a meeting of the board of supervisors properly convened. People v. Miller, 264 Ill. 148, 106 N. E. 191, Ann. Cas. 1915B, 1240.

28. State v. Belew, 79 Mo. 584; People v. Tredway, 3 Barb. (N. Y.) 470; People v. Phelps, 5 Wend. (N. Y.) 9. But see Barnard v. United States, 162 Fed. 618, 89 C. C. A. 376.

29. Barnard v. United States, 162 Fed. 618, 89 C. C. A. 376; Rich v. United States, 1 Okla. 354, 33 Pac. 804, 2 Okla. 146, 37 Pac. 1083; Peters v. United States, 2 Okla. 138, 37 Pac. 1081. Compare Com. v. Ransdall, 153 Ky. 334, 155 S. W. 1117.

30. Ark.—Loudermilk v. State, 110 Ark. 549, 162 S. W. 569. **S. C.**—State

v. Byrd, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660. **Tenn.**—State v. Wise, 3 Lea 38. But see, Steinston v. State, 6 Yerg. 531, for rule previous to present statute. **Tex.**—Etheridge v. State, 76 Tex. Crim. 198, 173 S. W. 1031.

[a] Although the better practice is to show that the court had obtained jurisdiction either by information or indictment, such explicit allegation is unnecessary when the indictment alleges explicitly that the court had jurisdiction to try the case. Powers v. State, 17 Tex. App. 428. Compare State v. Oppenheimer, 41 Tex. 82; State v. Webb, 41 Tex. 67.

31. **Ark.**—State v. Leatherman, 125 Ark. 243, 188 S. W. 545. **Cal.**—People v. Cohen, 118 Cal. 74, 50 Pac. 20; People v. Dunlap, 113 Cal. 72, 45 Pac. 183. **Fla.**—Adkinson v. State, 59 Fla. 1, 51 So. 818; Bedsole v. State, 59 Fla. 3, 52 So. 1. **Ga.**—Ruff v. State, 17 Ga. App. 337, 86 S. E. 784. **Ind.**—State v. Hopper, 133 Ind. 460, 32 N. E. 878. **Ia.**—State v. Cunningham, 66 Iowa 94, 23 N. W. 280; State v. Nickerson, 46 Iowa 447. **Ky.**—Com. v. Ransdall, 153 Ky. 334, 155 S. W. 1117; Com. v. Taylor, 96 Ky. 394, 29 S. W. 138; Kerfoot v. Com., 89 Ky. 174, 12 S. W. 189. **La.**—State v. Harlis, 33 La. Ann. 1172. **Mo.**—State v. Moran, 216 Mo. 550, 115 S. W. 1126. **Ore.**—State v. Woolridge, 45 Ore. 389, 78 Pac. 333. **Tex.**—Stewart v. State, 6 Tex. App. 184. **Wash.**—State v. Dalgiovanna, 69 Wash. 84, 124 Pac. 209, 40 L. R. A. (N. S.) 249. **Eng.**—Reg. v. Overton, 4 Q. B. 83, 3 G. & D. 133, 7 Jur. 196, 12 L. J. M. C. 61, 45 E. C. L. 83, 114 Eng. Reprint 828; Rex

express averment that the officer had such authority;³² or set out facts sufficient to make it appear to the court that he had such authority.³³ It is sufficient to allege that the person administering the oath had authority to do so without any further allegation as to the acquisition of authority by him; nor need his commission be set out.³⁴

4. Describing Court or Officer Administering Oath.—The style of the court before which the perjury is charged to have been committed must be properly described.³⁵ The person holding the court or the officer thereof before whom the oath was taken need not be named.³⁶ But when the oath upon which the perjury is predicated

v. Callanan, 6 B. & C. 102, 9 D. & R. 97, 5 L. J. M. C. (O. S.) 39, 13 E. C. L. 57, 108 Eng. Reprint 390.

But see *Com. v. Hughes*, 5 Allen (Mass.) 499.

[a] Failure to do so renders the indictment fatally defective. *Phillips v. State*, 5 Ga. App. 597, 63 S. E. 667; *State v. Owen*, 73 Mo. 440.

32. U. S.—*United States v. Boggs*, 31 Fed. 337. **Cal.**—*People v. Bradbury*, 155 Cal. 808, 103 Pac. 215. *Compare People v. Cohen*, 118 Cal. 74, 50 Pac. 20. **Ind.**—*Hall v. State*, 178 Ind. 448, 99 N. E. 732; *State v. Hopper*, 133 Ind. 460, 32 N. E. 878. *Compare McGrager v. State*, 1 Ind. 232, Smith 179. **Ia.**—*State v. Cunningham*, 66 Iowa 94, 23 N. W. 280. **Ore.**—*State v. Woolridge*, 45 Ore. 389, 78 Pac. 333. **Pa.**—*Com. v. O'Neill*, 5 Pa. Co. Ct. 209. **Tex.**—*Waters v. State*, 30 Tex. App. 284, 17 S. W. 411.

33. U. S.—*Baskin v. United States*, 209 Fed. 740, 126 C. C. A. 464. **Ind.**—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *State v. Hopper*, 133 Ind. 460, 32 N. E. 878. **Ia.**—*State v. Cunningham*, 66 Iowa 94, 23 N. W. 280. **Pa.**—See *Com. v. Briscoe*, 19 Pa. Dist. 422. **Tex.**—*St. Clair v. State*, 11 Tex. App. 297.

[a] Allegation that the oath was administered by a justice of the peace is sufficient. *Com. v. Combs*, 30 Ky. L. Rep. 1300, 101 S. W. 312.

[b] Allegation that the oath was administered by a "coroner" fails to show that it was administered by lawful authority, when such office no longer existed, although it was administered by a justice of the peace acting as coroner. The indictment should so have alleged. *Stewart v. State*, 6 Tex. App. 184.

[c] Court will then take judicial

notice of his authority to administer the oath, without formally alleging his authority to do so. **U. S.**—*United States v. Eddy*, 134 Fed. 114. **Ark.**—*Loudermilk v. State*, 110 Ark. 549, 162 S. W. 569. **Ind.**—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *State v. Hopper*, 133 Ind. 460, 32 N. E. 878. **Ia.**—*State v. Harter*, 131 Iowa 199, 108 N. W. 232. **Ky.**—*Goslin v. Com.*, 121 Ky. 698, 90 S. W. 223. **Can.**—*Reg. v. Callaghan*, 19 U. C. Q. B. 364.

34. Cal.—*People v. De Carlo*, 124 Cal. 462, 57 Pac. 383. **Ill.**—*Johnson v. People*, 94 Ill. 505. **Ind.**—*Burk v. State*, 81 Ind. 128. **Mo.**—*State v. Marshall*, 47 Mo. 378. **N. C.**—*State v. Bryson*, 4 N. C. 115. **Tex.**—*State v. Peters*, 42 Tex. 7; *Eoff v. State*, 75 Tex. Crim. 244, 170 S. W. 707; *Bradberry v. State*, 7 Tex. App. 375; *Stewart v. State*, 6 Tex. App. 184. **Eng.**—*Rex v. Callanan*, 6 B. & C. 102, 9 D. & R. 97, 5 L. J. M. C. (O. S.) 39, 13 E. C. L. 57, 108 Eng. Reprint 390.

Compare United States v. Wilcox, 4 Blatchf. 391, 28 Fed. Cas. No. 16,692.

35. Ariz.—*State v. Broshears*, 18 Ariz. 356, 161 Pac. 873. **Ind.**—*State v. Gross*, 175 Ind. 597, 95 N. E. 117. **Ky.**—*Woolsey v. Com.*, 4 Ky. L. Rep. 353. **Mo.**—*State v. Thothos*, 147 Mo. App. 596, 126 S. W. 797. **N. Y.**—*Guston v. People*, 4 Lans. 487, 61 Barb. 35. **N. C.**—*State v. Street*, 5 N. C. 156, 3 Am. Dec. 682. **Tex.**—*State v. Oppenheimer*, 41 Tex. 82.

[a] **Military Tribunal.**—In an indictment for perjury for taking a false oath before a Regimental Court of Enquiry, the indictment ought to set forth of what number of officers the court consisted and what was their respective rank. *Conner v. Com.*, 2 Va. Cas. 30.

36. U. S.—*United States v. Walsh*,

was taken in a non-judicial proceeding, the name of the officer before whom the alleged perjury was committed must be stated.³⁷

5. Administering Oath and Form Thereof.—The indictment or information must allege that the defendant was sworn in the proceedings in which it is alleged the perjury was committed.³⁸ This allegation should not be by way of recital or left to inference but should be a direct and positive averment.³⁹ The form of the oath alleged to have been administered need not be set out, either literally

22 Fed. 644. **Colo.**—*Smith v. People*, 32 Colo. 251, 75 Pac. 914. **Ga.**—*Ruff v. State*, 17 Ga. App. 337, 86 S. E. 784. See *Cain v. State*, 10 Ga. App. 473, 73 S. E. 623. **Ia.**—*State v. Harter*, 131 Iowa 199, 108 N. W. 232. **N. C.** *State v. Flowers*, 109 N. C. 841, 13 S. E. 718, but it is not error if in addition to naming the court the justices presiding at the trial are named. **Okla.** *Schlumbohm v. State*, 5 Okla. Crim. 36, 113 Pac. 235. **Ore.**—*State v. Spencer*, 6 Ore. 152.

37. U. S.—*United States v. Wilcox*, 4 Blatchf. 391, 28 Fed. Cas. No. 16,692. **Ill.**—*Kerr v. People*, 42 Ill. 307, omission to do so is fatal. **Ind.**—*Hitesman v. State*, 48 Ind. 473; *State v. Ellison*, 8 Blackf. 225. **La.**—*State v. Harlis*, 33 La. Ann. 1172. **Tex.**—*State v. Oppenheimer*, 41 Tex. 82.

[a] The official title of the officer need not be alleged. *McClerkin v. State*, 105 Ala. 107, 17 So. 123; *Com. v. O'Neill*, 5 Pa. Co. Ct. 209. *Contra*, *United States v. Wilcox*, 4 Blatchf. 391, 28 Fed. Cas. No. 16,692.

[b] The name of the grand jury foreman need not be stated when the perjury is charged to have occurred before that body. *St. Clair v. State*, 11 Tex. App. 297.

38. U. S.—*Hogue v. United States*, 184 Fed. 245, 106 C. C. A. 387; *United States v. McConaughy*, 33 Fed. 168, 13 Sawy. 141; *United States v. Hearing*, 26 Fed. 744. **Cal.**—*People v. Simpton*, 133 Cal. 367, 65 Pac. 834; *People v. Dunlap*, 113 Cal. 72, 45 Pac. 183. **Fla.**—*Bedsole v. State*, 59 Fla. 3, 52 So. 1; *Adkinson v. State*, 59 Fla. 1, 51 So. 818; *Craft v. State*, 42 Fla. 567, 29 So. 418. **La.**—*State v. Eddens*, 52 La. Ann. 1461, 27 So. 742. **N. H.** *State v. Divoll*, 44 N. H. 140. **Tex.** *Pigg v. State*, 71 Tex. Crim. 600, 160 S. W. 691; *Parker v. State*, 44 Tex. Crim. 147, 69 S. W. 75; *Curtley v. State*, 42 Tex. Crim. 227, 59 S. W. 44.

Eng.—*Reg v. Goodfellow*, C. & M. 569, 41 E. C. L. 310.

[a] If the perjury is charged against a party to the action, it is necessary to show by proper averments, that he was sworn under circumstances which authorized his being sworn as a witness in the cause. *State v. Hamilton*, 7 Mo. 300.

[b] But when facts are alleged showing that he was sworn prior to making the false statement it is unnecessary to allege specifically that the accused was "duly" sworn in the proceeding in which the perjury was committed. *Thomas v. Com.*, 175 Ky. 38, 193 S. W. 653.

[c] The manner of giving the testimony need not be stated. *Com. v. Knight*, 12 Mass. 274, 7 Am. Dec. 72.

[d] Swearing Through Interpreter. The indictment need not allege whether the oath was administered by the court or officer directly, or through an interpreter. *United States v. Mau Sing*, 3 Hawaii Fed. 385.

39. U. S.—*United States v. McConaughy*, 33 Fed. 168, 13 Sawy. 141; *United States v. Hearing*, 26 Fed. 744. **Mo.**—*State v. Hamilton*, 65 Mo. 667. **N. H.**—*State v. Divoll*, 44 N. H. 140. **Wis.**—*Brown v. State*, 91 Wis. 245, 64 N. W. 749. **Eng.**—*Rex v. Stevens*, 5 B. & C. 246, 11 E. C. L. 448, 108 Eng. Reprint 246; *Rex v. Richards*, 7 D. & R. 665, 4 L. J. K. B. (O. S.) 155, 16 E. C. L. 313.

But see *State v. Webber*, 78 Vt. 463, 62 Atl. 1018; *State v. Camley*, 67 Vt. 322, 31 Atl. 840.

[a] An allegation that the oath was taken "before" an officer is sufficient, though it is better form to say the oath was administered "by" an officer. **Cal.**—*People v. Ennis*, 137 Cal. 263, 70 Pac. 84. **Md.**—*State v. Mercer*, 101 Md. 535, 61 Atl. 220. **N. Y.** See *Campbell v. People*, 8 Wend. 636. **Tex.**—*Flournoy v. State* (Tex. Crim.), 59 S. W. 902.

or in substance.⁴⁰ It is sufficient to allege that the accused was "duly sworn."⁴¹ But when other terms are used, and the form of the oath is omitted, it becomes necessary to state the circumstances under which the oath was required, and the occasion when it was made, so as to show that the violation of the oath would be perjury.⁴²

6. Setting Out Alleged False Matter.—The indictment or information must at least allege the substance and effect of the matter claimed to be false;⁴³ and this should be done specifically, directly, and without uncertainty of meaning, so that both the court and the defendant may be informed of the particular offense charged against him.⁴⁴ It should allege the false testimony as nearly as possible in the language of the witness.⁴⁵

40. *Sistrunk v. State*, 18 Ga. App. 42, 88 S. E. 796.

41. Ark.—*State v. Green*, 24 Ark. 591. Cal.—See *People v. Bradbury*, 155 Cal. 808, 103 Pac. 215. Fla.—*Settles v. State*, 78 So. 287; *Fudge v. State*, 57 Fla. 7, 49 So. 128. Ga.—*Sistrunk v. State*, 18 Ga. App. 42, 88 S. E. 796; *Broadwater v. State*, 10 Ga. App. 458, 73 S. E. 691. Ia.—*State v. O'Hagan*, 38 Iowa 504. Mass.—*Com. v. Carel*, 105 Mass. 582. Mo.—*State v. Moran*, 216 Mo. 550, 115 S. W. 1126. N. J. *Dodge v. State*, 24 N. J. L. 455. N. Y. *Tuttle v. People*, 36 N. Y. 431. Ore. *State v. Woolridge*, 45 Ore. 389, 78 Pac. 333. Pa.—*Republica v. Newell*, 3 Yeates 407, 2 Am. Dec. 381. S. C. *State v. Farrow*, 10 Rich. L. 165. Tex. *State v. Umdenstock*, 43 Tex. 554; *Lamar v. State*, 49 Tex. Crim. 563, 95 S. W. 509; *Beach v. State*, 32 Tex. Crim. 240, 22 S. W. 976. Eng.—*Rex v. McCarther*, *Peake* 155.

42. *State v. Umdenstock*, 43 Tex. 554.

43. U. S.—*United States v. Walsh*, 22 Fed. 644. Cal.—See *People v. Bradbury*, 155 Cal. 808, 103 Pac. 215. Ill. *People v. Miller*, 264 Ill. 148, 106 N. E. 191, Ann. Cas. 1915B, 1240. Miss. *State v. Kelly*, 113 Miss. 461, 74 So. 225. N. Y.—*People v. Warner*, 5 Wend. 271; *People v. Robertson*, 3 Wheel. Cr. Cas. 180; *People v. Ostrander*, 64 Hun 335, 19 N. Y. Supp. 324. N. C.—*State v. Groves*, 44 N. C. 402. Pa.—*Com. v. De Cost*, 35 Pa. Super. 88. R. I.—*State v. Terline*, 23 R. I. 530, 51 Atl. 204, 91 Am. St. Rep. 650. Tex.—*State v. Umdenstock*, 43 Tex. 554; *Gonzales v. State*, 54 Tex. Crim. 230, 112 S. W. 941; *Simpson v. State*, 46 Tex. Crim. 77, 79 S. W. 530. Can.—*Reg. v. Trudel*, 14 Quebec 132.

[a] This does not necessarily require the whole oath to be set out; where a part only of the oath was falsely taken, the indictment need only set out that portion of the oath taken which contained the falsehood. Me.—*State v. Crocker*, 106 Me. 369, 76 Atl. 703. Mo.—*State v. Neal*, 42 Mo. 119. N. Y.—*Campbell v. State*, 8 Wend. 636. Tex.—*Gabrielsky v. State*, 13 Tex. App. 428.

[b] A partial misdescription of one of a number of statements contained in a false written statement will not render the indictment void. *People v. Grout*, 174 App. Div. 608, 161 N. Y. Supp. 718.

44. U. S.—*United States v. Salen*, 216 Fed. 420; *Hogue v. United States*, 184 Fed. 245, 106 C. C. A. 387. Ark. *Harp v. State*, 59 Ark. 113, 26 S. W. 714; *Thomas v. State*, 54 Ark. 584, 16 S. W. 568. Me.—*State v. Mace*, 76 Me. 64. P. R.—*People v. Acevedo*, 10 Porto Rico. 30. Tex.—*Carpenter v. State* (Tex. Crim.), 195 S. W. 199; *Knight v. State*, 71 Tex. Crim. 36, 158 S. W. 543; *Waddle v. State*, 69 Tex. Crim. 334, 153 S. W. 882. Can. *Reg. v. Trudel*, 14 Quebec 193.

But see *State v. Cline*, 146 N. C. 640, 61 S. E. 522, approving statutory form of indictment.

[a] If he swore to several facts, these should be stated in distinct and separate assignments. *Higgins v. State*, 50 Tex. Crim. 433, 97 S. W. 1054.

[b] The particular interrogatories which were put to the accused when testifying need not be set forth. *State v. Bishop*, 1 D. Chip. (Vt.) 120.

45. *Mares v. State*, 71 Tex. Crim. 303, 153 S. W. 1130; *Higgins v. State*, 50 Tex. Crim. 433, 97 S. W. 1054.

[a] Sufficient to state substance in

7. Materiality of Evidence, Oath, etc. — a. Necessity for Averment of Materiality of Testimony. — In the absence of a statute to the contrary, the indictment or information for perjury must either allege that the matter falsely sworn to was material to the issue,⁴⁶ or set forth the facts falsely sworn to, which must in themselves be sufficient to show such materiality,⁴⁷ in which case the court may draw

English language, though alleged false testimony was given in a foreign language. *State v. Terline*, 23 R. I. 530, 51 Atl. 204, 91 Am. St. Rep. 650; *Reg. v. Thomas*, 2 C. & K. 806, 61 E. C. L. 806.

46. U. S.—*Markham v. United States*, 160 U. S. 319, 325, 16 Sup. Ct. 288, 40 L. ed. 441; *United States v. Salen*, 216 Fed. 420; *United States v. Rhodes*, 212 Fed. 518. **Ark.**—*State v. Leatherman*, 125 Ark. 243, 188 S. W. 545; *Loudermilk v. State*, 110 Ark. 549, 162 S. W. 569. **Cal.**—*People v. Ennis*, 137 Cal. 263, 70 Pac. 84; *People v. Von Tiedeman*, 120 Cal. 128, 52 Pac. 155; *People v. Schweichler*, 16 Cal. App. 738, 117 Pac. 939. **Fla.**—*Parish v. State*, 18 Fla. 902; *Robinson v. State*, 18 Fla. 898. **Ga.**—*King v. State*, 103 Ga. 263, 30 S. E. 30; *Marion v. State* (Ga. App.), 94 S. E. 61; *Sistrunk v. State*, 18 Ga. App. 42, 88 S. E. 796. **Ill.**—*People v. Ashbrook*, 276 Ill. 382, 114 N. E. 922; *People v. Brown*, 254 Ill. 260, 98 N. E. 535; *Greene v. People*, 182 Ill. 278, 55 N. E. 341. **Ind.**—*Burk v. State*, 81 Ind. 128; *State v. Thrift*, 30 Ind. 211. **Ia.** *State v. Shupe*, 16 Iowa 36, 85 Am. Dec. 485. **La.**—*State v. Rogers*, 138 La. 867, 70 So. 863; *State v. Morrough*, 132 La. 655, 61 So. 726. **Me.** *State v. Ela*, 91 Me. 309, 39 Atl. 1001. **Mass.**—*Com. v. McCarty*, 152 Mass. 577, 26 N. E. 140. **Mich.**—*Flint v. People*, 35 Mich. 491. **Mo.**—*State v. Moran*, 216 Mo. 550, 115 S. W. 1126. **Neb.**—*Shevalier v. State*, 85 Neb. 366, 123 N. W. 424. **N. Y.**—*People v. Morris*, 155 App. Div. 711, 140 N. Y. Supp. 887; *People v. Peck*, 146 App. Div. 266, 130 N. Y. Supp. 967. **N. C.**—*State v. Cline*, 150 N. C. 854, 64 S. E. 591; *State v. Cline*, 146 N. C. 640, 61 S. E. 522. **S. C.**—*State v. Hayward*, 1 Nott & McC. 546. **Tenn.**—*State v. Moffatt*, 7 Humph. 250; *State v. Wall*, 9 Yerg. 347. **Tex.**—*Cox v. State*, 76 Tex. Crim. 326, 174 S. W. 1067; *Bell v. State*, 75 Tex. Crim. 401, 171 S. W. 239; *Pigg v. State*, 71 Tex. Crim. 600, 160 S. W.

691. **Vt.**—*State v. Chandler*, 42 Vt. 446.

[a] **Exception to Rule.**—When by statute perjury may be committed when the oath was not required by law, but was voluntarily made by the party, it is not necessary to allege that the false statement affected a material matter. *State v. Flagg*, 25 Ind. 243.

[b] **The degree of materiality** need not be alleged. *Rex v. Griepe*, 1 Ld. Raym. 256, 91 Eng. Reprint 1067.

[c] **Particular issue upon which it was material** need not be averred. *Loudermilk v. State*, 110 Ark. 549, 162 S. W. 569; *Thompson v. People*, 26 Colo. 496, 59 Pac. 51.

47. U. S.—*Markham v. United States*, 160 U. S. 319, 325, 16 Sup. Ct. 288, 40 L. ed. 441; *United States v. Salen*, 216 Fed. 420; *United States v. Rosenstein*, 211 Fed. 738. **Ark.**—*Smith v. State*, 91 Ark. 200, 120 S. W. 985. **Cal.**—*People v. Von Tiedeman*, 120 Cal. 128, 52 Pac. 155; *People v. Ah Bean*, 77 Cal. 12, 18 Pac. 815. **Fla.**—*Gibson v. State*, 47 Fla. 34, 36 So. 706; *Brown v. State*, 47 Fla. 16, 36 So. 705. **Ill.** *People v. Brown*, 254 Ill. 260, 98 N. E. 535. *Compare* *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699. **Ind.**—*State v. Hopper*, 133 Ind. 460, 32 N. E. 878; *State v. Cunningham*, 116 Ind. 209, 18 N. E. 613. **Ia.**—*State v. Cunningham*, 66 Iowa 94, 23 N. W. 280. **Kan.**—*State v. Horine*, 70 Kan. 256, 78 Pac. 411. **La.**—*State v. Brown*, 111 La. 170, 35 So. 501. **Mass.**—*Com. v. McCarty*, 152 Mass. 577, 26 N. E. 140; *Com. v. Polard*, 12 Mete. 225. **Mich.**—*People v. Collier*, 1 Mich. 137, 48 Am. Dec. 699. **Miss.**—*State v. Booker*, 84 Miss. 187, 36 So. 241. **Mo.**—*State v. Nelson*, 146 Mo. 256, 48 S. W. 84. **N. J.**—*State v. Sweeten*, 83 N. J. L. 369, 85 Atl. 311; *State v. Voorhis*, 52 N. J. L. 351, 20 Atl. 26. **N. Y.**—*Wood v. People*, 59 N. Y. 117; *People v. Peck*, 146 App. Div. 266, 130 N. Y. Supp. 967. **N. C.** *State v. Cline*, 150 N. C. 854, 64 S. E. 591; *State v. Cline*, 146 N. C. 640, 61 S. E. 522. **P. I.**—*United States v. Estrana*, 16 Phil. Isl. 520. **Tenn.**

the conclusion from such facts of materiality without alleging the legal conclusion that the evidence was material.⁴⁸ In the absence of such an allegation or showing, the indictment is fatally defective.⁴⁹ When the first of these allegations is the one made use of, the necessity of setting out the facts from which the materiality appears is obviated.⁵⁰ But if the facts are also set out and it clearly appears there-

State v. Bowlus, 3 Heisk. 29. **Tex.** Buller v. State, 33 Tex. Crim. 551, 28 S. W. 465; Partain v. State, 22 Tex. App. 100, 2 S. W. 854. **Va.**—Fitch v. Com., 92 Va. 824, 24 S. E. 272. **Wash.** *State v. Guse*, 21 Wash. 269, 57 Pac. 831. **Wyo.**—Dickerson v. State, 18 Wyo. 440, 111 Pac. 857, 116 Pac. 448. **Eng.**—Rex v. Nicholl, 1 B. & Ad. 21, 8 L. J. M. C. (O. S.) 112, 20 E. C. L. 381, 109 Eng. Reprint 695; Reg. v. Cutts, 4 Cox Cr. Cas. 437.

[a] If the allegation as to materiality is defective and the materiality of the facts appears on the face of the indictment, the indictment is nevertheless good. *United States v. McHenry*, 6 Blatchf. 503, 26 Fed. Cas. No. 15,681.

[b] In an indictment for perjury committed upon the examination of the defendant before the grand jury, the indictment must so specify the subject matter under investigation as to disclose that the testimony alleged to have been falsely given was material. *People v. Tatum*, 60 Misc. 311, 112 N. Y. Supp. 36.

48. **U. S.**—*United States v. Ammerman*, 176 Fed. 635. **Cal.**—*People v. Kelly*, 59 Cal. 372. **Ill.**—*Kizer v. People*, 211 Ill. 407, 71 N. E. 1035. **Ind.** *Galloway v. State*, 29 Ind. 442; *Hendricks v. State*, 26 Ind. 493. **Ky.**—*Com. v. Tracenerider*, 140 Ky. 660, 131 S. W. 495. **La.**—*State v. Grover*, 38 La. Ann. 567. **Mass.**—*Com. v. Knight*, 12 Mass. 274, 7 Am. Dec. 72. **Mo.**—*State v. Marshall*, 47 Mo. 378. **N. J.**—*State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270. **N. Y.**—*Campbell v. People*, 8 Wend. 636; *People v. Robertson*, 3 Wheel. Cr. Cas. 180. **Pa.**—*Com. v. Jermon*, 29 Leg. Int. 165. **Tex.**—*Pyles v. State*, 47 Tex. Crim. 435, 83 S. W. 811; *Tellis v. State*, 42 Tex. Crim. 574, 61 S. W. 717; *Rahm v. State*, 30 Tex. App. 310, 17 S. W. 416, 28 Am. St. Rep. 911. **Vt.**—*State v. Chamberlin*, 30 Vt. 559. **Wash.**—*State v. Douette*, 31 Wash. 6, 71 Pac. 556. **Eng.**—*Reg. v. Harvey*, 8 Cox Cr. Cas. 99; *Rex v. Dunn*, 1 D. & R. 10, 16 E. C. L. 11.

49. **U. S.**—*United States v. Singleton*, 54 Fed. 488. **Ariz.**—*State v. Broshears*, 18 Ariz. 356, 161 Pac. 873. **Ga.**—*Hembree v. State*, 52 Ga. 242. **Ind.**—*State v. Anderson*, 103 Ind. 170, 2 N. E. 332; *State v. McCormick*, 52 Ind. 169. **La.**—*State v. Smith*, 126 La. 135, 52 So. 244; *State v. Gibson*, 26 La. Ann. 71. **Mass.**—*Com. v. Byron*, 14 Gray 31. **Mich.**—*People v. Vogt*, 156 Mich. 594, 121 N. W. 293. **P. I.**—*United States v. Estrana*, 16 Phil. Isl. 520. **Tex.**—*Alt v. State* (Tex. Crim.), 203 S. W. 53; *McMurtry v. State*, 38 Tex. Crim. 521, 43 S. W. 1010; *Martin v. State*, 33 Tex. Crim. 317, 26 S. W. 400. **Eng.**—*Rex v. Nicholl*, 1 B. & Ad. 21, 8 L. J. M. C. (O. S.) 112, 20 E. C. L. 381, 109 Eng. Reprint 695.

50. **U. S.**—*Baskin v. United States*, 209 Fed. 740, 126 C. C. A. 464. **Ala.** *Thomas v. State*, 13 Ala. App. 421, 69 So. 413; *McDaniel v. State*, 13 Ala. App. 318, 69 So. 351; *Todd v. State*, 13 Ala. App. 301, 69 So. 325. **Ark.** *Loudermilk v. State*, 110 Ark. 549, 162 S. W. 569; *Smith v. State*, 91 Ark. 200, 120 S. W. 985. **Cal.**—*People v. Ennis*, 137 Cal. 263, 70 Pac. 84; *People v. Rodley*, 131 Cal. 240, 63 Pac. 351. **Colo.**—*Thompson v. People*, 26 Colo. 496, 59 Pac. 51. **Fla.**—*Markey v. State*, 47 Fla. 38, 37 So. 53. **Ga.**—*King v. State*, 103 Ga. 263, 30 S. E. 30. But see *Herndon v. State*, 17 Ga. App. 558, 87 S. E. 812. **Ill.**—*People v. Threewitt*, 251 Ill. 509, 96 N. E. 242; *Greene v. People*, 182 Ill. 278, 55 N. E. 341. **Kan.** *State v. Brownfield*, 67 Kan. 627, 73 Pac. 925. **La.**—*State v. Rogers*, 138 La. 867, 70 So. 863; *State v. Jean*, 42 La. Ann. 946, 8 So. 480. **Mass.**—*Com. v. McCarty*, 152 Mass. 577, 26 N. E. 140; *Com. v. Farley*, Thach. Cr. Cas. 654. **Mich.**—*Flint v. People*, 35 Mich. 491; *Hoch v. People*, 3 Mich. 552. **Miss.**—*Lea v. State*, 64 Miss. 278, 1 So. 235. **Mo.**—*State v. Nelson*, 146 Mo. 256, 48 S. W. 84. **Neb.**—*Shevalier v. State*, 85 Neb. 366, 123 N. W. 421; *Gandy v. State*, 23 Neb. 436, 36 N. W. 817. **N. M.**—*Territory v. Lockhart*, 8

from that the testimony was not material, the indictment is insufficient notwithstanding the formal allegation of materiality.⁵¹ The rule has been held applicable when the oath was taken before an assessor,⁵² or a registration officer,⁵³ as well as in insolvency proceedings.⁵⁴ Under some statutes the necessity for alleging that the false swearing was material to the issue is dispensed with.⁵⁵

b. *Necessity for Alleging Materiality of Oath.*—When the perjury is charged to have been committed in the making of an affidavit, the indictment or information must allege that it was necessary and proper to be made, taken and used, or was for a lawful purpose;⁵⁶

N. M. 523, 45 Pac. 1106, *overruling* Territory v. Remuzon, 3 N. M. 648, 9 Pac. 598. **N. Y.**—People v. Tillman, 139 App. Div. 572, 124 N. Y. Supp. 44; People v. Burroughs, 1 Park. Crim. 211. **N. C.**—State v. Davis, 69 N. C. 495; State v. Mumford, 12 N. C. 519, 17 Am. Dec. 573. **N. D.**—State v. Falk, 34 N. D. 520, 159 N. W. 10. **Ohio.** Dilcher v. State, 39 Ohio St. 130; Barnes v. State, 15 Ohio Cir. Ct. 14, 8 Ohio Cir. Dec. 153. **Okla.**—Miller v. State, 9 Okla. Crim. 196, 131 Pac. 181; Cutler v. Territory, 8 Okla. 101, 56 Pac. 861; Rich v. United States, 1 Okla. 354, 33 Pac. 804. **Tex.**—Bell v. State, 75 Tex. Crim. 401, 171 S. W. 239; Johnson v. State, 71 Tex. Crim. 428, 160 S. W. 964; Anderson v. State, 56 Tex. Crim. 360, 120 S. W. 462; Yardley v. State, 55 Tex. Crim. 486, 117 S. W. 146. **Vt.**—State v. Sleeper, 37 Vt. 122. **Wash.**—State v. McLain, 43 Wash. 124, 86 Pac. 388. **W. Va.**—Stofer v. State, 3 W. Va. 689. **Wyo.**—Dickerson v. State, 18 Wyo. 440, 111 Pac. 857, 116 Pac. 448. **Eng.**—Reg. v. Schlesinger, 10 Q. B. 670, 2 Cox Cr. Cas. 200, 12 Jur. 283, 17 L. J. M. C. 29, 59 E. C. L. 670, 116 Eng. Reprint 255; Reg. v. Scott, 2 Q. B. D. 415, 13 Cox Cr. Cas. 594, 46 L. J. M. C. 259, 36 L. T. N. S. 476, 25 Wkly. Rep. 697.

Contra, People v. Colon, 10 Porto Rico 197.

51. **U. S.**—United States v. Rhodes, 212 Fed. 518. See United States v. Nelson, 199 Fed. 464; United States v. Pettus, 84 Fed. 791. **Cal.**—People v. Ross, 103 Cal. 425, 37 Pac. 379; People v. Brilliant, 58 Cal. 214; People v. Metzler, 21 Cal. App. 80, 130 Pac. 1192. **Ind.**—State v. Sutton, 147 Ind. 158, 46 N. E. 468. **Kan.**—State v. Smith, 40 Kan. 631, 20 Pac. 529. **Me.**—State v. Ela, 91 Me. 309, 39 Atl. 1001. **Neb.** Shevalier v. State, 85 Neb. 366, 123 N. W. 424. **N. Y.**—People v. Peck, 146

App. Div. 266, 130 N. Y. Supp. 967; People v. Tillman, 139 App. Div. 572, 124 N. Y. Supp. 44; People v. Morrison, 98 Misc. 555, 164 N. Y. Supp. 712. **Pa.**—Com. v. Wood, 2 Pa. Dist. 823, 13 Pa. Co. Ct. 477, 7 Kulp 141.

[a] But the fact that the indictment or information contains some statements on which perjury is assigned that are immaterial is not a fatal defect. State v. Williams, 60 Kan. 837, 58 Pac. 476 (*affirmed*, 61 Kan. 739, 60 Pac. 1050); Jefferson v. State (Tex. Crim.), 49 S. W. 88; Dorrs v. State (Tex. Crim.), 40 S. W. 311.

52. **Ind.**—State v. Wood, 110 Ind. 82, 10 N. E. 639; State v. Reynolds, 108 Ind. 353, 9 N. E. 287. **Ia.**—State v. Cunningham, 66 Iowa 94, 23 N. W. 280. **Mo.**—State v. Crumb, 68 Mo. 206. **Tex.**—State v. Smith, 43 Tex. 655.

53. Com. v. McClelland, 83 Ky. 686.

54. Com. v. McCarty, 152 Mass. 577, 26 N. E. 140. See also People v. Naylor, 82 Cal. 607, 23 Pac. 116.

55. State v. Miller, 26 R. I. 282, 58 Atl. 882; State v. Byrd, 28 S. C. 18, 4 S. E. 793, 13 Am. St. Rep. 660.

56. **Ind.**—State v. Hopper, 133 Ind. 460, 32 N. E. 878; State v. Reynolds, 108 Ind. 353, 9 N. E. 287; State v. Anderson, 103 Ind. 170, 2 N. E. 332; State v. Flagg, 27 Ind. 24. **Mich.** People v. Fox, 25 Mich. 492. **Mo.** State v. Marshall, 47 Mo. 378. **N. J.** Heintz v. Court of General Quarter Sessions of Peace, 45 N. J. L. 523. **Vt.**—State v. Collins, 62 Vt. 195, 19 Atl. 368. **Wash.**—State v. Smith, 3 Wash. 11, 27 Pac. 1028.

But see People v. Kelly, 59 Cal. 372.

[a] **Sufficient Allegation.**—An allegation that the accused made oath as to certain material facts before a clerk of court, etc., is sufficient. State v. Floto, 81 Md. 600, 32 Atl. 315.

[b] **If the proceeding be ex parte,**

but it need not be alleged that the affidavit was actually used in any proceeding.⁵⁷ When the offense charged is the swearing falsely to a bill in equity, it must appear that the bill is one required by law to be verified.⁵⁸

c. *Necessity for Alleging Competency of Testimony.*—The indictment or information need not aver affirmatively that the alleged false testimony was admissible and competent and could not legally have been excluded.⁵⁹

8. *Assignment of Perjury.*—a. *Negating Truth of Alleged False Statements.*—As a general rule, the indictment or information must expressly and positively negative the truth of the alleged false statements or testimony,⁶⁰ by setting forth the true facts by way of antithesis;⁶¹ a mere general allegation that the testimony was false is

it is sufficient to allege that "it then and there became material to him," the defendant, to take the oath. *Storfer v. State*, 3 W. Va. 689.

[c] *Affidavit To Dissolve Injunction.*—*Com. v. Wood*, 2 Pa. Dist. 823, 13 Pa. Co. Ct. 477, 7 Kulp 141.

[d] *Claim Against Municipality.* *Ortner v. People*, 4 Hun (N. Y.) 323, 6 Thomp. & C. 548. And see *People v. Allen*, 45 Hun 589, 9 N. Y. St. 622.

57. *Ga.*—*Herring v. State*, 119 Ga. 709, 46 S. E. 876. *N. H.*—*State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196. *Eng.*—*Rex v. Hailey*, 1 C. & P. 258, R. & M. 94, 12 E. C. L. 155; *Rex v. White*, M. & M. 271, 22 E. C. L. 519.

58. *People v. Gaige*, 26 Mich. 30.

59. *State v. Spencer*, 45 La. Ann. 1, 12 So. 135.

60. *U. S.*—*Hogue v. United States*, 184 Fed. 245, 106 C. C. A. 387. *Ala.* See *De Bernie v. State*, 19 Ala. 23. *Ark.*—*Thomas v. State*, 54 Ark. 584, 16 S. W. 568. *Cal.*—See *People v. Rodley*, 131 Cal. 240, 63 Pac. 351. *Ga.*—*Rea v. State*, 17 Ga. App. 476, 87 S. E. 685. *Ia.*—*State v. Hulsman*, 147 Iowa 572, 126 N. W. 700; *State v. Gallagher*, 123 Iowa 378, 98 N. W. 906. *Ky.*—*Thomas v. Com.*, 175 Ky. 38, 193 S. W. 653; *Coulter v. Com.*, 154 Ky. 793, 159 S. W. 557; *Pipes v. Com.*, 148 Ky. 174, 146 S. W. 38; *Com. v. Compton*, 18 Ky. L. Rep. 479, 36 S. W. 1116. *La.*—*State v. Gibson*, 26 La. Ann. 71. *Mass.*—*Com. v. McLaughlin*, 122 Mass. 449. *Miss.* *State v. Silberberg*, 78 Miss. 858, 29 So. 761. *Mo.*—*State v. Morse*, 90 Mo. 91, 2 S. W. 137. *N. J.*—See *State v. Voorhis*, 52 N. J. L. 351, 20 Atl. 26. *Pa.*—*Perdue v. Com.*, 96 Pa. 311. *Tex.*

Hart v. State, 73 Tex. Crim. 362, 166 S. W. 152; *Johnson v. State*, 71 Tex. Crim. 428, 160 S. W. 964. *Vt.*—*State v. Smith*, 63 Vt. 201, 22 Atl. 604. *Va.*—*Fitch v. Com.*, 92 Va. 824, 24 S. E. 272; *Thomas v. Com.*, 2 Rob. (41 Va.) 795. *Eng.*—*Reg. v. Oxley*, 3 C. & K. 317; *Reg. v. Perrott*, 2 M. & S. 379, 15 Rev. Rep. 280, 105 Eng. Reprint 422.

[a] It is not necessary to negative in express terms the truth of the evidence, when it is denied in effect by charging particularly, specifically, and in detail that what the defendant so testified as true was not done as he said. *State v. Murphy*, 101 N. C. 697, 8 S. E. 142. To same effect, *People v. Clements*, 107 N. Y. 205, 13 N. E. 782, modifying 42 Hun 353.

[b] When the allegation is that the defendant committed the crime of perjury, it is not necessary to allege that his testimony was false, the latter being included in the former allegation. *State v. Corson*, 59 Me. 137; *State v. Camley*, 67 Vt. 322, 31 Atl. 840, decided under a later statute than *State v. Smith*, 63 Vt. 201, 22 Atl. 604.

[c] *Use of Word "Corruptly."* Though it must undoubtedly appear from some proper averment that the testimony was falsely given, the word "corruptly" will suffice, it implying falsity. *State v. Smith*, 63 Vt. 201, 22 Atl. 604.

[d] The term "feloniously" has been held equivalent to "falsely." *State v. Anderson*, 103 Ind. 170, 2 N. E. 332.

61. *U. S.*—*United States v. Pettus*, 84 Fed. 791. Compare *United States v. Salen*, 216 Fed. 420; *United States v. Freed*, 179 Fed. 236. *Ark.*—*State*

not sufficient; the indictment or information must traverse the truth of the alleged false testimony by contradicting the matter alleged to have been falsely sworn to expressly and specifically, and designate particularly wherein the matter sworn to was false.⁶² When the statement which is the subject of the perjury was given upon information and belief, the pleader must negative both the truth of the oath and the information and belief.⁶³

b. *Averring Knowledge of Falsity.*—While it is unnecessary in some jurisdictions to allege knowledge of the falsity of the statements alleged to have been made,⁶⁴ in others, the indictment or information

v. Leatherman, 125 Ark. 243, 188 S. W. 545. **Minn.**—State v. Nelson, 74 Minn. 409, 77 N. W. 223. **Miss.**—State v. Silberberg, 78 Miss. 858, 29 So. 761. **Tex.**—Turner v. State, 30 Tex. App. 691, 18 S. W. 792; Gabrielsky v. State, 13 Tex. App. 428.

Compare Johnson v. State, 76 Ga. 790. *Contra*, Gray v. State, 4 Okla. Crim. 292, 111 Pac. 825.

[a] **Alleging Truth of Matter.**—An indictment or information which shows the truth of the matter alleged to have been sworn falsely, sufficiently to apprise a person of ordinary understanding of the charge against him, is sufficient. *Com. v. Ransdall*, 153 Ky. 334, 155 S. W. 1117.

[b] **When the negation of the truthfulness of the testimony in itself shows the truth**, it is not necessary to affirmatively allege what the truth was. *United States v. Howard*, 132 Fed. 325, 358; *Atkinson v. State* (Ark.), 202 S. W. 709; *Loudermilk v. State*, 110 Ark. 549, 162 S. W. 569.

62. **Ala.**—Gibson v. State, 44 Ala. 17. **Ark.**—Harp v. State, 59 Ark. 113, 26 S. W. 714; Thomas v. State, 54 Ark. 584, 16 S. W. 568. **Cal.**—See *People v. Bradbury*, 155 Cal. 808, 103 Pac. 215. **Fla.**—Fudge v. State, 57 Fla. 7, 49 So. 128. **Ga.**—Rea v. State, 17 Ga. App. 476, 87 S. E. 685. **Ia.**—State v. Gallagher, 123 Iowa 378, 98 N. W. 906; *United States v. Morgan*, Morris 341, 41 Am. Dec. 234. **Ky.**—Shackelford v. Com., 25 Ky. L. Rep. 1830, 79 S. W. 192; *Com. v. Weingartner*, 16 Ky. L. Rep. 221, 27 S. W. 815. **La.**—State v. Joiner, 128 La. 876, 55 So. 560. **Me.**—State v. Mahoney, 115 Me. 251, 98 Atl. 750; State v. Ela, 91 Me. 309, 39 Atl. 1001. **Mich.**—*People v. Vogt*, 156 Mich. 594, 121 N. W. 293. **Minn.**—State v. Nelson, 74 Minn. 409, 77 N. W. 223. **N. J.**—State v. Voorhis, 52 N. J. L. 351, 20 Atl. 26; *Heintz v.*

Union County Court General Quarter Sessions of Peace, 45 N. J. L. 523. **N. M.**—Territory v. Lockhart, 8 N. M. 523, 45 Pac. 1106. **N. Y.**—*People v. Tatum*, 60 Misc. 311, 112 N. Y. Supp. 36; *Matter of Rothaker*, 11 Abb. N. C. 122. **N. C.**—State v. Mumford, 12 N. C. 519, 17 Am. Dec. 573. **Tex.**—Hart v. State, 73 Tex. Crim. 362, 166 S. W. 152; *Lowe v. State*, 59 Tex. Crim. 557, 129 S. W. 842; *Morris v. State*, 47 Tex. Crim. 420, 83 S. W. 1126. **Vt.**—State v. Rowell, 72 Vt. 28, 47 Atl. 111, 82 Am. St. Rep. 918, 15 Am. Cr. Rep. 567.

But see: **U. S.**—*United States v. Freed*, 179 Fed. 236. **Mass.**—*Com. v. Dunham*, Thach. Cr. Cas. 519. **Tenn.**—*Lawson v. State*, 3 Lea 309.

63. *State v. Coyne*, 214 Mo. 344, 114 S. W. 8, 21 L. R. A. (N. S.) 993; *Lambert v. People*, 76 N. Y. 220, 6 Abb. N. C. 181, 32 Am. Rep. 293, reversing 14 Hun 512. See also *State v. Ellison*, 8 Blackf. (Ind.) 225; *State v. Cruikshank*, 6 Blackf. (Ind.) 62.

64. **Idaho.**—Territory v. Anderson, 2 Idaho 573, 21 Pac. 417. **Ill.**—*Johnson v. People*, 94 Ill. 505. **Ia.**—State v. Gallagher, 123 Iowa 378, 98 N. W. 906; *State v. Raymond*, 20 Iowa 582. *Compare* State v. Morse, 1 G. Gr. 503. **Ore.**—State v. Ah Lee, 18 Ore. 540, 23 Pac. 424. **Tex.**—*Ferguson v. State*, 36 Tex. Crim. 60, 35 S. W. 369, overruling *State v. Powell*, 28 Tex. 626. **Can.**—*Rex v. Yee Mock*, 6 Alberta L. Rep. 231. See also *Reg. v. Skelton*, 3 Terr. L. Rep. 58.

[a] **The word (1) "wilfully" is now substituted for "knowingly"** (*United States v. Pettus*, 84 Fed. 791), and (2) when used, the omission of the word "knowingly" does not render the indictment defective, the former term implying intention as well as deliberation and purpose. **Ill.**—*Johnson v. People*, 94 Ill. 505. **Minn.**—*State v. Stein*,

must contain an averment of knowledge of the falsity of the testimony.⁶⁵ When the false testimony or statement was made on information and belief, knowledge must be alleged.⁶⁶ Such an allegation is also necessary, when knowledge of the falsity of the testimony is made a statutory element of the offense.⁶⁷

c. *Averring Intent To Commit*.—When wilfulness is an element of the crime of perjury, the indictment or information must allege that the defendant “wilfully”⁶⁸ and “corruptly”⁶⁹ swore falsely; both the terms “wilfully” and “corruptly” must be used.⁷⁰ Omitting

48 Minn. 466, 51 N. W. 474. **Vt.**—State v. Sleeper, 37 Vt. 122. **Can.**—Rex v. Doyle, 12 Can. Cr. Cas. 69. See also Atkinson v. State (Ark.), 202 S. W. 709, holding that an indictment alleging that testimony was “wilfully and corruptly” false was sufficient.

[b] An averment that the statement was consciously false is sufficient under United States v. Salen, 216 Fed. 420; United States v. Freed, 179 Fed. 236.

65. See the following: **Conn.**—Page v. Camp, Kirby 7. **La.**—State v. Williams, 111 La. 1033, 36 So. 111; State v. Brown, 110 La. 591, 34 So. 698; State v. Wells, Man. Unrep. Cas. 242. **N. D.**—State v. Scott, 37 N. D. 105, 163 N. W. 810. **Va.**—Com. v. Cook, 1 Rob. (40 Va.) 729.

66. **Ala.**—Gibson v. State, 44 Ala. 17; State v. Lea, 3 Ala. 602. **Ia.**—State v. Gallagher, 123 Iowa 378, 98 N. W. 906; State v. Raymond, 20 Iowa 582. **Mo.**—State v. Coyne, 214 Mo. 344, 114 S. W. 8, 21 L. R. A. (N. S.) 993. **Va.**—Fitch v. Com., 92 Va. 824, 24 S. E. 272. **Eng.**—Rex v. Perrott, 2 M. & S. 379, 15 Rev. Rep. 280, 105 Eng. Reprint 422.

67. **U. S.**—See Daniels v. United States, 196 Fed. 459, 116 C. C. A. 233. **Ky.**—Tudor v. Com., 134 Ky. 186, 119 S. W. 816; Adams v. Com., 29 Ky. L. Rep. 683, 94 S. W. 664. **N. Y.** People v. Root, 94 App. Div. 84, 87 N. Y. Supp. 962. **N. C.**—State v. Champion, 116 N. C. 987, 21 S. E. 700. **P. R.**—People v. Hernandez, 9 Porto Rico 477. **Can.**—Rex v. Cohn, 6 Can. Cr. Cas. 386, 36 Nova Scotia 240.

[a] *Rule Applies in Indictment for False Swearing*.—Pipes v. Com., 148 Ky. 174, 146 S. W. 38; Com. v. Still, 83 Ky. 275. See also Fisher v. Com., 152 Ky. 411, 153 S. W. 417.

68. **U. S.**—United States v. Eddy, 134 Fed. 114; United States v. Lake,

129 Fed. 499; United States v. Edwards, 43 Fed. 67. **Cal.**—People v. Turner, 122 Cal. 679, 55 Pac. 685. **Fla.** Parrish v. State, 18 Fla. 902; Robinson v. State, 18 Fla. 898. **Ia.**—State v. Morse, 1 G. Gr. 503. **Mass.**—Com. v. Carel, 105 Mass. 582. **Mo.**—State v. Day, 100 Mo. 242, 12 S. W. 365; State v. Morse, 90 Mo. 91, 2 S. W. 137. **N. C.**—State v. Davis, 84 N. C. 787; State v. Carland, 14 N. C. 114. **N. D.** See State v. Scott, 37 N. D. 105, 163 N. W. 810. **Pa.**—Com. v. Nailor, 29 Pa. Super. 275. **Va.**—Thomas v. Com., 2 Rob. (41 Va.) 795.

[a] *Rule at Common Law*.—Rex v. Stevens, 5 Barn. & C. 246, 11 E. C. L. 448, 108 Eng. Reprint 246; Rex v. Richards, 7 Dowl. & R. 665, 4 L. J. K. B. (O. S.) 155, 16 E. C. L. 313. But see State v. Spencer, 45 La. Ann. 1, 12 So. 135; Rex v. Cox, 1 Leach Cr. Cas. (Eng.) 71.

[b] “*Feloniously*” is equivalent to “wilfully.” Williams v. People, 26 Colo. 272, 57 Pac. 701.

69. **U. S.**—United States v. Babcock, 4 McLean 113, 24 Fed. Cas. No. 14,488. **Ia.**—State v. Morse, 1 G. Gr. 503. **Mo.** State v. Morse, 90 Mo. 91, 2 S. W. 137. **N. C.**—State v. Davis, 84 N. C. 787; State v. Carland, 14 N. C. 114. **Pa.**—Com. v. Nailor, 29 Pa. Super. 275. **Va.**—Thomas v. Com., 2 Rob. (41 Va.) 795. **Can.**—Rex v. Cohn, 6 Can. Cr. Cas. 386, 36 Nova Scotia 240.

70. Wilkinson v. People, 226 Ill. 135, 80 N. E. 699. See also People v. Ashbrook, 276 Ill. 382, 114 N. E. 922, and the cases cited in the preceding notes.

[a] “*Corruptly*” and “wilfully” are not equivalent terms. United States v. Edwards, 43 Fed. 67; Williams v. People, 26 Colo. 272, 57 Pac. 701.

[b] But when it is alleged that defendant swore “wilfully” or “knowingly,” the term “corruptly” need not be used. State v. Bixler, 62 Md. 354.

both the words "wilfully" and "corruptly" has never been allowed.⁷¹ Most statutes make perjury a felony, and therefore the use of the word "feloniously" has also been held essential;⁷² but it is otherwise in some jurisdictions.⁷³ When the statute uses the words "deliberately and falsely," such terms must be used, as well as the word "wilfully."⁷⁴

d. *Joining Assignments.* — The indictment or information may embrace in one count a number of assignments of perjury, when they all relate to the same transaction.⁷⁵ The charging of more than one distinct false statement under oath does not render the indictment defective, if the statements were all given under one oath and in the same proceeding.⁷⁶

C. *CONCLUSION.*⁷⁷ — At the common law, a formal conclusion was required to all indictments for perjury.⁷⁸ Statutes do not usually name such formal conclusion as an essential element in such an indictment.⁷⁹

III. INDICTMENT OR INFORMATION FOR SUBORNATION OF PERJURY OR ATTEMPT. — A. SUBORNATION OF PERJURY. — An

71. *Rex v. Stevens*, 5 B. & C. 246, 11 E. C. L. 448, 108 Eng. Reprint 246; *Rex v. Richards*, 7 D. & R. 665, 4 L. J. K. B. (O. S.) 155, 16 E. C. L. 313.

72. *Ark.*—*Nelson v. State*, 32 Ark. 192. *Ind.*—*State v. Anderson*, 103 Ind. 170, 2 N. E. 332. *Ky.*—*Com. v. Swanger*, 108 Ky. 579, 57 S. W. 10. *Miss.*—*Wile v. State*, 60 Miss. 260. *Mo.*—*State v. Terry*, 30 Mo. 368; *State v. Williams*, 30 Mo. 364. *N. C.*—*State v. Bunting*, 118 N. C. 1200, 24 S. E. 118; *State v. Shaw*, 117 N. C. 764, 23 S. E. 246.

73. *Cal.*—*People v. Parsons*, 6 Cal. 487. *Ill.*—*People v. Ashbrook*, 276 Ill. 382, 114 N. E. 922. *La.*—*State v. Matlock*, 48 La. Ann. 663, 19 So. 669. *Can.*—*Rex v. Yaldon*, 17 Ont. L. R. 179, 12 Ont. W. R. 384.

74. *State v. Perry*, 42 Tex. 238; *Allen v. State*, 42 Tex. 12; *State v. Webb*, 41 Tex. 67.

75. *Ark.*—*Atkinson v. State*, 202 S. W. 709. *Ga.*—*McLaren v. State*, 4 Ga. App. 643, 62 S. E. 138. *La.*—*State v. Joiner*, 128 La. 876, 55 So. 560. *Mass.*—*Com. v. Johns*, 6 Gray 274. *Mo.*—*State v. Taylor*, 202 Mo. 1, 100 S. W. 41; *State v. Gordon*, 196 Mo. 185, 95 S. W. 420. *N. C.*—*State v. Bordeaux*, 93 N. C. 560. *Vt.*—*State v. Bishop*, 1 D. Chip. 120. *Wash.*—*State v. Eaid*, 55 Wash. 302, 104 Pac. 275, 33 L. R. A. (N. S.) 946.

[a] Each fact sworn to should be stated in distinct and separate assignments and each traversed. *Higgins v.*

State (Tex. Crim.), 97 S. W. 1054; *State v. Eaid*, 55 Wash. 302, 104 Pac. 275, 33 L. R. A. (N. S.) 946.

[b] One good assignment will support the indictment, although the other assignments are defective. *Ala.*—*De Bernie v. State*, 19 Ala. 23. *Mass.*—*Com. v. McLaughlin*, 122 Mass. 449; *Com. v. Johns*, 6 Gray 274. *Tex.*—*Fry v. State*, 36 Tex. Crim. 582, 37 S. W. 741, 38 S. W. 168. *Vt.*—*State v. Smith*, 63 Vt. 201, 22 Atl. 604. *Wash.*—*State v. Eaid*, 55 Wash. 302, 104 Pac. 275, 33 L. R. A. (N. S.) 946.

76. *Pa.*—*Cover v. Com.*, 5 Sad. 79, 8 Atl. 196. *Wash.*—*State v. Eaid*, 55 Wash. 302, 104 Pac. 275, 33 L. R. A. (N. S.) 946. *Eng.*—*Castro v. Reg.*, 6 App. Cas. 229, 14 Cox Cr. Cas. 546, 50 L. J. Q. B. 497, 44 L. T. N. S. 350, 29 Wkly. Rep. 669. *Can.*—*Rex v. Yee Mock*, 6 Alberta L. Rep. 231.

77. As to generally, see 12 STANDARD PROC. 201, et seq.

78. *Henderson v. The People*, 117 Ill. 265, 7 N. E. 677, form of the old precedents was substantially as follows: "And so the jurors aforesaid, upon their oaths aforesaid, do say," etc., "that the defendant did commit wilful and corrupt perjury," etc.

79. *Henderson v. The People*, 117 Ill. 265, 7 N. E. 677. See also: *U. S. United States v. Wood*, 44 Fed. 753. *N. C.*—*State v. Peters*, 107 N. C. 876, 12 S. E. 74; *State v. Hoyle*, 28 N. C. 1. *S. C.*—*State v. Kennerly*, 10 Rich. L. 152.

indictment or information for subornation of perjury must, in addition to charging subornation, state all the essential elements constituting the crime of perjury.⁸⁰ Following this rule it becomes necessary to allege the nature of the proceeding in which the perjury is alleged to have been committed,⁸¹ the court in which the perjury was committed or the officer before whom the false oath was taken,⁸² the fact that the witness was duly sworn,⁸³ and the materiality,⁸⁴ and falsity,⁸⁵ of the testimony.

The indictment or information must also allege that the defendant did knowingly and wilfully procure another to commit perjury,⁸⁶ and that the person so procured did knowingly⁸⁷ and wilfully⁸⁸ testify falsely;⁸⁹ and that the defendant knew that the testimony which he instigated the suborned witness to give would be false,⁹⁰ and that he knew that the person giving the testimony knew it was false.⁹¹

80. **U. S.**—United States *v.* Howard, 132 Fed. 325; United States *v.* Wilcox, 4 Blatchf. 393, 28 Fed. Cas. No. 16,693. **Cal.**—People *v.* Ross, 103 Cal. 425, 37 Pac. 379. **Ill.**—See Coyne *v.* People, 124 Ill. 17, 14 N. E. 668, 7 Am. St. Rep. 324. **Kan.**—State *v.* Geer, 46 Kan. 529, 26 Pac. 1027.

Indictment or information for perjury or false swearing, see *supra*, II.

81. **Cal.**—People *v.* Carpenter, 136 Cal. 391, 68 Pac. 1027. **Dak.**—United States *v.* Robinson, 4 Dak. 72, 23 N. W. 90. **Ind.**—Smith *v.* State, 125 Ind. 440, 25 N. E. 598. **Wis.**—Thompson *v.* State, 89 Wis. 253, 61 N. W. 565.

See generally *supra*, II, B, 2.

82. United States *v.* Cobban, 134 Fed. 290; United States *v.* Howard, 132 Fed. 325; People *v.* Carpenter, 136 Cal. 391, 68 Pac. 1027. See *supra*, II, B, 4.

83. **U. S.**—United States *v.* Howard, 132 Fed. 325. **Ark.**—Davis *v.* State, 199 S. W. 902. **Cal.**—People *v.* Carpenter, 136 Cal. 391, 68 Pac. 1027. **Ore.**—State *v.* Jewett, 48 Ore. 577, 85 Pac. 994.

See also *supra*, II, B, 5.

84. **U. S.**—United States *v.* Howard, 132 Fed. 325. See also Hendricks *v.* United States, 223 U. S. 178, 32 Sup. Ct. 313, 56 L. ed. 394. **Cal.**—People *v.* Ross, 103 Cal. 425, 37 Pac. 379. **Kan.**—State *v.* Geer, 46 Kan. 529, 26 Pac. 1027. **Tex.**—Miller *v.* State, 43 Tex. Crim. 367, 65 S. W. 908.

See also *supra*, II, B, 7.

85. United States *v.* Howard, 132 Fed. 325; Davis *v.* State (Ark.), 199 S. W. 902. See also *supra*, II, B, 8, a.

86. **U. S.**—United States *v.* Wilcox, 4 Blatchf. 393, 28 Fed. Cas. No. 16,693. **Kan.**—State *v.* Geer, 46 Kan. 529, 26 Pac. 236. **Mass.**—Com. *v.* Devine, 155 Mass. 224, 29 N. E. 515.

Compare *supra*, II, B, 8, b.

[a] The means or methods employed by the defendant to procure the witness to testify falsely need not be alleged. State *v.* Porter, 105 Iowa 677, 75 N. W. 519.

[b] The words "wilfully, feloniously, maliciously, falsely and corruptly," import intent and knowledge. State *v.* Richardson, 248 Mo. 563, 154 S. W. 735, 44 L. R. A. (N. S.) 307.

87. **U. S.**—United States *v.* Cobban, 134 Fed. 290; United States *v.* Wilcox, 4 Blatchf. 393, 28 Fed. Cas. No. 16,693. **Cal.**—People *v.* Ross, 103 Cal. 425, 37 Pac. 379. **Ore.**—State *v.* Jewett, 48 Ore. 577, 85 Pac. 994.

88. United States *v.* Howard, 132 Fed. 325; United States *v.* Wilcox, 4 Blatchf. 393, 28 Fed. Cas. No. 16,693; People *v.* Ross, 103 Cal. 425, 37 Pac. 379.

89. Com. *v.* Devine, 155 Mass. 224, 29 N. E. 515.

90. United States *v.* Dennee, 3 Woods 39, 25 Fed. Cas. No. 14,947; State *v.* Trook, 172 Ind. 558, 88 N. E. 930.

91. **U. S.**—United States *v.* Cobban, 134 Fed. 290; United States *v.* Thompson, 31 Fed. 331. **Cal.**—People *v.* Ross, 103 Cal. 425, 37 Pac. 379. **Ind.**—State *v.* Trook, 172 Ind. 558, 88 N. E. 930. **La.**—State *v.* Williams, 111 La. 1033, 36 So. 111. **Ohio.**—Stewart *v.* State, 22 Ohio St. 477. **Ore.**—State *v.* Jewett, 48 Ore. 577, 85 Pac. 994.

B. ATTEMPT TO SUBORN PERJURY.—The indictment or information must usually be as specific, definite, and certain as an indictment for perjury.⁹² But it is not necessary that the fact which the defendant attempted to procure the witness to swear to, should be stated specifically,⁹³ though the materiality of the testimony which the accused solicited must be alleged either expressly or by alleging facts showing its materiality.⁹⁴ It is not necessary to allege that the person approached knew that the testimony sought to be procured was false;⁹⁵ nor is it always necessary to allege that the person who was to give the false testimony was actually approached.⁹⁶ An indictment charging that the act of perjury was to be committed in an action which it was intended to bring is fatally defective.⁹⁷

IV. JOINDER AND ELECTION OF OFFENSES.—Perjury and subornation of perjury may be joined in the same indictment, and the perjuror and suborner may both be included in it.⁹⁸

Election.⁹⁹—When the offense is within both a statute against perjury and also one against false swearing, an indictment will lie for either offense.¹ When various statements are assigned as perjury, no election between the different assignments is required, when they are based on the same testimony.² When but one allegation of perjury is contained in the indictment or information, though presented in two assignments, there is but one count, and an election between counts is not required.³

V. JOINDER OF PARTIES.—Perjury or false swearing is an offense which can only be committed by a person in his individual capacity; it is therefore improper to jointly indict two or more persons for the crime.⁴

VI. TRIAL.⁵—**A. VARIANCE.**—The general rules governing variance obtain in prosecutions for perjury or false swearing.⁶

B. QUESTIONS OF LAW AND FACT.⁷—The court must determine as

92. *Rivers v. State*, 97 Ala. 72, 12 So. 434; *State v. Brown*, 254 Ill. 260, 98 N. E. 535.

Indictment for perjury, see *supra*, II. [a] Attempting to suborn perjury is not the generic name of any class of offenses; therefore, merely charging such an offense without a statement of the facts constituting the crime, renders the indictment or information insufficient. *People v. Thomas*, 63 Cal. 482.

93. *State v. Holding*, 1 McCord (S. C.) 31.

94. *People v. Brown*, 254 Ill. 260, 98 N. E. 535; *State v. Tappan*, 58 N. H. 152.

95. *People v. Clement*, 127 Mich. 130, 86 N. W. 535.

96. *People v. Bloom*, 149 App. Div. 295, 133 N. Y. Supp. 708.

97. *State v. Joaquin*, 69 Me. 218.

98. *Com. v. Devine*, 155 Mass. 224, 29 N. E. 515.

Joinder of offenses generally, see 12 STANDARD PROC. 499, et seq.

99. As to generally, see 12 STANDARD PROC. 670, et seq.

1. *Com. v. Ransdall*, 153 Ky. 334, 155 S. W. 1117.

2. *McLeod v. State* (Tex. Crim.), 75 S. W. 522.

3. *Foreman v. State*, 47 Tex. Crim. 179, 85 S. W. 809.

4. *Walker v. Com.*, 162 Ky. 111, 172 S. W. 109.

Joinder of parties generally, see 12 STANDARD PROC. 495, et seq.

5. See generally the title "Trial."

6. See generally the title "Variance and Failure of Proof," and 13 ENCY. OF EV. 736, et seq.

7. See generally the title "Province of Judge and Jury."

a question of law whether the court in which the perjury was committed had jurisdiction of the cause.⁸ So also, whether the court or officer administering the oath had authority to do so is a question of law for the court.⁹ It is the province of the jury upon a trial for perjury to determine all questions of fact, however.¹⁰

The question of the materiality of the evidence alleged to have been false is generally one of law for the court.¹¹ But when the materiality

8. *State v. Clough*, 111 Iowa 714, 83 N. W. 727; *State v. Richardson*, 248 Mo. 563, 154 S. W. 735, 44 L. R. A. (N. S.) 307. See also *State v. Tate*, 77 Miss. 469, 27 So. 619.

9. *Ky.*—*Howell v. Com.*, 113 S. W. 881. *Mo.*—*State v. Richardson*, 248 Mo. 563, 154 S. W. 735, 44 L. R. A. (N. S.) 307. *N. D.*—*State v. Scott*, 37 N. D. 105, 163 N. W. 810.

10. *Ala.*—*Storey v. State*, 14 Ala. App. 127, 72 So. 267; *McDaniel v. State*, 13 Ala. App. 318, 69 So. 351. *La.*—*State v. Brown*, 111 La. 170, 35 So. 501. *Mich.*—*People v. Ostrander*, 110 Mich. 60, 67 N. W. 1079. *N. Y.* *People v. Gilhooley*, 108 App. Div. 234, 95 N. Y. Supp. 636, *affirmed*, 187 N. Y. 551, 80 N. E. 1116. *Tex.*—*Urban v. State*, 77 Tex. Crim. 261, 178 S. W. 514. *Wash.*—*State v. Miller*, 80 Wash. 75, 141 Pac. 293.

[a] Thus (1) whether the oath was knowingly and corruptly false is a question for the jury (*U. S.*—*United States v. Smith*, 1 *Sawyer*, 27 Fed. Cas. No. 16,341. *Colo.*—*Wheeler v. People*, 165 Pac. 257. *Ky.*—*Walker v. Com.*, 162 Ky. 111, 172 S. W. 109. *N. Y.*—See *People v. Doody*, 172 N. Y. 165, 64 N. E. 807), as (2) is the question whether the statements alleged to have been false were made under duress, threats or fear. *People v. McIntie*, 193 Mich. 589, 160 N. W. 461.

11. *U. S.*—*United States v. Singleton*, 54 Fed. 488; *United States v. Shinn*, 14 Fed. 447, 8 *Sawyer*, 403. *Ark.* *Beavers v. State*, 124 Ark. 38, 186 S. W. 300; *Barre v. State*, 99 Ark. 629, 139 S. W. 641; *Brooks v. State*, 91 Ark. 505, 121 S. W. 740. *Cal.*—*People v. Bradbury*, 155 Cal. 808, 103 Pac. 215; *People v. Lem You*, 97 Cal. 224, 32 Pac. 11; *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389. *Ill.*—*People v. Melnick*, 274 Ill. 616, 113 N. E. 971; *People v. Threewitt*, 251 Ill. 509, 96 N. E. 242; *Wilkinson v. People*, 226 Ill. 137, 80 N. E. 699. *Ia.*—*State v. Brown*, 128 Iowa 24, 102 N. W. 799; *State v.*

Clough, 111 Iowa 714, 83 N. W. 727. *Kan.*—*State v. Lewis*, 10 Kan. 157. *Ky.*—*Renan v. Com.*, 2 Ky. L. Rep. 66. *Miss.*—*Saucier v. State*, 95 Miss. 226, 48 So. 840; *Cothran v. State*, 39 Miss. 541. *Mo.*—*State v. Richardson*, 248 Mo. 563, 154 S. W. 735, 44 L. R. A. (N. S.) 307; *State v. Moran*, 216 Mo. 550, 115 S. W. 1126; *State v. Dineen*, 203 Mo. 628, 102 S. W. 480. *N. J.*—*Gordon v. State*, 48 N. J. L. 611, 7 Atl. 476. *N. Y.*—*People ex rel. Hegeman v. Corrigan*, 195 N. Y. 1, 87 N. E. 792. But see *People v. Redmond* (App. Div.), 165 N. Y. Supp. 821. *N. D.*—*State v. Scott*, 37 N. D. 105, 163 N. W. 810. *Okla.*—*Coleman v. State*, 6 Okla. Crim. 252, 118 Pac. 594; *Peters v. United States*, 2 Okla. 138, 37 Pac. 1081; *Stanley v. United States*, 1 Okla. 336, 33 Pac. 1025. *Pa.* *Com. v. Stern*, 58 Pa. Super. 591. See *Steinman v. McWilliams*, 6 Pa. 170. *Tex.*—*Jones v. State*, 76 Tex. Crim. 398, 174 S. W. 1071; *Maroney v. State*, 45 Tex. Crim. 524, 78 S. W. 696; *Luna v. State*, 44 Tex. Crim. 482, 72 S. W. 378. *Wyo.*—*Dickerson v. State*, 18 Wyo. 440, 111 Pac. 857, 116 Pac. 448. But see *Fletcher v. State*, 20 Wyo. 284, 123 Pac. 80, to the effect that it is only when the materiality of the evidence is not disputed that the question is for the court. *Eng.*—*Reg. v. Courtney*, 7 Cox Cr. Cas. 111; *Reg. v. Southwood*, 1 F. & F. 356; *Rex v. Dunston, R. & M.* 109, 21 E. C. L. 712. But see *Reg. v. Goddard*, 2 F. & F. 361, holding that question of materiality of the evidence is for the jury.

[a] Whether the testimony was relevant is a question for the court and for the jury. *Partin v. Com.*, 154 Ky. 701, 159 S. W. 542; *Com. v. Maynard*, 91 Ky. 131, 15 S. W. 52.

[b] Submission of Materiality to Jury.—Although the question of materiality of the evidence is for the court, if it be submitted to the jury and they find by their verdict that the evidence was material, the rights of

of the testimony depends upon the existence of certain other facts and these facts are controverted, the entire question must be determined by the jury.¹²

C. INSTRUCTIONS.—1. **In General.**—The general rules as to instructions obtain in prosecutions for perjury or false swearing.¹³

2. **Necessity for Particular Instructions.**—It is the duty of the court to instruct the jury what the material allegations of the indictment or information are and what material facts must be established to sustain a conviction.¹⁴ The alleged false testimony must be pointed out;¹⁵ and when severable the jury instructed which assignment or assignments of false testimony are submitted to them as a basis for their verdict.¹⁶ The jury must be instructed that the false

the defendant is in no way prejudiced. **Colo.**—*Wheeler v. People*, 165 Pac. 257; *Thompson v. People*, 26 Colo. 496, 59 Pac. 51. **Kan.**—*State v. Lewis*, 10 Kan. 157. **Tex.**—*Montgomery v. State* (Tex. Crim.), 40 S. W. 805. But see *Wilkinson v. People*, 226 Ill. 135, 80 N. E. 699; *Young v. People*, 134 Ill. 37, 24 N. E. 1070, holding it error to submit to jury question whether testimony was material.

[c] Where the jury is the judge of the law of the case, the issue of the materiality of the evidence is for the jury. *State v. Spencer*, 45 La. Ann. 1, 12 So. 135.

12. **U. S.**—*United States v. Shinn*, 14 Fed. 447, 8 Sawy. 403. **Cal.**—*People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389. **Okla.**—*Coleman v. State*, 6 Okla. Crim. 252, 118 Pac. 594. **Pa.** *Com. v. Stern*, 58 Pa. Super. 591. **Tex.** *McAvoy v. State*, 39 Tex. Crim. 684, 47 S. W. 1000; *Washington v. State*, 23 Tex. App. 336, 5 S. W. 119. **Wyo.** *Dickerson v. State*, 18 Wyo. 440, 111 Pac. 857, 116 Pac. 448. But see *Fletcher v. State*, 20 Wyo. 284, 123 Pac. 80, to the effect that the question of materiality is for the jury except when there is no dispute as to the evidence being material.

13. See generally the title "Instructions."

[a] When evidence is admitted for a particular purpose the court must instruct the jury that it may only be considered for that special purpose and no other. **N. C.**—*State v. Austin*, 132 N. C. 1037, 43 S. E. 905. **Tex.**—*Mahon v. State*, 46 Tex. Crim. 234, 79 S. W. 28; *Estill v. State*, 38 Tex. Crim. 255, 42 S. W. 305. **Utah.**—*State v. Justesen*, 35 Utah 105, 99 Pac. 456. See

generally 13 STANDARD PROC. 926, et seq.

[b] **Degree of Proof.**—**Ga.**—*Haines v. State*, 109 Ga. 526, 35 S. E. 141; *Pennaman v. State*, 58 Ga. 336. **Ill.** *Mackin v. People*, 115 Ill. 312, 3 N. E. 222, 56 Am. Rep. 167. **Tex.**—*Kitchen v. State*, 26 Tex. App. 165, 9 S. W. 461. **Wash.**—*State v. Rutledge*, 37 Wash. 523, 79 Pac. 1123. See also *Thompson v. People*, 26 Colo. 496, 59 Pac. 51.

[c] **Number of Witnesses and Corroboration.**—**Ky.**—*Walker v. Com.*, 162 Ky. 111, 172 S. W. 109; *Goslin v. Com.*, 28 Ky. L. Rep. 683, 90 S. W. 223; *Wadlington v. Com.*, 22 Ky. L. Rep. 1108, 59 S. W. 851. **Mich.**—*People v. McClintic*, 193 Mich. 589, 160 N. W. 461. **Miss.**—*Saucier v. State*, 95 Miss. 226, 48 So. 840; *Brown v. State*, 57 Miss. 424. **Tex.**—*Knight v. State*, 71 Tex. Crim. 36, 158 S. W. 543; *Whitaker v. State*, 37 Tex. Crim. 479, 36 S. W. 253.

[d] **The Term "Corroborated" Should Be Defined.**—*State v. Hunter*, 181 Mo. 316, 80 S. W. 955.

[e] **The word "credible" need not be defined by the court to the jury.** *Chavarria v. State* (Tex. Crim.), 63 S. W. 312.

[f] **Conviction for Other Offense.** It is error for the court to instruct the jury that under an allegation of an attempt to induce a person to commit perjury, they might convict of an attempt to induce false swearing. *Shipp v. State* (Tex. Crim.), 196 S. W. 840.

14. *Cox v. State*, 13 Ga. App. 687, 79 S. E. 909; *Gandy v. State*, 23 Neb. 436, 36 N. W. 817.

15. *Conant v. State*, 51 Tex. Crim. 610, 103 S. W. 897.

16. *People v. Scharfstein*, 162 App.

swearing was both wilfully and corruptly done.¹⁷ As bearing upon the question of intent, the court if requested and the evidence justifies it, should instruct the jury that they may take into consideration defendant's mental condition at the time of committing the alleged perjury.¹⁸ It is also essential that the jury be instructed that defendant must have had knowledge of the falsity of the testimony given by him;¹⁹ and that if he testified honestly in the belief of the truth of his statement he would not be guilty.²⁰

D. VERDICT.—The general rules as to verdicts obtain in prosecutions for perjury or false swearing.²¹

Div. 642, 147 N. Y. Supp. 946; *Conant v. State*, 51 Tex. Crim. 610, 103 S. W. 897; *Sisk v. State*, 28 Tex. App. 432, 13 S. W. 647.

[a] **When there are several assignments negatived**, any one of the false statements being material may be selected by the court and submitted to the jury. *Stanley v. State* (Tex. Crim.), 74 S. W. 318.

[b] **When the assignment of perjury embraces several particulars**, it is not prejudicial to the accused for the court to stress one of them in his instructions, as being the main material matter. *McCord v. State*, 83 Ga. 521, 10 S. E. 437.

[c] **When not severable** (1), an instruction submitting all the predicates in *solido* is proper. *Adams v. State*, 49 Tex. Crim. 361, 91 S. W. 225. See also *Stanley v. State* (Tex. Crim.), 74 S. W. 318. (2) When the indictment charges an attempt to induce another to commit perjury by swearing to a false affidavit, and the entire affidavit in *solido* is charged as false, the court must instruct the jury that in order to convict the entire affidavit must be proven false. *Shipp v. State* (Tex. Crim.), 196 S. W. 840.

17. *Cothran v. State*, 39 Miss. 541; *Steber v. State*, 23 Tex. App. 176, 4 S. W. 880. *Compare Brown v. State*, 57 Miss. 424, holding that "wilfully" also implies corruption, and the latter term need not be used in the instruction when the former is used.

[a] **Words of similar import** may be used, however. *Morgan v. State*, 63 Miss. 162, "knowingly" may be used instead, it implying both wilfulness and corruption. See *Holt v. State*, 48 Tex. Crim. 559, 89 S. W. 838, wilfully and deliberately.

[b] **Terms Used (1) Must Be Defined.**—*Roberts v. State* (Tex. Crim.), 201 S. W. 998; *Knight v. State*, 71 Tex.

Crim. 36, 158 S. W. 543; *Winton v. State*, 56 Tex. Crim. 198, 119 S. W. 309; *Holt v. State*, 48 Tex. Crim. 559, 89 S. W. 838; *Mahon v. State*, 46 Tex. Crim. 234, 79 S. W. 28. But (2) it is not error to refuse to give an instruction in which the words "wilfully" and "corruptly" are defined, when they were defined in other instructions so far as they were applicable to the cause on trial. *Wheeler v. People* (Colo.), 165 Pac. 257.

18. *Leaptrot v. State*, 51 Fla. 57, 40 So. 616. See also *Wheeler v. People* (Colo.), 165 Pac. 257.

19. *Goodwin v. State*, 118 Ga. 770, 45 S. E. 620. See *Davis v. State*, 7 Ga. App. 680, 67 S. E. 839; *Porter v. State*, 48 Tex. Crim. 301, 88 S. W. 359. But see *People v. Wong Fook Sam*, 146 Cal. 114, 79 Pac. 848.

[a] **Drunkenness as Affecting Knowledge.**—*State v. Brown*, 111 La. 170, 35 So. 501. See *Sisk v. State*, 28 Tex. App. 432, 13 S. W. 647.

[b] **Upon a prosecution for subornation of perjury** the court must instruct the jury that the falsity of testimony was known to both the witness and the suborner. *Smith v. State*, 107 Miss. 404, 65 So. 642.

20. **Mich.**—*People v. German*, 110 Mich. 244, 68 N. W. 150. **Mo.**—*State v. Lynes*, 194 Mo. App. 184, 185 S. W. 535. **Tex.**—*Mason v. State*, 57 Tex. Crim. 319, 122 S. W. 871; *Luna v. State*, 44 Tex. Crim. 482, 72 S. W. 378; *Aguierre v. State*, 31 Tex. Crim. 519, 21 S. W. 256.

21. See *infra*, this note, and generally the title "Verdict."

[a] **Verdict must be responsive to the issues and not inconsistent.** *Brown v. State*, 145 Ill. App. 263. See also *Harris v. People*, 64 N. Y. 148, *affirming* 4 Hun 1, 6 Thomp. & C. 206.

[b] **A general verdict (1) is sufficient**, though several assignments of

VII. NEW TRIALS in prosecutions for perjury and kindred offenses are governed by the general rules.²²

VIII. REVIEW.—The appellate procedure in prosecutions for perjury and kindred offenses follow the general rules.²³

perjury or subornation are charged (State v. Richardson, 248 Mo. 563, 154 S. W. 735, 44 L. R. A. [N. S.] 307), (2) provided the evidence is sufficient to support all of the assignments. People v. Root, 94 App. Div. 84, 87 N. Y. Supp. 962.

[c] **Need not add the words "as charged in the indictment,"** there being no degrees of the offense charged. Barton v. Com., 17 Ky. L. Rep. 580, 32 S. W. 171, 396.

22. See generally the title "**New Trial.**"

[a] **One convicted of subornation of perjury is entitled to a new trial,** when the person charged with committing perjury is acquitted of such charge on a trial subsequently held. Maybush v. Com., 29 Gratt. (70 Va.) 857.

23. See *infra*, this note, and generally the title "**Review.**"

[a] **When no question was raised below** (1) as to whether the particular form of oath required by law was administered (Adams v. State, 49 Tex. Crim. 361, 91 S. W. 225), or (2) whether the information or indictment was sufficient (State v. Moore, 111 La. 1006, 36 So. 100; United States v. Jamias, 21 Phil. Isl. 632; Mortiga v. Serra, 5 Phil. Isl. 34; United States v. Sarabia, 4 Phil. Isl. 566; People v. Alvarado, 19 Porto Rico 827), it cannot be raised for the first time upon appeal.

[b] **Failure to call attention during the trial of a variance** precludes the presentation of such question on the appeal. People v. Melnick, 274 Ill. 616, 113 N. E. 971.

PERPETUATION OF TESTIMONY.—See **Depositions; Discovery.**

PERSONAL ACTIONS

By the Editorial Staff.

I. DEFINITION AND DISTINCTIONS, 335

II. CLASSIFICATION, 336

CROSS-REFERENCES:

Forms of Action;
Proceedings In Rem;

Real and Mixed Actions;
Suits and Actions.

Proceedings in personam in admiralty, see 1 STANDARD PROC. 413, 418.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION AND DISTINCTIONS.—Personal actions, at common law, are those brought for the recovery of a debt, or damages for breach of contract, or for a specific personal chattel, or for satisfaction in damages because of some injury to the person or to personal or real property.¹ The term is used to distinguish the actions em-

1. *Doe v. Waterloo Min. Co.*, 43 Fed. 219, 221; *Osborn v. Fall River*, 140 Mass. 508, 5 N. E. 483; 1 Chit. Pl. 97.

[a] For other definitions, see *Me. Boyd v. Cronan*, 71 Me. 286; *Linscott v. Fuller*, 57 Me. 406, 408; *Hall v. Decker*, 48 Me. 255. **N. J.**—*Hayden v. Vreeland*, 37 N. J. L. 372, 18 Am. Rep. 723. **N. Y.**—*Farrington v. Freeman*, 2 Edw. Ch. 572, 573. **Pa.**—*Com. v. Lehigh Valley R. Co.*, 7 Kulp 229. **Eng.**—*Attorney General v. Churchill*, 8 Mees. & W. 171, 191. **Can.**—*Forrester v. Thrasher*, 9 Ont. Pr. 383, 388; *Re McGugan v. McGugan*, 21 Ont. 289, 294, personal action signifies common law action.

[b] The term "personal actions" includes (1) the action of trespass *quare clausum* (*Boyd v. Cronan*, 71 Me. 286; *Linscott v. Fuller*, 57 Me. 406. See the title "Trespass"), (2) the action for damages to real estate (*Egoz-*

v. Belaval, 5 Porto Rico 174), (3) the action for abatement of nuisance (*Giervolini v. Succession of Rodriguez*, 23 Porto Rico, 808. See the title "Nuisance"), (4) an action for collection of rent (*Boga v. Sajo Vecina*, 11 Phil. Isl. 409; *Asencio v. Gutierrez*, 1 Phil. Isl. 12), (5) a suit for execution of deed and damages (*Argueso v. Mulenhoff*, 5 Porto Rico 157), (6) an action for money lost on a wager (*Motlow v. Johnson*, 151 Ala. 276, 44 So. 42), (7) *mandamus* (*State ex rel. Brumley v. Jessup & Moore Paper Co.*, 3 Boyce [Del.] 118, 80 Atl. 350. Compare the title "Mandamus"), and (8) process to obtain damages for flowing land by a mill dam under statute. *Hall v. Decker*, 48 Me. 255. (9) But the term does not include an information in the nature of *quo warranto* (*Vanatta v. Delaware & B. B. R. Co.*, 38 N. J. L. 282. See the title "Quo Warranto"), or (10) a prosecution by

braced within it from real and mixed actions,² and sometimes from actions in rem.³ In a more limited sense, the term is used to designate those actions which die with the person in whose behalf they are instituted.⁴

II. CLASSIFICATION. — Personal actions are as to cause of action either *ex contractu* or *ex delicto*;⁵ and as to place of trial, either local or transitory;⁶ and it has been held, as to object, in *personam* or in rem.⁷

indictment; *Com. v. Lehigh Valley R. Co.*, 7 Kulp (Pa.) 229.

[c] As used in a statute authorizing the enforcement of a lien by personal action, the term does not suppose the ordinary action in *personam* for the recovery of a sum of money or damages against the debtor. *Dewey v. Fifield*, 2 Wis. 73. See the titles "*Liens*;" "*Mechanics' Liens*."

2. *Kane v. Fillmore Ave. Baptist Church*, 72 N. J. L. 442, 60 Atl. 1099; *Attorney General v. Churchill*, 8 Mees. & W. (Eng.) 171, 191. See the title "*Real and Mixed Actions*."

3. *Kean v. Rogers* (Iowa), 118 N. W. 515. See the title "*Proceedings in Rem.*"

[a] As used in a statute relating to venue, the term "*personal actions*"

includes all actions except actions in rem. *Kean v. Rogers* (Iowa), 118 N. W. 517; *Everett v. Board of Suprs. of Pottawatamie Co.*, 93 Iowa 721, 725, 61 N. W. 1062.

4. *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 3 Boyce (Del.) 118, 80 Atl. 350; *Hayden v. Vreeland*, 37 N. J. L. 372, 18 Am. Rep. 723.

[a] The maxim, *actio personalis moritur cum persona*, is the embodiment of this rule. See the titles "*Revivor*;" "*Survival*."

5. 3 Bl. Com. 108.

6. *Boyd v. Cronan*, 71 Me. 286; *Linseott v. Fuller*, 57 Me. 406; *Hall v. Decker*, 48 Me. 255. See the title "*Venue*."

7. *Hall v. Decker*, 48 Me. 255.

PERSONAL INJURIES. — See *Injuries to Persons and Property*.

PERSONAL PROPERTY

By the Editorial Staff.

I. ACTIONS AND REMEDIES IN GENERAL AFFECTING PERSONAL PROPERTY, 338

II. ACTIONS RELATING TO BAILMENTS, 338

A. *Between Bailor and Bailee*, 338

1. *Form of Action*, 338

a. *By Bailor*, 338

(I.) *Assumpsit*, 338

(II.) *Trespass*, 339

(III.) *Case*, 339

(IV.) *Detinue*, 339

(V.) *Replevin*, 339

(VI.) *Trover*, 340

b. *By Bailee*, 340

2. *Conditions Precedent*, 340

a. *Demand*, 340

b. *Tender*, 341

3. *Parties*, 341

4. *Pleadings*, 341

5. *Trial*, 342

a. *Instructions*, 342

b. *Questions of Law and Fact*, 342

B. *Actions Against Third Persons*, 343

1. *Form of Action*, 343

a. *Assumpsit*, 343

b. *Trespass*, 343

c. *Case*, 344

d. *Trover and Conversion*, 344

e. *Replevin and Detinue*, 345

2. *Parties*, 345

3. *Pleadings*, 345

C. *Actions by Third Persons*, 346

III. REMEDIES OF OWNER OR FINDER OF LOST GOODS, 346

A. *Of Owner*, 346

B. *Of Finder*, 346

IV. RELIEF FOR INFRINGEMENT OF LITERARY PROPERTY, 346

- A. *Unauthorized Publication of Manuscript*, 346
- B. *Other Infringement*, 347

V. RELIEF FOR VIOLATION OF PRIVACY, 347

- A. *Publication of Photographs*, 347
- B. *Other Violations of Privacy*, 348

CROSS-REFERENCES:

Chattel Mortgages;	Liens;
Injuries to Persons and Property;	Pledges;
Judgments and Decrees,	Warehouseman.
Enforcement of;	

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. ACTIONS AND REMEDIES IN GENERAL AFFECTING PERSONAL PROPERTY.—The question of the appropriate remedy and procedure for the recovery of personal property,¹ or for injury thereto,² or for the loss thereof,³ will be found elsewhere in this work.

II. ACTIONS RELATING TO BAILMENTS.—A. BETWEEN BAILOR AND BAILEE. — 1. **Form of Action.** — a. *By Bailor.* — (I.) **Assumpsit.**⁴ — Where a bailee converts the property the bailor may waive the tort and sue in assumpsit,⁵ and where the bailee fails to return

1. See the titles "Replevin;" "Trove and Conversion."

Recovery from carrier, see the title "Freight Carriers."

Recovery of baggage, see the title "Passengers."

Recovery of property in factor's hands, see 8 STANDARD PROC. 863.

Recovery from pawnbroker, see the title "Pawnbrokers."

Recovery from pledgee, see the title "Pledges."

Recovery from warehousemen, see the title "Warehousemen."

2. See title "Injuries to Persons and Property."

Injury to baggage, see the title "Passengers."

Injury to freight by carrier, see the title "Freight Carriers."

Injury by warehouseman, see the title "Warehousemen."

3. Loss of baggage, see the title "Passengers."

Loss of goods by carrier, see the title "Freight Carriers."

For loss of goods by guest, see the title "Inns and Innkeepers."

For loss of goods by warehousemen, see the title "Warehousemen."

4. Assumpsit generally, see 3 STANDARD PROC. 166.

5. U. S.—*In re Coe*, 169 Fed. 1002, having election between assumpsit and tort. Ala.—*Hackney v. Perry*, 152 Ala. 626, 44 So. 1029. Ind.—*Smith v. Stewart*, 5 Ind. 220. N. H.—*Frothingham v. Morse*, 45 N. H. 545. N. Y.—*Scovill v. Griffith*, 12 N. Y. 509. Ohio.—*Barker v. Cory*, 15 Ohio 9. Pa.—*Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664.

[a] Action for goods sold and delivered lies where goods are sent to

the property and agrees to pay for it, the bailment being converted into a sale, assumpsit may be maintained.⁶ The bailor may recover by assumpsit from the bailee the moneys received by the latter from one who has injured the bailed property.⁷ Assumpsit will lie for a breach of the implied covenant that the bailee will take reasonable and proper care of the bailed property.⁸

(II.) **Trespass.**⁹ — Trespass is a proper action where the bailee has destroyed,¹⁰ or injured,¹¹ the property intrusted to his care.

(III.) **Case.**¹² — Case is proper where the bailed property has been misused by the bailee,¹³ lost,¹⁴ or the property has been injured through the negligence of the bailee.¹⁵

(IV.) **Detinue.**¹⁶ — Detinue is a proper remedy where the bailor is entitled to the immediate possession of the bailed property.¹⁷

(V.) **Replevin.**¹⁸ — Replevin, like detinue,¹⁹ is a proper remedy where

a person who is to take and use such parts thereof as he needs for his own purposes and sell the remainder, and he takes and uses all the goods for his own purposes. *Wadsworth v. Gay*, 118 Mass. 44.

[b] **Refusal to deliver goods on demand** where bailee has promised to deliver them when called for authorizes assumpsit for their value. *Mason v. Briggs*, 16 Mass. 453.

[c] **Intermingled Goods.** — If the owner of goods intentionally intermingles them with the goods of another person, but through negligence, merely, and not wilfully, or fraudulently, his property in them is not lost; but his remedy is not by action of book account, even though his goods may have been used by the owner of the goods with which they were thus intermingled, but is trover where such person refuses to return them to him, or if they have been sold the tort may be waived and assumpsit brought. *Pratt v. Bryant*, 20 Vt. 333.

6. *Parker v. Tiffany*, 52 Ill. 286.

7. *Walsh v. United States Tent, etc. Co.*, 153 Ill. App. 229.

8. *Phillips v. International Text Book Co.*, 26 Pa. Super. 230, "In case the property is negligently injured an action will lie for the breach of the implied covenant, and whether that action be in assumpsit or trespass, it is still founded in contract."

[a] **Where goods are lost by bailee** it is generally optional for bailor to bring assumpsit or sue in tort. *Coal Co. v. Richter*, 31 W. Va. 858, 8 S. E. 609.

9. **Action of trespass generally**, see the title "Trespass."

10. *Nelson v. Bondurant*, 26 Ala.

341; *Setzar v. Butler*, 27 N. C. 212.

11. *Ala.*—*Hall v. Goodson*, 32 Ala.

277. *Pa.*—*Phillips v. International Text Book Co.*, 26 Pa. Super. 230. *Tenn.*—*James v. Carper*, 4 Sneed 397.

12. **Action of case generally**, see the title "Case (The Action of Trespass on the)."

13. *Del.*—*Keith Co. v. Booth Fisheries Co.*, 4 Boyce 218, 87 Atl. 715. *Mo.*—*Johnson v. Strader*, 3 Mo. 359. *N. Y.*—*Seovill v. Griffith*, 12 N. Y. 509. *N. C.*—*Setzar v. Butler*, 27 N. C. 212. *Tenn.*—*Parker v. Thompson*, 5 Sneed 349; *McNeill v. Brooks*, 1 Yerg. 73.

14. *Hallenbake v. Fish*, 8 Wend. (N. Y.) 547, 24 Am. Dec. 88 (lost or stolen); *Packard v. Getman*, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300.

15. *Ala.*—*Haekney v. Perry*, 152 Ala. 626, 44 So. 1029. *Del.*—*Union Stone Co. v. Wilmington Trans. Co.*, 5 Boyce 59, 90 Atl. 407; *Keith Co. v. Booth Fisheries Co.*, 4 Boyce 218, 87 Atl. 715. *Ill.*—*Standard Brewery v. Hales & Curtis Malting Co.*, 70 Ill. App. 363, 365. *Mo.*—*Johnson v. Strader*, 3 Mo. 359.

16. **Action of detinue generally**, see 7 STANDARD PROC. 467.

17. *Boozer v. Jones*, 169 Ala. 481, 53 So. 1018; *Lay's Exr. v. Lawson's Admr.*, 23 Ala. 377; *Stoker v. Yerby*, 11 Ala. 322; *Rucker v. Hamilton*, 3 Dana (Ky.) 36 (even though the bailee parts with possession of the property before suit is brought); *Lewis v. Hoover*, 1 J. J. Marsh. (Ky.) 500, 19 Am. Dec. 120.

18. **Action of replevin generally**, see the title "Replevin."

19. See *supra*, II, A, 1, a, (IV).

the bailee has a right to the immediate possession of the subject of the bailment.²⁰

(VI.) *Trover*.²¹ — Generally a bailor for hire for a definite term cannot maintain trover for an injury done to the thing during the continuance of the term,²² but if the bailee be actually guilty of conversion trover will lie,²³ as where he sells the property bailed the bailor may sue him in trover.²⁴ Trover will not lie against the bailee where the property is stolen from his possession.²⁵

b. *By Bailee*. — A person in possession of goods as bailee may maintain replevin against all persons except the bailor,²⁶ and if he have a lien against the property he may even maintain replevin against the bailor.²⁷

2. **Conditions Precedent.** — a. *Demand*. — Generally a demand must be made upon the bailee before suit can be brought,²⁸ but where the bailee has converted the property bailed,²⁹ or, it is held, if the

20. **D. C.**—Wall *v. De Mitkiewicz*, 9 App. Cas. 109. **Miss.**—Dutton *v. Shaw*, 38 So. 638. **N. Y.**—Wood *v. Orser*, 25 N. Y. 348. **Can.**—Sutherland *v. Mannix*, 8 Man. 541.

21. **Action of trover generally see the title "Trover and Conversion."**

22. **Felton v. Hales**, 67 N. C. 107; **Swift v. Moseley**, 10 Vt. 208, 33 Am. Dec. 197. And cases cited in succeeding notes.

23. **Ala.**—Cartlidge *v. Slone*, 124 Ala. 596, 26 So. 918. **N. H.**—Sanborn *v. Colman*, 6 N. H. 14, 23 Am. Dec. 703. **N. C.**—Felton *v. Hales*, 67 N. C. 107. **Vt.**—Swift *v. Moseley*, 10 Vt. 208, 33 Am. Dec. 197. **Va.**—Harvey *v. Epes*, 12 Gratt. (53 Va.) 153.

[a] **Misuse of Property.**—"But if he merely use the property in a manner or for a purpose not authorized by the contract, and without destroying it, or without intending to injure or impair the reversionary interest of the bailor therein such misuser does not determine the bailment, and therefore is not a conversion for which trover will lie." Harvey *v. Epes*, 12 Gratt. (53 Va.) 153.

24. **Sanborn v. Colman**, 6 N. H. 14, 23 Am. Dec. 703; **Swift v. Moseley**, 10 Vt. 208, 33 Am. Dec. 197.

25. **Dorman v. Kane**, 5 Allen (Mass.) 38; **Brown v. Waterman**, 10 Cush. (Mass.) 117.

[a] **Negligent omission not amounting to an exercise of dominion** will not authorize bailor to sue in trover, as where the bailor's horse in control of the bailee was lost due to the latter's omission to place the horse in a barn at night as agreed, and the

horse either escaped or was stolen. **Rosenberg v. Diele**, 61 Misc. 610, 114 N. Y. Supp. 24.

26. **Sowden v. Kessler**, 76 Mo. App. 581.

27. **Sowden v. Kessler**, 76 Mo. App. 581.

28. **Ark.**—McLain *v. Huffman*, 30 Ark. 428; **Spencer v. McDonald**, 22 Ark. 466. **Ga.**—Montgomery *v. Evans*, 8 Ga. 178. **Ind.**—Underwood *v. Tatham*, 1 Ind. 276, Smith 152. **Mo.**—Ross *v. Clark*, 27 Mo. 549; **Irwin v. Wells**, 1 Mo. 9. **Mont.**—Cassidy *v. Slemmons*, 41 Mont. 426, 109 Pac. 976; **Woods v. Latta**, 35 Mont. 9, 88 Pac. 402. **N. Y.**—Phelps *v. Bostwick*, 22 Barb. 314; **Brown v. Cook**, 9 Johns. 361. **N. C.**—Benners *v. Howard's Exrs.*, 1 N. C. 149, 1 Am. Dec. 583. **Tex.**—Clapp *v. Nelson*, 12 Tex. 370, 62 Am. Dec. 530.

29. **Ala.**—Cothran *v. Moore*, 1 Ala. 423. **Ind.**—Cox *v. Reynolds*, 7 Ind. 257; **Smith v. Stewart**, 5 Ind. 220; **Spencer v. Morgan**, 5 Ind. 146. **Mo.**—People's State Savings Bank *v. Missouri, K. & T. Ry.*, 158 Mo. App. 519, 138 S. W. 915. **N. H.**—Lovejoy *v. Jones*, 30 N. H. 164. **N. Y.**—Delamater *v. Miller*, 1 Cow. 75, 13 Am. Dec. 512; **Bates v. Conkling**, 10 Wend. 389; **Corotinsky v. Cooper**, 26 Misc. 138, 55 N. Y. Supp. 970. **N. C.**—Felton *v. Hales*, 67 N. C. 107.

[a] **Must be demand or an actual conversion** before trover can be brought against a bailee. **Baston v. Rabun**, 115 Ga. 378, 41 S. E. 568.

[b] **As long as the property is in the hands of the bailee demand is necessary** but where the bailee has de-

bailee does not return the bailed property at the termination of the bailment;³⁰ or where demand would avail nothing,³¹ as where the property has been lost through the negligence of the bailee,³² demand need not be made. Where the property has been deposited with the bailee by two bailors, demand by one of the bailors without the concurrence of the other is not sufficient,³³ and where property is bailed to two, a demand on one alone will not suffice as a demand on the other.³⁴

b. *Tender*. — If money be due the bailee, it must be tendered before suit can be brought against him for the property.³⁵

3. *Parties*. — The bailor of property though not the real owner thereof may sue in his own name for loss or injury thereto.³⁶

4. *Pleadings*.³⁷ — When a necessary condition precedent, a demand must be appropriately alleged.³⁸ Where the action is for breach of the contract to return the bailed property in as good condition as received, no allegation of negligence on the part of the bailee is necessary,³⁹ it being sufficient in this respect to allege delivery to the bailee of the property in good condition under a contract to deliver it in like condition and its return in bad condition or failure to return.⁴⁰ Generally in suing for damage to goods while in possession of a bailee, negligence may be alleged in general terms.⁴¹ In an action for conversion the pleading follows the general rules elsewhere treated.⁴²

livered it to a third person, conversion being completed no demand is necessary. *Esmay v. Fanning*, 9 Barb. (N. Y.) 176, 5 How. Pr. 228.

30. *Lay's Exr. v. Lawson's Admr.*, 23 Ala. 377.

31. *Line v. Mills*, 12 Ind. App. 100, 39 N. E. 870; *Pattee v. Gilmore*, 18 N. H. 460, 45 Am. Dec. 385.

32. *Ala.*—*Cothran v. Moore*, 1 Ala. 423. *Ill.*—*Warner v. Dunnavan*, 23 Ill. 380. *Ind.*—*Line v. Mills*, 12 Ind. App. 100, 39 N. E. 870.

33. *May v. Harvey*, 13 East 197, 104 Eng. Reprint 345.

34. *White v. Demary*, 2 N. H. 546.

35. *Cal.*—*Vance v. Dingley*, 14 Cal. 53. *Kan.*—*Brown v. Holmes*, 21 Kan. 687. *Mich.*—*Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468. *Miss.*—*Dutton v. Shaw*, 38 So. 638, where bailee has lien for services in repairing property, tender must be made of the sum due him before replevin will lie. *Mo.* *Montieth v. Great Western Printing Co.*, 16 Mo. App. 450. *Pa.*—*Brown v. Dempsey*, 95 Pa. 243.

[a] Where the bailee refuses to deliver property except on payment of excessive amount, formal and complete tender of the amount actually due should be made. *Folsom v. Barrett*,

180 Mass. 439, 62 N. E. 723, 91 Am. St. Rep. 320.

36. *Casey v. Suter*, 36 Md. 1; *Oehmen v. Portmann*, 153 Mo. App. 240, 133 S. W. 104. See generally the title "*Parties*."

37. *Pleadings on contracts generally* see the title "*Implied and Express Agreements*."

38. *Montgomery v. Evans*, 8 Ga. 178. See the title "*Suits and Actions*."

When demand necessary see *supra*, II, A, 2, a.

39. *N. Y.*—*Harms v. New York*, 69 Misc. 315, 125 N. Y. Supp. 477. *N. D.* *Grady v. Schweinler*, 16 N. D. 452, 113 N. W. 1031, 125 Am. St. Rep. 674, 14 L. R. A. (N. S.) 1089, 15 Ann. Cas. 161. *S. C.*—*Tindall v. McCarthy*, 44 S. C. 487, 22 S. E. 734.

40. *Harms v. New York*, 69 Misc. 315, 125 N. Y. Supp. 477.

41. *Ga.*—*Miller v. Ben H. Fletcher Co.*, 142 Ga. 668, 83 S. E. 521; *Stewart v. Greene*, 124 Ga. 975, 53 S. E. 450. *Ind.*—*Belt R. & S. Co. v. McClain*, 58 Ind. App. 171, 106 N. E. 742. *Mo.*—*Freeman v. Foreman*, 141 Mo. App. 359, 125 S. W. 524.

See the title "*Negligence*."

42. See the title "*Trover and Conversion*."

Joinder of Counts.⁴³ — Counts in case and trover may be joined in a declaration against a bailee,⁴⁴ but counts in trover and assumpsit cannot be joined.⁴⁵

5. Trial. — a. *Instructions.*⁴³ — The court should charge the jury in accordance with the law applicable to the issues made by the pleadings,⁴⁷ and should instruct the jury on all the issues presented by the evidence.⁴⁸

b. *Questions of Law and Fact.* — The degree of care or diligence required on the part of the bailee is usually one of law for the court,⁴⁹ while the question whether the bailee exercised the requisite degree of care in a particular case is one of fact for the jury,⁵⁰ except where

[a] **Termination of Hiring.** — An allegation that plaintiff is entitled to immediate possession of a certain article "his property" theretofore by him let for hire to the defendant" is a sufficient allegation that the term of hiring had ceased. *Gleason v. Morrison*, 20 Misc. 320, 45 N. Y. Supp. 684.

43. See the titles "**Joinder of Actions**;" "**Several Counts**."

44. *Horsely v. Branch*, 1 Humph. (Tenn.) 199; *Baxter v. Pope*, Meigs (Tenn.) 467; *Harvey v. Skipwith*, 16 Gratt. (57 Va.) 393; *Spencer v. Pilcher*, 8 Leigh (35 Va.) 565.

45. *Angus v. Dickerson*, Meigs (Tenn.) 459; *Spencer v. Pilcher*, 8 Leigh (35 Va.) 565.

[a] **Where the declaration has a double aspect being partly in trover and partly in conversion**, the plaintiff may be permitted to strike from his declaration the objectionable features so as to make it applicable to but one form of action. *Moses v. Taylor*, 6 Mackey (D. C.) 255.

46. See generally the title "**Instructions**."

47. **Ala.** — *Higman v. Camody*, 112 Ala. 267, 20 So. 480, 57 Am. St. Rep. 33. **Ark.** — *James v. Orrell*, 68 Ark. 284, 57 S. W. 931, 82 Am. St. Rep. 293. **Ill.** — *Bennett v. O'Brien*, 37 Ill. 250.

48. **Ga.** — *Evans v. Nail*, 1 Ga. App. 42, 57 S. E. 1020. **Ky.** — *Tudor v. Lewis*, 3 Mete. 378. **Tex.** — *Baker & Lockwood Mfg. Co. v. Clayton*, 40 Tex. Civ. App. 586, 90 S. W. 519.

49. **Ind.** — *Watkins v. Roberts*, 28 Ind. 167. **Kan.** — *Filson v. Pacific Express Co.*, 84 Kan. 614, 114 Pac. 863. **N. Y.** — *Morris v. Third Ave. R. Co.*, 1 Daly 202. **N. C.** — *Brook v. King*, 48 N. C. 45.

50. **U. S.** — *Stewart v. Western*

Union R. Co., 4 Biss. 362, 23 Fed. Cas. No. 13,438. **Ala.** — *Bricken v. Sikes*, 14 Ala. App. 187, 68 So. 801. **Ark.** — *Baker v. Bailey*, 103 Ark. 12, 145 S. W. 532, 39 L. R. A. (N. S.) 1085. **Cal.** — *Southern Pacific Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. 650. **Del.** — *Pusey v. Webb*, 2 Penne. 490, 47 Atl. 701. **Fla.** — *West v. Blackshear & Co.*, 20 Fla. 457. **Ga.** — *MacNabb v. Lockhart*, 18 Ga. 495; *Morel v. Roe*, Charl. 19. **Ill.** — *Gray v. Merriam*, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769; *Skelley v. Kahn*, 17 Ill. 170; *Saunders v. Hartsook*, 85 Ill. App. 55. **Ia.** — *Sherwood v. Home Sav. Bank*, 131 Iowa 528, 109 N. W. 9. **Kan.** — *Filson v. Pacific Express Co.*, 84 Kan. 614, 114 Pac. 863; *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167. **Ky.** — *Green v. Hollingsworth*, 5 Dana 173, 30 Am. Dec. 680; *Dehoney v. Kimball*, 14 Ky. L. Rep. 858. **Me.** — *Storer v. Gowen*, 18 Me. 174. **Mass.** — *Conway Bank v. American Express Co.*, 8 Allen 512; *Whitney v. Lee*, 8 Mete. 91. **Minn.** — *Miller v. Dayton*, 94 Minn. 340, 102 N. W. 862. **Miss.** — *Batesville Gin Co. v. Whitten*, 48 So. 616; *Illinois Cent. R. Co. v. Sims*, 77 Miss. 325, 27 So. 527, 49 L. R. A. 322. **Mo.** — *Corbin v. Gentry & Forsythe Cleaning & Dyeing Co.*, 181 Mo. App. 151, 167 S. W. 1144; *McKenna v. Walker*, 85 Mo. App. 570. **N. Y.** — *Wilson v. Wyckoff*, 133 App. Div. 92, 117 N. Y. Supp. 783; *Bean v. Ford*, 65 Misc. 481, 119 N. Y. Supp. 1074; *Hoffman v. Coughlin*, 26 Misc. 24, 55 N. Y. Supp. 600. **N. C.** — *Ashford v. Pittman*, 160 N. C. 45, 75 S. E. 943; *Rowland v. Jones*, 73 N. C. 52. **Ohio.** — *Griffith v. Zipperwick*, 28 Ohio St. 388. **Pa.** — *Carlisle First Nat. Bank v. Graham*, 79 Pa. 106, 21 Am. Rep. 49; *Lancaster County Nat. Bank v. Smith*, 62

but one inference can be drawn from the evidence.⁵¹ Whether the transaction between the parties was a bailment,⁵² or whether the bailee has been guilty of negligence;⁵³ whether the bailment was gratuitous or not,⁵⁴ or whether there was a special contract between the parties for the care of the bailed property;⁵⁵ whether the bailee has violated the terms of the bailment contract;⁵⁶ whether the bailor by his conduct waived provision of the bailment contract,⁵⁷ or whether the bailment contract was cancelled,⁵⁸ is for the jury, on disputed evidence.

B. ACTIONS AGAINST THIRD PERSONS.—1. **Form of Action.**—a. *Assumpsit*.⁵⁹—An action for money had and received will lie by a bailor against one who has received the bailed property from the bailee and sold it after notice of bailor's title.⁶⁰

b. *Trespass*.⁶¹—Generally a bailor, having neither the actual nor constructive possession of the property, cannot maintain trespass against a wrongdoer.⁶² If, however, the bailment be gratuitous,⁶³ or otherwise one that may be terminated at any time by the bailor,⁶⁴ or

Pa. 47. **S. C.**—Glover v. Burbidge, 27 S. C. 305, 3 S. E. 471. **Tenn.**—Kirtland v. Montgomery, 1 Swan 452. **Tex.**—Fulton v. Alexander, 21 Tex. 148; Haralson v. Hahl, 85 S. W. 1008. **Va.**—Carrington v. Ficklin's Exrs. 32 Gratt. (73 Va.) 670. **W. Va.**—Powell Music Co. v. Parkersburg Transfer & Storage Co., 75 W. Va. 659, 84 S. E. 563.

See the title "Negligence."

51. **Kan.**—Filson v. Pacific Express Co., 84 Kan. 614, 114 Pac. 863. **Mo.**—Wiser v. Chesley, 53 Mo. 547; Mason v. St. Louis Union Stock Yards Co., 60 Mo. App. 93. **N. Y.**—Wamser v. Browning, 187 N. Y. 87, 79 N. E. 861, 10 L. R. A. (N. S.) 314. **Pa.**—See Reading Auto Co. v. DeHaven, 53 Pa. Super. 344. **Vt.**—Briggs v. Taylor, 28 Vt. 180.

52. Porter v. Duncan, 23 Pa. Super. 58.

53. **Ala.**—Cartlidge v. Slone, 124 Ala. 596, 26 So. 918. **Kan.**—Lobenstein v. Prichett, 8 Kan. 213. **N. Y.**—Morris v. Third Ave. R. Co., 1 Daly 202.

54. Kincheloe v. Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117; Mariner v. Smith, 5 Heisk. (Tenn.) 203.

55. Saunders v. Hartsook, 85 Ill. App. 55.

56. Miller v. Dayton, 94 Minn. 340, 102 N. W. 862; Sharpless v. Zelle, 37 Pa. Super. 102.

57. Gafford v. Globe Transfer & S. Co., 71 Wash. 204, 128 Pac. 228, for the jury whether a bailor's failure to remove goods amounted to a waiver

of a special agreement whereby a warehouseman agreed to store goods on the fourth floor of a building, where the bailor, observing them on the first floor, told the manager that the goods were not stored according to agreement, and protested that the first floor was not a good place to store them.

58. Cox v. Burdett, 23 Pa. Super. 346.

59. *Assumpsit* generally see the title "Assumpsit."

60. Kaminski v. Schefer, 46 App. Div. 170, 61 N. Y. Supp. 771.

61. See the title "Trespass."

62. **Cal.**—Triscony v. Orr, 49 Cal. 612. **Ky.**—Lexington & O. R. Co. v. Kidd, 7 Dana 245. **N. H.**—Wilson v. Martin, 40 N. H. 88. **Vt.**—Swift v. Moseley, 10 Vt. 208, 33 Am. Dec. 197 (where he has parted with property for a definite period); Soper v. Sumner, 5 Vt. 274.

See Enos v. Cole, 53 Wis. 235, 10 N. W. 377. But see Ely v. Ehle, 3 N. Y. 506, that owner is in constructive possession of goods held by his bailee within the rule that one whose chattel is tortiously taken from his actual or constructive possession may at his election bring trespass or replevin.

63. Walker v. Wilkinson, 35 Ala. 725, 76 Am. Dec. 315.

64. **Ala.**—Walker v. Wilkinson, 35 Ala. 725, 76 Am. Dec. 315. **Ky.**—Lexington & O. R. Co. v. Kidd, 7 Dana 245. **N. Y.**—Orser v. Storms, 9 Cow. 687, 18 Am. Dec. 543.

has been determined by some act of the bailee,⁶⁵ he may do so. A bailee of chattels may maintain trespass for the taking of them, against a stranger.⁶⁶

c. *Case*.⁶⁷ — Where there is a permanent injury to the chattel, the owner may maintain an action of case against the wrongdoer,⁶⁸ and a bailee may maintain case against one injuring the bailed property.⁶⁹

d. *Trover and Conversion*.⁷⁰ — During the continuance of the bailment the bailor cannot maintain the action of trover as he has neither the possession nor the right of possession,⁷¹ but if the bailment has

65. **Me.**—Sibley *v.* Brown, 15 Me. 185. **Mass.**—Stanley *v.* Gaylord, 1 Cush. 536, 48 Am. Dec. 643, unauthorized mortgage of property may sue mortgagee in trespass. **Mo.**—Moore *v.* Simms, 47 Mo. App. 182, conversion by bailee. **Vt.**—Swift *v.* Moseley, 10 Vt. 208, 33 Am. Dec. 197.

66. **U. S.**—United States *v.* Atlantic Coast Line R. Co., 206 Fed. 190. **Ala.**—Hare *v.* Fuller, 7 Ala. 717. **Me.**—Little *v.* Fossett, 34 Me. 545, 56 Am. Dec. 671. **Mass.**—Cowing *v.* Snow, 11 Mass. 415. **N. J.**—Outcalt *v.* Durling, 25 N. J. L. 413. **N. Y.**—Bass *v.* Pierce, 16 Barb. 595; Neff *v.* Thompson, 8 Barb. 213; Brownell *v.* Carnley, 3 Duer 9. **S. C.**—Jones *v.* McNeil, 2 Bailey 466. **Vt.**—Burdiet *v.* Murray, 3 Vt. 302, 21 Am. Dec. 588.

67. Action on case generally see the title, "**Case, The Action of Trespass on The.**"

68. **Conn.**—Palmer *v.* Mayo, 80 Conn. 353, 68 Atl. 369, 125 Am. St. Rep. 123, 15 L. R. A. (N. S.) 428, 12 Ann. Cas. 691. **Ky.**—Hawkins *v.* Pythian, 8 B. Mon. 515; Lexington & O. R. Co. *v.* Kidd, 7 Dana 245. **N. H.**—Howard *v.* Farr, 18 N. H. 457. **N. J.**—New York, L. E. & W. R. Co. *v.* New Jersey etc. Co., 60 N. J. L. 338, 38 Atl. 828. **N. Y.**—Baird *v.* Daly, 57 N. Y. 236, 15 Am. Rep. 488. **N. C.**—White *v.* Griffin, 49 N. C. 139. **Eng.**—Mears *v.* London & S. W. Ry. Co., 11 C. B. (N. S.) 850, 103 E. C. L. 850, 142 Eng. Reprint, 1029.

69. **U. S.**—Knight *v.* Davis Carriage Co., 71 Fed. 662, 18 C. C. A. 287, 30 U. S. App. 664; Cornell Steamboat Co. *v.* The Jersey City, 51 Fed. 327, 2 C. C. A. 365; United States *v.* Vermilye, 10 Blatchf. 280, 28 Fed. Cas. No. 16,618; Hovey *v.* The Sarah E. Brown, 12 Fed. Cas. No. 6,744. **Ala.**—Hare *v.* Fuller, 7 Ala. 717; Cox *v.* Easley, 11 Ala. 362. **Ark.**—Chamblee *v.* McKenzie, 31 Ark. 155. **Cal.**—Bode

v. Lee, 102 Cal. 583, 36 Pac. 936. **Conn.**—Gillette *v.* Goodspeed, 69 Conn. 363, 37 Atl. 973. **Fla.**—Atlantic Coast Line R. Co. *v.* Partridge, 58 Fla. 153, 50 So. 634. **Ill.**—Walsh *v.* United States Tent, etc. Co., 153 Ill. App. 229; McGraw *v.* Patterson, 47 Ill. App. 87. **Ia.**—Allen *v.* Barrett, 100 Iowa 16, 16 N. W. 272. **Ky.**—Lexington & O. R. Co. *v.* Kidd, 7 Dana 245. **Me.**—Morgan *v.* Portland Steam Packet Co., 35 Me. 55. **Md.**—American District Tel. Co. *v.* Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479. **Mass.**—Bowen *v.* New York, etc. R. Co., 202 Mass. 263, 88 N. E. 781; Way *v.* Davidson, 12 Gray 465, 74 Am. Dec. 604. **Mich.**—Mizner *v.* Frazier, 40 Mich. 592, 29 Am. Rep. 562. **Minn.**—Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114. **Miss.**—Baggett *v.* McCormack, 73 Miss. 552, 19 So. 89, 55 Am. St. Rep. 554. **Mo.**—American Storage & Moving Co. *v.* St. Louis Transit Co., 120 Mo. App. 410, 97 S. W. 184. **Neb.**—Union Pac. Ry. Co. *v.* Meyer, 76 Neb. 549, 107 N. W. 793, 14 Ann. Cas. 634. **N. H.**—Dumas *v.* Hampton, 58 N. H. 134. **N. Y.**—Abrahamovitz *v.* New York City R. Co., 104 N. Y. Supp. 663; Harrison *v.* Marshall, 4 E. D. Smith 271. **N. C.**—Hopper *v.* Miller, 76 N. C. 402. **Pa.**—Lyle *v.* Barker, 5 Binn. 457. **S. C.**—Jones *v.* McNeil, 2 Bailey 466. **Vt.**—Wilder *v.* Stafford, 30 Vt. 399. **Eng.**—Armory *v.* Delamirie, 1 Stra. 505, 93 Eng. Reprint 664; Rooth *v.* Wilson, 1 B. & Ald. 59, 106 Eng. Reprint 22; Burton *v.* Hughes, 2 Bing. 173, 9 E. C. L. 533, 130 Eng. Reprint 272. **Can.**—Mason *v.* Morgan, 24 U. C. Q. B. 328; Irving *v.* Hagerman, 22 U. C. Q. B. 545.

70. See the title "**Trover and Conversion.**"

71. **Cal.**—Triseony *v.* Orr, 49 Cal. 612. **N. J.**—New York, L. E. & W. R. Co. *v.* New Jersey, etc. R. Co., 60 N. J. L. 338, 38 Atl. 828. **N. C.**—An-

been terminated by some act of the bailee he may do so.⁷² A bailee who has been dispossessed by a third person may maintain trover.⁷³

e. *Replevin and Detinue*.⁷⁴ — Replevin cannot generally be brought by a bailor as he has not an immediate right of possession.⁷⁵ The same is true as to detinue.⁷⁶ But where the bailment was gratuitous, or has been terminated by an act on the part of the bailee,⁷⁷ the rule is the contrary. A bailee may bring replevin,⁷⁸ or detinue,⁷⁹ against a stranger who tortiously takes or retains the property.

2. **Parties**.⁸⁰ — The bailee need not join the bailor as a party plaintiff in a suit against one injuring the bailed property.⁸¹ A bailor cannot join as defendants the bailee and a third person, the former for breach of his contract and the latter for a tort, affecting the bailed property.⁸²

3. **Pleadings**. — A bailee in suing a stranger for injury to the

draws *v. Shaw*, 15 N. C. 70. **Tenn.** *Caldwell v. Cowan*, 9 Yerg. 262. **Vt.** *Swift v. Moseley*, 10 Vt. 208, 33 Am. Dec. 197. **Eng.**—*Gordon v. Harper*, 7 T. Rep. 9, 101 Eng. Reprint 828.

72. **Ala.**—*Abererombie v. Bradford*, 16 Ala. 560. **Mass.**—*H. A. Prentice Co. v. Page*, 164 Mass. 276, 41 N. E. 279. **N. H.**—*Sargent v. Gile*, 8 N. H. 325. **Pa.**—*Lewis v. Shortledge*, 1 W. N. C. 507. **Vt.**—*Thrall v. Lathrop*, 30 Vt. 307, 73 Am. Dec. 306; *Swift v. Moseley*, 10 Vt. 208, 33 Am. Dec. 197.

73. **U. S.**—*United States v. Atlantic Coast Line R. Co.*, 206 Fed. 190. **Mass.**—*Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137. **N. J.**—*Warren v. Finn*, 84 N. J. L. 206, 86 Atl. 530. **N. Y.**—*Bowen v. Fenner*, 40 Barb. 383. **N. C.**—*Hopper v. Miller*, 76 N. C. 402.

[a] "The reason why the bailee is entitled to recover full damages against one who converts the property bailed is that he is bound to restore the property to the general owner or stand responsible to him for the full value." *United States v. Atlantic Coast Line R. Co.*, 206 Fed. 190.

74. See the titles "*Detinue*;" "*Replevin*."

75. **Me.**—*Wyman v. Dorr*, 3 Greenl. 183. **Mass.**—*Collins v. Evans*, 15 Pick. 63; *Wheeler v. Train*, 3 Pick. 255. **Mich.**—*Hunt v. Strew*, 33 Mich. 85. See also *Warren v. Gutches*, 71 Mich. 407, 39 N. W. 476. **N. J.**—*New York, L. E. & W. R. Co. v. New Jersey*, etc. R. Co., 60 N. J. L. 338, 38 Atl. 828. **N. Y.**—*Marshall v. Davis*, 1 Wend. 109, 19 Am. Dec. 463.

76. *Sims v. Boynton*, 32 Ala. 353,

70 Am. Dec. 540. But see *Sims v. Boynton*, 32 Ala. 353, 70 Am. Dec. 540, that if the bailee of a hired slave is deprived of his possession during the term by a third person, and thereupon notifies his bailor that he declines to sue for his recovery, and requests the latter to sue, the bailor may maintain detinue for the slave against such third person, without waiting for the termination of the bailment.

77. **Ind.**—*Lucas v. Rader*, 29 Ind. App. 287, 64 N. E. 488. **Me.**—*Small v. Hutchins*, 19 Me. 255; *Emerson v. Fisk*, 6 Greenl. 200, 19 Am. Dec. 206. **Mass.**—*Bemis v. De Land*, 177 Mass. 182, 58 N. E. 684. **Mich.**—*Dunlap v. Gleason*, 16 Mich. 158, 93 Am. Dec. 231. **N. H.**—*Partridge v. Philbrick*, 60 N. H. 556. **N. Y.**—*Ely v. Ehle*, 3 N. Y. 506. **Pa.**—*Collins v. Bellefonte Cent. R. Co.*, 171 Pa. 243, 33 Atl. 331; *Barnett v. Fein*, 41 Pa. Super. 423.

78. **Mich.**—*West Michigan Sav. Bank v. Howard*, 52 Mich. 423, 18 N. W. 199. **Mo.**—*Sowden v. Kessler*, 76 Mo. App. 581. **N. D.**—*Smith v. Willoughby*, 24 N. D. 1, 138 N. W. 7. **Pa.**—*Mead v. Kilday*, 2 Watts 110.

79. **U. S.**—*Knight v. Davis Carriage Co.*, 71 Fed. 662, 18 C. C. A. 287, 30 U. S. App. 664. **Ala.**—*Noles v. Marable*, 50 Ala. 366. See also *Traylor v. Marshall*, 11 Ala. 458. **Va.** *Boyle v. Townes*, 9 Leigh (36 Va.) 158.

80. See the title "*Parties*."

81. *Chicago v. Pennsylvania Co.*, 119 Fed. 497, 57 C. C. A. 509.

82. *Hackney v. Perry*, 152 Ala. 626, 44 So. 1029.

chattel should allege facts showing his interest in the property.⁸³

C. ACTIONS BY THIRD PERSONS. — Trover is a proper action for the true owner of the property to maintain against a bailee who has converted the property,⁸⁴ or detainee may be brought to recover the property.⁸⁵ One from whom goods have been wrongfully taken need not pay or tender storage charges of a bailee to whom the goods were delivered by the wrongdoer, as a condition precedent to maintaining an action.⁸⁶

III. REMEDIES OF OWNER OR FINDER OF LOST GOODS.

A. OF OWNER. — The true owner may recover the goods from the finder by replevin,⁸⁷ or sue in trover for their conversion where the finder refuses to return them,⁸⁸ or if the finder refuse to return the goods on demand, the owner may waive the tort and sue in assumpsit.⁸⁹

B. OF FINDER. — The finder of goods may maintain trover,⁹⁰ or replevin,⁹¹ against anyone, except the true owner, depriving him of the possession of the goods.

IV. RELIEF FOR INFRINGEMENT OF LITERARY PROPERTY.

A. UNAUTHORIZED PUBLICATION OF MANUSCRIPT. — The author of unpublished manuscript may bring case for damages against one publishing the same without authority,⁹² or may proceed in equity to have the publication enjoined,⁹³ and for an accounting of the prof-

83. *Mizner v. Frazier*, 40 Mich. 592, 29 Am. Rep. 562, alleging that bailed property was "then and there lawfully used and driven by" the plaintiff imports that plaintiff was a bailee and is sufficient in the absence of demurrer.

84. *Ala.*—*Blair v. Riddle*, 3 Ala. App. 292, 57 So. 382, one to whom bailor has transferred his right may bring trover. *N. C.*—*Smith v. Durham*, 127 N. C. 417, 37 S. E. 473. *Tex.* *Kirkpatrick v. San Angelo Nat. Bank* (Tex. Civ. App.) 148 S. W. 362, may sue bailee and bailor, jointly and severally.

85. *Hunter v. Sevier*, 7 Yerg. (Tenn.) 127.

[a] A demand is necessary before one to whom property has been bailed by the apparent owner can be sued in detainee by the true owner. *Hunter v. Sevier*, 7 Yerg. (Tenn.) 127.

86. *Florence Sewing Machine Co. v. Warford*, 1 Sweeney (N. Y.) 433.

87. *Tome v. Four Cribs of Lumber, Taney* 533, 24 Fed. Cas. No. 14,083.

88. *Wood v. Pierson*, 45 Mich. 313, 7 N. W. 888.

89. *Rittenhouse v. Knoop*, 9 Ind. App. 126, 36 N. E. 384.

90. *Del.*—*Clark v. Maloney*, 3 Harr. 68. *Me.*—*Weeks v. Hackett*, 104 Me.

264, 71 Atl. 858, 129 Am. St. Rep. 390, 19 L. R. A. (N. S.) 1201. *Mo.*—*Hoagland v. Forest Park Highlands Amusement Co.*, 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740. *N. Y.*—*Mathews v. Harsell*, 1 E. D. Smith 393. *Ore.* *Robertson v. Ellis*, 58 Ore. 219, 114 Pac. 100, 35 L. R. A. (N. S.) 979.

[a] Action by Joint Finders Against Each Other.—*Weeks v. Hackett*, 104 Me. 264, 71 Atl. 858, 129 Am. St. Rep. 390, 19 L. R. A. (N. S.) 1201.

91. *Hamaker v. Blanchard*, 90 Pa. 377, 35 Am. Rep. 664. See also *Tancil v. Seaton*, 28 Gratt. (69 Va.) 601, 26 Am. Rep. 380.

92. *Press Pub. Co. v. Monroe*, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353.

93. *Goldmark v. Kreling*, 35 Fed. 661, 13 Sawy. 310; *Goldmark v. Kreling*, 25 Fed. 349; *Keene v. Wheatley*, 4 Phila. 157, 14 Fed. Cas. No. 7,644; *Folsom v. Marsh*, 2 Story 100, 9 Fed. Cas. No. 4,901; *Crowe v. Aiken*, 2 Biss. 208, 6 Fed. Cas. No. 3,441, 4 Am. Law Rev. 450; *Boucicault v. Hart*, 13 Blatchf. 47, 3 Fed. Cas. No. 1,692; *Boucicault v. Wood*, 2 Biss. 34, 3 Fed. Cas. No. 1,693; *Bartlett v. Crittenden*, 5 McLean 32, 2 Fed. Cas. No. 1,076. *N. J.*—*Aronson v. Baker*, 43 N. J. Eq. 365, 12 Atl. 177. *N. Y.*—*Jones v. Thorne*, 1 N. Y. Leg. Obs. 408. *Eng.*

its.⁹⁴ Trover has been said to be the proper remedy for conversion of literary property.⁹⁵ An employe who takes and publishes his employer's manuscript will be restrained,⁹⁶ as will third persons who secure the works from them with knowledge of the breach of trust.⁹⁷

B. OTHER INFRINGEMENT. — Where one has successfully produced on the stage a play under a certain title, the use of such title for a dissimilar moving picture will be restrained.⁹⁸ And one news agency may restrain another agency from appropriating and publishing news gathered by it.⁹⁹

V. RELIEF FOR VIOLATION OF PRIVACY. — **A. PUBLICATION OF PHOTOGRAPHS.** — The publication of a photograph of either a living or deceased person will not be enjoined by equity so long as there is no breach of trust or contract and it is not libelous.¹ The destruction of photographs of inmates of a reformatory kept under authority of

Macklin v. Richardson, Ambl. 694, 27 Eng. Reprint 451.

[a] **Assignee of author** will be protected to the same ends. *Crowe v. Aiken*, 2 Biss. 208, 6 Fed. Cas. No. 3441, 4 Am. Law Rev. 450.

[b] **Presentation of opera not copyrighted**, by one not authorized, may be enjoined by owner thereof on giving security. *Goldmark v. Kreling*, 25 Fed. 349.

94. *French v. Kreling*, 63 Fed. 621, opera produced without authority of the author; *Macklin v. Richardson*, Ambl. 694, 27 Eng. Reprint 451.

95. *Stover v. Lathrop*, 33 Fed. 348.

96. *Lamb v. Evans*, 1 Ch. (1893) 218, 62 L. J. Ch. 404, 68 L. T. N. S. 131, 2 Report 189, 41 Wkly. Rep. 405; *Merryweather v. Moore*, 2 Ch. (1892) 518, 61 L. J. Ch. 505, 66 L. T. N. S. 719, 40 Wkly. Rep. 540; *Prince Albert v. Strange*, 2 De G. & Sm. 652, 13 Jur. 507, 64 Eng. Reprint 293; *Reuter's Telegram Co. v. Byron*, 43 L. J. Ch. 661; *Louis v. Smellie*, 73 L. T. N. S. 226.

97. *Abernathy v. Hutchinson*, 1 Hall & Tw. 28, 3 L. J. Ch. (O. S.) 209, 47 Eng. Reprint 1313; *Prince Albert v. Strange*, 2 De G. & Sm. 652, 13 Jur. 507, 64 Eng. Reprint 293; *Exchange Tel. Co. v. Gregory*, 1 Q. B. (1896) 147, 60 J. P. 52, 65 L. J. Q. B. 262, 74 L. T. N. S. 83; *Exchange Tel. Co. v. Central News*, 2 Ch. (1897) 48, 66 L. J. Ch. 672, 76 L. T. N. S. 591, 45 Wkly. Rep. 595.

98. *Dickey v. Metro Pictures Corp.*, 164 N. Y. Supp. 788; *Klaw v. General Film Co.*, 154 N. Y. Supp. 988.

99. *Associated Press v. International News Service*, 240 Fed. 983.

1. *Mich.*—*Atkinson v. Doherty & Co.*, 121 Mich. 372, 80 N. W. 285, 80 Am. St. Rep. 507, 46 L. R. A. 219. **N. Y.** *Roberson v. Rochester Folding-Box Co.*, 171 N. Y. 538, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478; *Owen v. Partridge*, 40 Misc. 415, 82 N. Y. Supp. 248; *Murray v. Gast Lith., etc. Co.*, 8 Misc. 36, 28 N. Y. Supp. 271, 31 Abb. N. Cas. 266, 58 N. Y. St. 811. See *Marks v. Jaffa*, 6 Misc. 290, 26 N. Y. Supp. 908, where plaintiff was granted injunction to restrain publication of photograph in newspaper popularity contest without his consent. Under recent statute, see *Binns v. Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108, Ann. Cas. 1915B, 1024, L. R. A. 1915C, 839.

Contra, see *Munden v. Harris*, 153 Mo. App. 652, 134 S. W. 1076.

[a] **An injunction will be granted** against a photographer who publishes a photograph taken in the regular course of business. *Pollard v. Photographic Co.*, 40 Ch. D. 345, 58 L. J. Ch. 251, 60 L. T. N. S. 418, 37 Wkly. Rep. 266; *Monson v. Tussands*, 1 Q. B. 671, 58 J. P. 524, 63 L. J. Q. B. 454, 70 L. T. Rep. N. S. 335, 9 Reports 177; *Du Bost v. Beresford*, 2 Camp. 511 (where it was held that a libelous picture was not a work of art, and the only damages to be recovered for its destruction are the value of the paint and canvas alone); *Corliss v. E. W. Walker Co.*, 64 Fed. 280, 31 L. R. A. 283, 57 Fed. 434, holding that a private individual may enjoin the publication of his portrait, but a public character cannot in the absence of breach of contract or violation of con-

law will not be compelled by injunction,² nor will officers be restrained from sending them to other police officers of the state.³ However, the taking and circulation of the photograph of one merely suspected of crime, when not necessary to identify him or detect crime, will be enjoined.⁴

B. OTHER VIOLATIONS OF PRIVACY. — Equity will not restrain the publication of a biography of a public character,⁵ or the making and exhibition of a statue of a deceased person,⁶ or the use of a family name where trade rights are not involved.⁷

fidence in securing the photograph from which the publication is made.

2. *Hodgeman v. Olsen*, 86 Wash. 615, 150 Pac. 1122, L. R. A. 1916A. 739, even after convict has been pardoned.

3. *Hodgeman v. Olsen*, 86 Wash. 615, 150 Pac. 1122, L. R. A. 1916A. 739, though convict has been pardoned.

4. *Schulman v. Whitaker*, 117 La. 704, 42 So. 227, 7 L. R. A. (N. S.) 274; *Itzkovitch v. Whitaker*, 117 La. 708, 42 So. 228, 116 Am. St. Rep. 215.

5. *Corliss v. E. W. Walker Co.*, 64

Fed. 280, 31 L. R. A. 283, 57 Fed. 434.

6. *Schuyler v. Curtis*, 147 N. Y. 434, 42 N. E. 22, 49 Am. St. Rep. 671, 31 L. R. A. 286.

7. *Du Boulay v. Du Boulay*, L. R. 2 P. C. 430, 38 L. J. P. C. 35, 6 Moore P. C. (N. S.) 31, 17 Wkly. Rep. 594.

[a] **Unauthorized use of one's name for business purposes** will be enjoined. **U. S.**—*Edison v. Continental Chemical Co.*, 220 Fed. 398. **N. J.**—*Edison v. Edison P. & Mfg. Co.*, 73 N. J. Eq. 136, 67 Atl. 392. **N. Y.**—*Thompson v. Tillford*, 152 App. Div. 928, 137 N. Y. Supp. 523; *Ellis v. Hurst*, 66 Misc. 235, 121 N. Y. Supp. 438.

PERSONAL SERVICE. — See **Service of Process and Papers.**

Vol. XXI

PETITIONS

By the Editorial Staff.

I. DEFINITION AND DISTINCTIONS, 349

II. USE OF PETITIONS, 350

A. *Generally*, 350

B. *In Specific Actions and Proceedings*, 350

III. FORM AND REQUISITE, 350

A. *In General*, 350

B. *Verification*, 351

IV. AMENDMENT OF, 351

V. NOTICE OF PETITION AND HEARING THEREON, 351

CROSS-REFERENCES:

Bills and Answers; Motions;
Declaration and Complaint; Verification.

For forms, see 9 STANDARD PROC. 966, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION AND DISTINCTIONS. — A petition is defined as an instrument in writing containing a prayer from the party presenting it, called the petitioner, to some body or court for the redress of some wrong or the granting of some favor, which the latter has the right to give.¹ It is distinguished from a motion in that it is an application to the court in writing, whereas a motion may be made *viva voce*;² but there does not appear to be any exact line of demarcation between the matters that should be presented by motion and those where a petition should be used.³

1. *Eustis v. Holmes*, 48 Miss. 34, quoting Bouvier's Law Dict.

2. *Bergen v. Jones*, 4 Metc. (Mass.) 371; *Shaft v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 544, 23 Am. Rep. 138. See generally the title "**Motions.**"

3. *State Bank v. First Nat. Bank*, 34 N. J. Eq. 450.

[a] A petition in many respects very nearly resembles a motion, and there seems to be no precise or positive boundaries between them. But petitions are usually resorted to when a fuller statement is required than can be conveniently contained in a notice of a motion. *Hill v. Richards*,

II. USE OF PETITIONS.—A. **GENERALLY.**—Petitions are generally used for matters ancillary and incidental to a pending judicial proceeding,⁴ or in a matter over which the court has jurisdiction by some act of the legislature or other special authority.⁵ A petition is sometimes used to commence suits or proceedings in lieu of a declaration or complaint;⁶ and, where such is the case, matter pertaining to such a petition is treated elsewhere in this work.⁷

B. **IN SPECIFIC ACTIONS AND PROCEEDINGS.**—The treatment of matters as to a petition for an alternative writ of mandamus;⁸ for a writ of certiorari;⁹ for an interpleader;¹⁰ for a writ of prohibition;¹¹ for the appointment of a receiver and matters pertaining to receivership;¹² in bankruptcy proceedings;¹³ in insolvency proceedings;¹⁴ in partition proceedings;¹⁵ of intervention;¹⁶ for appointment of a guardian;¹⁷ removal of guardian;¹⁸ as an application for writ of habeas corpus;¹⁹ for allotment of a homestead;²⁰ in juvenile proceedings;²¹ to sell property of an infant;²² for removal of a cause from a state to a federal court;²³ and other specific matters will be found elsewhere in this work.²⁴

III. FORM AND REQUISITES.—A. **IN GENERAL.**²⁵—A petition must be in writing,²⁶ contain the name of the person²⁷ presenting

11 Smed. & M. (Miss.) 194; *Shipbrooke v. Hinchinbrook*, 13 Ves. Jr. 387, 33 Eng. Reprint, 339.

4. **U. S.**—*Maitland v. Gibson*, 79 Fed. 136. **Ala.**—*Renfro Bros. v. Goetter*, Weil & Co., 78 Ala. 311, proper for some order or direction in a pending suit, touching the matter in controversy, or preliminary to the preparation of the cause. **Miss.**—*Hill v. Richards*, 11 Smed. & M. 194. **N. J.**—*State Bank v. First Nat. Bank*, 34 N. J. Eq. 450, ordinarily used for interlocutory purposes. **N. Y.**—*Codwise v. Gelston*, 10 Johns. 507, 521, whether a party is entitled to relief by petition, or must apply by bill, depends on circumstances and the discretion of the chancellor; where the petition is upon some collateral matter which has reference to a suit in court, he may be relieved on petition.

5. **Mich.**—*Southern Michigan Nat. Bank v. Byles*, 67 Mich. 296, 34 N. W. 702, quoting 1 Barb. Ch. Pr. 578. **Miss.**—*Hill v. Richards*, 11 Smed. & M. 194. **N. Y.**—*Livingston's Petition*, 34 N. Y. 555, 2 Abb. Pr. N. S. 1, where under statute any person interested in the execution of an express trust might apply for the removal of the trustee on petition.

6. *Majors v. McNeilly*, 7 Heisk. (Tenn.) 294, suit in equity may be commenced in Tennessee by bill or by petition.

7. See the title "**Declaration and Complaint.**"

8. See the title "**Mandamus.**"

9. See the title "**Certiorari.**"

10. See the title "**Interpleader.**"

11. See the title "**Prohibition.**"

12. See the title "**Receivers.**"

13. See the title "**Bankruptcy Proceedings.**"

14. See the title "**Insolvency.**"

15. See the title "**Partition.**"

16. See the title "**Intervention.**"

17. **Guardian ad litem**, see 10 STANDARD PROC. 733.

Guardian for ward, see 10 STANDARD PROC. 784.

18. See 10 STANDARD PROC. 812.

19. See 10 STANDARD PROC. 920.

20. See 11 STANDARD PROC. 319, 354.

21. See 12 STANDARD PROC. 864.

22. See 12 STANDARD PROC. 815, 818.

Mortgaging infant's property, see 12 STANDARD PROC. 858.

23. See the title "**Removal of Causes.**"

24. See generally the index to this work.

25. **Form of petition**, see 9 STANDARD PROC. 968.

26. *Eustis v. Holmes*, 48 Miss. 34.

27. *Glazbrook v. Gillatt*, 9 Beav. 492, 50 Eng. Reprint 434, also his address where he is not a party to the suit.

it, and be signed by him.²⁸ A petition in a pending proceeding should be entitled in that proceeding,²⁹ and should not present new questions and claims not involved in the original cause.³⁰ Scandalous and impertinent matter in a petition will be stricken out on motion.³¹

B. VERIFICATION. — A petition must generally be verified.³²

IV. AMENDMENT OF. — A petition may generally be amended.³³

V. NOTICE OF PETITION AND HEARING THEREON.

Where the adverse party is entitled to be heard, notice of the petition should be given him;³⁴ and petitions for relief in a cause against new parties must have process against such new parties to affect them.³⁵ The usual practice is to have a day fixed for the hearing of the petition and serve a copy thereof together with a notice of the day of hearing on the adverse party.³⁶ Affidavits are presented by the parties in respect to the matters set forth in the petition and the petition is heard on these affidavits.³⁷

28. *Hathaway v. Scott*, 11 Paige (N. Y.) 173. See also *Swan v. Newman*, 3 Head (Tenn.) 288, holding that it is not essential to the validity of either a bill or petition that the complainants should sign them; it is sufficient if their names appear in the body or caption of them.

29. See *Stafford v. Brown*, 4 Paige (N. Y.) 360.

[a] A petition relating to two suits should be entitled in both causes. *Knight v. Knight*, 25 L. J. Ch. (Eng.) 848, 4 Wkly. Rep. 771.

Form of caption to petition, see 9 STANDARD PROC. 968.

30. *Renfro Bros. v. Goetter, Weil & Co.*, 78 Ala. 311; *Cowles v. Andrews*, 39 Ala. 125.

31. *Toler v. East Tennessee, etc.*, R. Co., 67 Fed. 168; *King v. Sea Ins. Co.*, 26 Wend. (N. Y.) 62. See generally the title "Surplusage and Scandal."

32. *Bull v. Pyle*, 41 Md. 419; *Shaft v. Phoenix Mutual Life Ins. Co.*, 67 N. Y. 544, 23 Am. Rep. 138; *Matter of Christie*, 5 Paige (N. Y.) 242. See

generally the title "Verification."

Form of verification of petition, see 9 STANDARD PROC. 968.

33. *In re Westbrook's Trusts*, L. R. 11 Eq. (Eng.) 252. See 1 STANDARD PROC. 849.

34. Ala.—*Thornton v. Highland Ave., etc.*, R. Co., 94 Ala. 353, 10 So. 442. N. J.—*Long Branch & S. S. R. Co. v. Sneden*, 26 N. J. Eq. 539. N. Y.—*Isnard v. Cazeaux*, 1 Paige 39. Pa.—*Gibbon's Appeal*, 104 Pa. 587. Tenn.—*Majors v. McNeilly*, 7 Heisk. 294.

[a] If the adverse party appears and answers the petition, notice is dispensed with. *Weaver v. Cooper*, 73 Ala. 318.

35. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Morgan v. Morgan*, 42 W. Va. 542, 26 S. E. 294. See generally the title "Process."

36. *Crane v. Brigham*, 11 N. J. Eq. 29; *Gibbon's Appeal*, 104 Pa. 587.

37. *Crane v. Brigham*, 11 N. J. Eq. 29, petition itself is no evidence of the facts stated therein; matters presented by the petition are heard upon affidavits and upon them only.

PETITORY ACTIONS. — See Real and Mixed Actions; Title.

PHILIPPINE ISLANDS. — See States and Territories.

PHYSICAL EXAMINATION

By the Editorial Staff.

I. VOLUNTARY EXAMINATION, 353

II. COMPULSORY EXAMINATION, 353

- A. *Power of Court Respecting*, 353
 - 1. *Criminal Cases*, 353
 - 2. *Civil Cases*, 353
 - a. *Involving Impotency*, 353
 - b. *Personal Injury Cases*, 353
 - 3. *Jurisdiction at Chambers*, 356
- B. *Procedure To Obtain Examination*, 356
 - 1. *Motion or Petition*, 356
 - a. *Court of Its Own Motion*, 356
 - b. *Application of Party*, 356
 - (I.) *In General*, 356
 - (II.) *Time To Make*, 356
 - (III.) *Form and Sufficiency*, 357
 - (IV.) *Affidavits*, 358
 - (V.) *Hearing*, 358
 - 2. *Order of Court*, 358
 - a. *In General*, 358
 - b. *Form and Contents*, 358
 - c. *Service of Order*, 359
 - d. *Modifying and Vacating*, 359
 - e. *Review on Appeal*, 359
 - (I.) *In General*, 359
 - (II.) *Extent of Review*, 359
 - 3. *Renewal of Motion*, 360
 - 4. *Enforcement of Order*, 360
- C. *The Examiners*, 361
- D. *The Examination*, 362
 - 1. *Generally*, 362
 - 2. *Time for*, 363
 - 3. *Place of*, 363
 - 4. *Report by Examiner*, 363
- E. *Expense of Examination*, 363
- F. *Instructions to Jury*, 364

CROSS-REFERENCES:

See the *ENCYCLOPÆDIA OF EVIDENCE*, title "Physical Examination."

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. VOLUNTARY EXAMINATION. — A party's right, in a proper case, to submit voluntarily to a physical examination, is of course unquestioned,¹ such examinations, however, concern procedural law only in so far as they limit or otherwise affect the compulsory examination of which this article treats.²

II. COMPULSORY EXAMINATION. — A. **POWER OF COURT RESPECTING.** — 1. **Criminal Cases.** — The rule of criminal law that a party cannot be compelled to be a witness against himself negatives any right to compel an examination of his person in such cases,³ unless he has waived his privilege.⁴ It seems, however, that in some jurisdictions, though not in others, the court may, under some circumstances compel a prosecuting witness to submit to physical examination.⁵

2. **Civil Cases.** — a. *Involving Impotency.* — In a certain class of civil cases such as divorce,⁶ annulment of marriage,⁷ and the like, involving the question of impotency, the power of the court to order a physical examination of the parties has perhaps never been questioned.

b. *Personal Injury Cases.* — Concerning the right to order a physical examination in personal injury cases, the authorities are in conflict. The power is recognized, however, in the majority of jurisdictions, having its source either in statutory enactment,⁸ or in the inherent⁹

1. Hall v. Manson, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207; Schroeder v. Chicago, R. I. & P. R. Co., 47 Iowa 375, 378. See ENCY. OF EV., title "Physical Examination."

Private examination by jury, see 9 ENCY. OF EV. 811.

2. See 9 ENCY. OF EV. 799.

3. See 9 ENCY. OF EV. 816 (title "Physical Examination"); 14 ENCY. OF EV. 661.

4. See 9 ENCY. OF EV. 816; 14 ENCY. OF EV. 662.

5. See 9 ENCY. OF EV. 817, title "Physical Examination."

6. See 7 STANDARD PROC. 752; 9 ENCY. OF EV. 791.

7. See the title "Marriage;" and 9 ENCY. OF EV. 791.

8. Fla.—State *ex rel. Carter v. Call*, 64 Fla. 144, 59 So. 789, 41 L. R. A. (N. S.) 1071. N. J.—*McGovern v. Hope*, 63 N. J. L. 76, 42 Atl. 830. N. Y.—*Lyon v. Manhattan R. Co.*, 142 N. Y. 298, 37 N. E. 113, 25 L. R. A. 402; *Gregory v. Acme Road Machinery Co.*, 175 App. Div. 473, 162 N. Y. Supp. 574; *Goldenberg v. Zirinsky*, 114 App. Div. 827, 100 N. Y. Supp. 251.

[a] A strict construction is given the statutes. *Goldenberg v. Zirinsky*, 114 App. Div. 827, 100 N. Y. Supp. 251. See also State *ex rel. Carter v.*

Call, 64 Fla. 144, 59 So. 789, 41 L. R. A. (N. S.) 1071.

[b] **X-ray examination** (1) in connection with the usual physical examination before trial, not authorized by the statute (*Gregory v. Acme Road Machinery Co.*, 175 App. Div. 473, 162 N. Y. Supp. 574; *Lasher v. S. Bolton's Sons*, 161 App. Div. 381, 146 N. Y. Supp. 321), (2) unless with the consent of the injured party. State *ex rel. Carter v. Call*, 64 Fla. 144, 59 So. 789, 41 L. R. A. (N. S.) 1071.

9. Ala.—*Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442. Ark.—*Louisiana & A. R. Co. v. Woodson*, 127 Ark. 323, 192 S. W. 174; *St. Louis, I. M. & S. Ry. Co. v. Carter*, 93 Ark. 589, 126 S. W. 99; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584. Cal.—*Johnston v. Southern Pac. R. Co.*, 150 Cal. 535, 89 Pac. 348. Colo.—*Western Glass Mfg. Co. v. Schoeninger*, 42 Colo. 357, 94 Pac. 342, 126 Am. St. Rep. 165, 15 L. R. A. (N. S.) 663. Ga.—*Bagwell v. Atlanta Consol. St. Ry. Co.*, 109 Ga. 611, 34 S. E. 1018, 47 L. R. A. 486; *Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808. Ind.—*Kokomo M. & W. Traction Co. v. Walsh*, 58 Ind. App. 182, 108 N. E. 19, 21; *South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep.

powers of the court. The federal tribunals,¹⁰ and those of a number of states,¹¹ deny the courts power in this respect. But even in these

200, 54 L. R. A. 396; *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178. **Ia.**—*Hall v. Manson*, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207. **Kan.**—*Atchison, T. & S. F. Ry. Co. v. Palmore*, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. 90; *Ottawa v. Gilliland*, 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232; *Southern K. Ry. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938. **Ky.** *Stearns Coal & Lumber Co. v. Williams*, 177 Ky. 698, 198 S. W. 54; *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 161 Ky. 205, 170 S. W. 650; *Illinois Cent. R. Co. v. Beeler*, 142 Ky. 772, 135 S. W. 305. **Md.**—*Scheffler v. Lee*, 126 Md. 373, 94 Atl. 907; *United Rys. & Elec. Co. v. Cloman*, 107 Md. 681, 69 Atl. 379. **Mich.**—*Graves v. Battle Creek*, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641. **Minn.** *Rief v. Great Northern R. Co.*, 126 Minn. 430, 148 N. W. 309; *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141; *Wanek v. Winona*, 78 Minn. 98, 80 N. W. 851, 79 Am. St. Rep. 354, 46 L. R. A. 448. **Mo.** *State ex rel. American Mfg. Co. v. Anderson*, 270 Mo. 533, 194 S. W. 268, L. R. A. 1917E, 833; *Sidekum v. Wabash, St. L. & P. Ry. Co.*, 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549; *Shepard v. Missouri Pac. Ry. Co.*, 85 Mo. 629, 55 Am. Rep. 390. **Neb.**—*State ex rel. Parmenter v. Troup*, 98 Neb. 333, 152 N. W. 748, L. R. A. 1915E, 936. See also *Booth v. Andrus*, 91 Neb. 810, 137 N. W. 884; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724. **Nev.**—*Murphy v. Southern Pac. R. Co.*, 31 Nev. 120, 101 Pac. 322. **N. D.**—*Brown v. Chicago, M. & St. P. R. Co.*, 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564. **Ohio.**—*Miami & M. Turnpike Co. v. Baily*, 37 Ohio St. 104. **Pa.**—*Cohen v. Philadelphia Rapid Transit Co.*, 250 Pa. 15, 95 Atl. 315. **Tenn.**—*Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101. **Wash.**—*Just v. Littlefield*, 87 Wash. 299, 151 Pac. 780; *Lane v. Spokane Falls & N. R. Co.*, 21 Wasn. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153. **Wis.**—*O'Brien v. La Crosse*, 99 Wis. 421, 75 N. W. 81.

[a] Analogous to Discovery.—The power of the court in respect to physical examinations is analogous to its

power to compel the discovery of books, papers and documents. *Walsh v. Sayre*, 52 How. Pr. (N. Y.) 334.

10. *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. ed. 734.

[a] Following State Statutes.—(1) The federal courts in a common law action will be governed by the state statutes on the matter. Where state statutes exist empowering the court to order an examination the federal courts will enforce them. *Camden & S. Ry. Co. v. Stetson*, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. ed. 721. (2) In the absence of such statutes the power does not exist (*Brace v. Central R. Co.*, 216 Fed. 718); (3) not even where the courts of the state will, in the exercise of their equitable powers, grant the order. *Brace v. Central R. Co.*, 216 Fed. 718.

[b] Courts of Territory.—*Kingfisher v. Altizer*, 13 Okla. 121, 74 Pac. 107.

11. **Ill.**—*Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *Carden v. Chicago Rys. Co.*, 183 Ill. App. 168; *Schuerger v. City Water Co.*, 183 Ill. App. 469. **La.**—*Kennedy v. New Orleans Ry. & Light Co.*, 77 So. 777. **Mass.**—*Stack v. New York, N. H. & H. R. Co.*, 177 Mass. 155, 58 N. E. 686, 83 Am. St. Rep. 269, 52 L. R. A. 328. **Miss.**—*Gentry v. Gulf & S. I. R. Co.*, 109 Miss. 66, 67 So. 849; *Yazoo & M. V. R. Co. v. Robinson*, 107 Miss. 192, 65 So. 241. **Mont.**—*May v. Northern Pac. R. Co.*, 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111. **Okla.**—*Atchison, T. & S. F. Ry. Co. v. Melson*, 40 Okla. 1, 134 Pac. 388, Ann. Cas. 1915D, 760; *Chicago, R. I. & P. Ry. Co. v. Hill*, 36 Okla. 540, 129 Pac. 13, 43 L. R. A. (N. S.) 622. **S. C.**—*Brackett v. Southern Ry.*, 88 S. C. 447, 70 S. E. 1026, Ann. Cas. 1912C, 1212; *Best v. Columbia S. Ry. L. & P. Co.*, 85 S. C. 422, 67 S. E. 1. **Utah.**—*Sharp v. Ogden Rapid Transit Co.*, 48 Utah 481, 160 Pac. 438; *Larson v. Salt Lake City*, 34 Utah 318, 97 Pac. 483, 23 L. R. A. (N. S.) 462.

The early New York cases denying the right have since been met by statutory enactment, see *supra*, this subsection.

[a] Cases Seemingly Denying the Power.—*Galveston, H. & S. A. Ry. Co. v. Sherwood (Tex.)*, 67 S. W. 776; *Ft.*

latter jurisdictions the exemption may be waived.¹²

Nature of Right. — The right to have a physical examination ordered is not an absolute one, but rests in the sound discretion of the court,¹³ to be exercised only where the circumstances require it, and under well defined restrictions looking to the convenience and safety of the subject.¹⁴

Compelling Furnishing of Urine for Analysis. — As to whether a party may be compelled to furnish a sample of urine for analysis the courts are not in harmony, the matter apparently being governed by the same principles that are applied to compusory physical examination.¹⁵

Worth & R. G. Ry. Co. *v.* White (Tex. Civ. App.), 51 S. W. 855; Chicago, R. I. & T. Ry. Co. *v.* Langston, 19 Tex. Civ. App. 568, 47 S. W. 1027, 48 S. W. 610; Gulf, C. & S. F. Ry. Co. *v.* Pendery, 14 Tex. Civ. App. 60, 36 S. W. 793. And see Chicago, R. I. & G. Ry. Co. *v.* Pemberton (Tex. Civ. App.), 170 S. W. 108.

[b] **Permissible in Connection With Cross-Examination.** — Larson *v.* Salt Lake City, 34 Utah 318, 97 Pac. 483, 23 L. R. A. (N. S.) 462.

12. Swenson *v.* Aurora, 196 Ill. App. 83; Oklahoma Ry. Co. *v.* Thomas (Okla.), 164 Pac. 120. See also Wheeler *v.* Chicago & W. L. R. Co., 267 Ill. 306, 108 N. E. 330; Galveston, H. & S. A. Ry. Co. *v.* Chojnaeky (Tex.), 163 S. W. 1011; San Antonio & A. P. Ry. Co. *v.* Stuart (Tex. Civ. App.), 178 S. W. 17.

[a] **Where the party voluntarily puts his injured limb in evidence, the court may then order a physical examination of the limb.** Swenson *v.* Aurora, 196 Ill. App. 83. See also Pronskévitch *v.* Chicago & A. R. Co., 232 Ill. 136, 83 N. E. 545.

13. Ark.—Louisiana & A. R. Co. *v.* Woodson, 127 Ark. 323, 192 S. W. 174; St. Louis, I. M. & S. Ry. Co. *v.* Carter, 93 Ark. 589, 126 S. W. 99. Fla.—State *ex rel.* Carter *v.* Call, 64 Fla. 144, 59 So. 789, 41 L. R. A. (N. S.) 1071. Ga.—Macon Ry. & L. Co. *v.* Vining, 120 Ga. 511, 48 S. E. 232; Savannah F. & W. Ry. Co. *v.* Wainwright, 99 Ga. 255, 25 S. E. 622; Richmond & D. R. Co. *v.* Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808. Ind.—Kokomo M. & W. Traction Co. *v.* Walsh, 58 Ind. App. 182, 108 N. E. 19; South Bend *v.* Turner, 156 Ind. 418, 60 N. E. 271, 83 Am. St. Rep. 200, 54 L. R. A. 396. Ia.—Hall *v.* Manson, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207. Kan.—Atchison, T. & S. F. Ry.

Co. *v.* Thul, 29 Kan. 466, 44 Am. Rep. 659. Ky.—Stearns Coal & Lumber Co. *v.* Williams, 177 Ky. 698, 198 S. W. 54; Illinois Cent. R. Co. *v.* Beeler, 142 Ky. 772, 135 S. W. 305; Belle of Nelson Distilling Co. *v.* Riggs, 104 Ky. 1, 45 S. W. 99. Md.—Scheffler *v.* Lee, 126 Md. 373, 94 Atl. 907. Mo.—Fullerton *v.* Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516; Owens *v.* Kansas City, St. J. & C. B. R. Co., 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; Sidekum *v.* Wabash, St. L. & P. Ry. Co., 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549; Shepard *v.* Missouri Pac. Ry. Co., 85 Mo. 629, 55 Am. Rep. 390; Graham *v.* Sly, 177 Mo. App. 348, 164 S. W. 136; Paul *v.* Omaha & St. Louis Ry. Co., 82 Mo. App. 500; Kinney *v.* Springfield, 35 Mo. App. 97. Neb.—Stuart *v.* Havens, 17 Neb. 211, 22 N. W. 419. Pa.—Cohen *v.* Philadelphia Rapid Transit Co., 250 Pa. 15, 95 Atl. 315. Wash.—Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153; Smith *v.* Spokane, 16 Wash. 403, 47 Pac. 888.

[a] **Refusal of a second examination at a second trial held not error where the party had been compelled to submit to an examination by defendant's physicians at the first trial.** Scullin *v.* Vining, 127 Ark. 124, 191 S. W. 924.

14. State *ex rel.* Carter *v.* Call, 64 Fla. 144, 59 So. 789, 41 L. R. A. (N. S.) 1071; Dean *v.* Wabash R. Co., 229 Mo. 425, 129 S. W. 953.

Matters controlling the court in the exercise of its discretion, see 9 ENCY. OF EV. 800.

15. See Cleveland, C. C. & St. L. Ry. Co. *v.* Huddleston, 151 Ind. 549, 46 N. E. 678, 68 Am. St. Rep. 238, 36 L. R. A. 681 (power affirmed); Austin & N. W. Ry. Co. *v.* Cluck, 97 Tex. 172,

3. Jurisdiction at Chambers.—The power to order a physical examination cannot be exercised by a judge at chambers,¹⁶ and especially outside of the county where the suit was pending.¹⁷

B. PROCEDURE TO OBTAIN EXAMINATION.—1. Motion or Petition.

a. Court of Its Own Motion.—In the exercise of its power to control the conduct of a case, the court may of its own motion order the physical examination of a party.¹⁸

b. Application of Party.—(I.) In General.—The usual mode of obtaining such examination is by proper and timely application to the court by motion,¹⁹ or petition.²⁰

(II.) Time To Make.—The application should be seasonably made²¹ so as to insure care and deliberation on the part of the movant,²² and to avoid any unnecessary delay or prolongation of the trial,²³ or any prejudice to the plaintiff in proving his case.²⁴ It is usual, if not necessary to make the application a reasonable²⁵ length of time before the trial.²⁶ If made pending the trial, the motion will be denied when

77 S. W. 403, 104 Am. St. Rep. 863, 64 L. R. A. 494.

Evidence of refusal to submit, see 9 ENCY. OF EV. 812.

16. *Ellsworth v. Fairbury*, 41 Neb. 881, 60 N. W. 336. See generally the title "Judicial Officers."

17. *Ellsworth v. Fairbury*, 41 Neb. 881, 60 N. W. 336.

18. Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425; *Hall v. Manson*, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207.

19. **Colo.**—*Western Glass Mfg. Co. v. Schoeniger*, 42 Colo. 357, 94 Pac. 342, 126 Am. St. Rep. 165, 15 L. R. A. (N. S.) 663. **Fla.**—*State ex rel. Carter, v. Call*, 64 Fla. 144, 59 So. 789, 41 L. R. A. (N. S.) 1071; *Atlantic Coast Line R. Co. v. Dees*, 56 Fla. 127, 48 So. 28. **Ga.**—*Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808. **Haw.**—*Fuller v. Honolulu Rapid Transit, etc. Co.*, 16 Haw. 1. **Mo.**—*Owens v. Kansas City, St. J. & C. B. R. Co.*, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39. **Tenn.**—*Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101. **Tex.**—*St. Louis Southwestern R. Co. v. Smith*, 38 Tex. Civ. App. 507, 86 S. W. 943.

20. *Scheffler v. Lee*, 126 Md. 373, 94 Atl. 907.

21. **Ala.**—*Richmond & D. R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495; Anonymous, 35 Ala. 226; *Mobile Light & R. Co. v. Burch*, 12 Ala. App. 421, 68 So. 509. **Ind.**—*Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90. **Kan.**—*South-*

ern K. Ry. Co. v. Michaels, 57 Kan. 474, 46 Pac. 938. **Ky.**—*Lexington Ry. Co. v. Cropper*, 142 Ky. 39, 133 S. W. 968. **Mo.**—*Dent v. Springfield Traction Co.*, 145 Mo. App. 61, 129 S. W. 1044.

22. *Southern K. Ry. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938.

23. **Ala.**—*Richmond & D. R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495; *Mobile Light & R. Co. v. Burch*, 12 Ala. App. 421, 68 So. 509. **Kan.**—*Southern K. Ry. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938. **Ohio.**—*Miami & M. Turnpike Co. v. Baily*, 37 Ohio St. 104.

24. *Miami & M. Turnpike Co. v. Baily*, 37 Ohio St. 104.

25. *Southern K. Ry. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938; *Kinney v. Springfield*, 35 Mo. App. 97.

[a] **An application made one day** before the date on which the case is called for trial and two days after the date for which it was docketed, may, in the court's discretion, be refused, especially where the granting of the application would delay the trial. *Kinney v. Springfield*, 35 Mo. App. 97.

26. **Ga.**—*Savannah F. & W. Ry. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622. **Haw.**—*Fuller v. Honolulu Rapid Transit, etc. Co.*, 16 Haw. 1. **Ind.**—*Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178. **Kan.**—*Southern K. Ry. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938. **Minn.**—*Wittenberg v. Onsgard*, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141. **Mo.**—*Dent v. Springfield Traction Co.*, 145 Mo. App. 61, 129 S. W. 1044. **Neb.**—*Chadron v. Glover*,

it appears that to grant the examination would in any way suspend or interrupt the proceedings,²⁷ but the facts of each case must be considered and a denial of a motion for examination made after the trial is entered upon may under the circumstances amount to an abuse of discretion,²⁸ and, on the other hand, the court may be warranted in refusing an application made before the trial has begun.²⁹

(III.) **Form and Sufficiency.**³⁰ — The motion, though ordinarily made by oral application in open court, may of course be by formal application in writing.³¹

Contents. — It should appear from the motion,³² or the supporting

43 Neb. 732, 62 N. W. 62; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724. **Wash.**—*Myrberg v. Baltimore & S. M. R. Co.*, 25 Wash. 364, 65 Pac. 539.

27. **Ala.**—*Mobile Light & R. Co. v. Burch*, 12 Ala. App. 421, 68 So. 509. **Ga.**—*Macon Ry. & L. Co. v. Vining*, 120 Ga. 511, 48 S. E. 232. **Ind.**—*Terre Haute & I. R. Co. v. Bruner*, 128 Ind. 542, 26 N. E. 178. **Mo.**—*Dent v. Springfield Traction Co.*, 145 Mo. App. 61, 129 S. W. 1044.

[a] **Motion made after plaintiff's testimony is closed** held under the circumstances to be too late. **Ala.**—*Mobile Light & R. Co. v. Burch*, 12 Ala. App. 421, 68 So. 509. **Ga.**—*Savannah F. & W. R. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622. **Ind.**—*Terre Haute & I. R. Co. v. Bruner*, 128 Ind. 542, 26 N. E. 178. **Kan.**—*Southern K. Ry. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938. **Ky.**—*Lexington R. Co. v. Cropper*, 142 Ky. 39, 133 S. W. 968. **Mo.**—*Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516. **Neb.**—*Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724. **Wash.**—*Myrberg v. Baltimore & S. M. R. Co.*, 25 Wash. 364, 65 Pac. 539.

[b] **At the end of cross-examination of plaintiff**, it is too late to apply for physical examination. *Archer v. The Sixth Avenue R. Co.*, 20 Jones & S. (N. Y.) 378.

[c] **Case Ready for Argument.**—Motion made after all the testimony is in and the case ready for argument, properly denied. *Macon Ry. & L. Co. v. Vining*, 120 Ga. 511, 48 S. E. 232; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287.

[d] **Renewal During Trial.**—Where prior to entering upon the trial a mo-

tion is made to require an examination, it may be renewed during the trial. *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442.

[e] **Some reason for the delay** must be shown, or the court will ordinarily deny a belated motion. *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90; *Miami & M. Turnpike Co. v. Baily*, 37 Ohio St. 104.

[f] **That a satisfactory and competent physician could not be obtained** without a suspension of the trial will justify the court in refusing the order. *Savannah F. & W. Ry. Co. v. Wainwright*, 99 Ga. 255, 25 S. E. 622.

28. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 375.

[a] **Application after jury sworn**, improperly denied. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 375.

29. *Graham v. Sly*, 177 Mo. App. 348, 164 S. W. 136.

[a] **After two mistrials**, wherein no physical examination was asked for, a motion for such examination made shortly before the third trial, is properly refused. *Graham v. Sly*, 177 Mo. App. 348, 164 S. W. 136.

30. **Forms of motions**, see 9 **STANDARD PROC.** 852, and *Atlantic Coast Line R. Co. v. Dees*, 56 Fla. 127, 48 So. 28; *Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

31. *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516; *Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

32. **Colo.**—*Western Glass Mfg. Co. v. Schoeniger*, 42 Colo. 357, 94 Pac. 342, 126 Am. St. Rep. 165, 15 L. R. A. (N. S.) 663. **Fla.**—*Atlantic Coast Line Ry. Co. v. Dees*, 56 Fla. 127, 48

papers.³³ that the examination is necessary to a full presentation of all the facts.

(IV.) **Affidavits.**³⁴ — **Supporting Affidavits.** — The movant may be required to support his motion with affidavits showing a necessity for the examination,³⁵ his belief as to what it would develop,³⁶ and facts showing that the examination can be had without danger to the plaintiff or any serious pain.³⁷

Answering affidavits may be filed by the adversary, in opposition to the motion.³⁸

(V.) **Hearing.** — The motion is heard as are motions generally.³⁹ A sufficient showing must be made by the movant,⁴⁰ and the court should determine the matter in its discretion in view of all the circumstances.⁴¹

2. Order of Court.⁴² — a. *In General.* — Upon hearing the motion, the court makes an order granting or denying the application.⁴³

b. *Form and Contents.*⁴⁴ — The order may designate the persons

So. 28. **Tex.**—International & G. N. Ry. Co. *v.* Underwood, 64 Tex. 463.

[a] **Unwillingness to submit to a voluntary examination** by a reputable surgeon or physician should be stated. See International & G. N. Ry. Co. *v.* Underwood, 64 Tex. 463.

33. See *infra*, III, B, 1, b, (IV).

34. See generally "Affidavits of Merits and Defense;" "Motions."

35. **Colo.**—Western Glass Mfg. Co. *v.* Schoeniger, 42 Colo. 357, 94 Pac. 342, 126 Am. St. Rep. 165, 15 L. R. A. (N. S.) 663. **Ind.**—Terre Haute & I. R. Co. *v.* Brunner, 128 Ind. 542, 26 N. E. 178. **Ky.**—Lexington R. Co. *v.* Cropper, 142 Ky. 39, 133 S. W. 968. **N. Y.**—Orlando *v.* Syracuse Rapid Transit R. Co., 109 App. Div. 356, 95 N. Y. Supp. 898; Landau *v.* Citron, 47 Misc. 354, 93 N. Y. Supp. 1111; Green *v.* Middlesex R. Co., 10 Misc. 473, 32 N. Y. Supp. 177, 24 Civ. Proc. 272, 1 N. Y. Ann. Cas. 167, 65 N. Y. St. 257. **Tenn.**—Williams *v.* Chattanooga Iron Works, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101. **Tex.**—Galveston, H. & S. A. Ry. Co. *v.* Sherwood, 67 S. W. 776.

36. Terre Haute & I. R. Co. *v.* Brunner, 128 Ind. 542, 26 N. E. 178. See Galveston, H. & S. A. Ry. Co. *v.* Sherwood (Tex.), 67 S. W. 776.

37. Williams *v.* Chattanooga Iron Works, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

38. Orlando *v.* Syracuse Rapid Transit R. Co., 109 App. Div. 356, 95 N. Y. Supp. 898.

39. See the title "Motions."

40. See 9 ENCY. OF EV. 808, and

Williams *v.* Chattanooga Iron Works, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

41. See 9 ENCY. OF EV. 800, and *supra*, II, A, 2, b.

42. See generally the title "Orders."

43. Ellsworth *v.* Fairbury, 41 Neb. 881, 60 N. W. 336; Williams *v.* Chattanooga Iron Works, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

44. **Forms of orders generally**, see 9 STANDARD PROC. 900.

[a] **Form of Order.**—And now on this (insert date) this motion coming on for hearing before me ———, judge of the fifth judicial district of the state of ———, and it appearing that due notice has been given of the application and filing of this motion and having read the affidavit of ——— filed herewith: It is ordered by me that Dr. ——— of ———; Dr. ——— of ———; Dr. ——— of ———, and one physician to be selected by each party hereto, be, and they are hereby appointed a board of surgeons and physicians to proceed to the residence of plaintiff in this case, in ——— and to thoroughly examine said plaintiff, and to ascertain, if possible, what disease or injury she is now suffering from, if any, and the cause thereof.

It is further ordered that the costs and expenses attending such examination shall be paid in the first instance by the defendant in the case, and the same reported to the clerk of the district court of ——— county, ———, to be charged up as costs in this case

to conduct the examination and the time, place and manner of making it,⁴⁵ and in some jurisdictions should state the finding or conclusions of the court authorizing it.⁴⁶ It must operate upon the plaintiff himself and not on his attorney.⁴⁷

Oral Examination. — Under the New York statute the order must contain a provision for the party's oral examination.⁴⁸

c. *Service of Order.*⁴⁹ — The order should be served upon the party who is to be examined.⁵⁰

d. *Modifying and Vacating.* — In the exercise of its power over its own orders the court may for good cause and on proper application modify,⁵¹ or vacate,⁵² its order for a physical examination.

e. *Review on Appeal.* — (I.) **In General.** — Orders upon motion for physical examination are reviewable on appeal⁵³ unless the party has waived his right to have the decision reviewed.⁵⁴

(II.) **Extent of Review.** — Since the application in such cases is addressed to the sound discretion of the trial court,⁵⁵ its ruling will not be disturbed on appeal unless such discretion is manifestly abused.⁵⁶

and to abide the result thereof.

Judge.

Ellsworth v. Fairbury, 41 Neb. 881, 60 N. W. 336. See also Hess v. Lake Shore & M. S. R. Co., 7 Pa. Co. Ct. 565.

45. Ellsworth v. Fairbury, 41 Neb. 881, 60 N. W. 336.

Appointment of examiners, see *infra*, II, C.

As to examination, see *infra*, III, D.

46. Williams v. Chattanooga Iron Works, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

47. Bowe v. Brunnbauer, 13 Misc. 631, 25 Civ. Proc. 56, 34 N. Y. Supp. 919, 69 N. Y. St. 138.

48. Lyon v. Manhattan Ry. Co., 142 N. Y. 298, 37 N. E. 113, 25 L. R. A. 402; Landau v. Citron, 47 Misc. 354, 93 N. Y. Supp. 1111.

[a] The scope of the examination may be confined by the court to questions touching the nature and extent of his injuries. Landau v. Citron, 47 Misc. 354, 93 N. Y. Supp. 1111.

49. See generally the title "Service of Process and Papers."

50. Goldenberg v. Zirinsky, 114 App. Div. 827, 100 N. Y. Supp. 251.

[a] Service on the attorney of the party to be examined is not sufficient, even though the order directs that service on the attorney be made. Goldenberg v. Zirinsky, 114 App. Div. 827, 100 N. Y. Supp. 251.

51. Landau v. Citron, 47 Misc. 354, 93 N. Y. Supp. 1111.

[a] But there is no warrant for striking out all provision for an oral examination. Landau v. Citron, 47 Misc. 354, 93 N. Y. Supp. 1111.

52. Orlando v. Syracuse Rapid Transit R. Co., 109 App. Div. 356, 95 N. Y. Supp. 898.

[a] Where prior voluntary examination has been had. Orlando v. Syracuse Rapid Transit R. Co., 109 App. Div. 356, 95 N. Y. Supp. 898.

53. Goldenberg v. Zirinsky, 114 App. Div. 827, 100 N. Y. Supp. 251; Williams v. Chattanooga Iron Works, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

54. Ellsworth v. Fairbury, 41 Neb. 881, 60 N. W. 336.

[a] **Failure To Object.**—(1) Acquiescence in an erroneous order by compliance therewith without filing an exception, and failure to raise the question at the trial, constitutes a waiver of the right to review. Ellsworth v. Fairbury, 41 Neb. 881, 60 N. W. 336. (2) But where it must affirmatively appear that the court properly exercised his discretion in ordering an examination, no specific objections need be made in the trial court pointing out deficiencies in the prerequisites of the order. Williams v. Chattanooga Iron Works, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

55. See *supra*, II, A, 2, b.

56. Ga.—Macon Ry. & L. Co. v. Vin-
ing, 120 Ga. 511, 48 S. E. 232. Ind.

Harmless Error. — An error which works no prejudice to the complaining party will be disregarded by the appellate court.⁵⁷

3. Renewal of Motion. — The denial of an application for physical examination may be made without prejudice to renew the same during the trial,⁵⁸ and in any case the motion may be renewed within the limitations applicable to the renewal of motions generally.⁵⁹

4. Enforcement of Order. — Power of Court. — The court has full power to compel obedience to its order for physical examination,⁶⁰ and while it remains in full force and effect it cannot be treated as a nullity by the party against whom it is obtained.⁶¹

Remedies To Enforce. — Disobedience to an order for physical examination may result in the party's being put in contempt.⁶² The usual

Aspy v. Botkins, 160 Ind. 170, 66 N. E. 462. **Ky.**—*Illinois Cent. R. Co. v. Beeler*, 142 Ky. 772, 135 S. W. 305; *Belle of Nelson Distilling Co. v. Riggs*, 104 Ky. 1, 45 S. W. 99. **Mo.**—*Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516; *Owens v. Kansas City, St. J. & C. B. R. Co.*, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39; *Sidekum v. Wabash, St. L. & P. Ry. Co.*, 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549; *Paul v. Omaha & St. L. Ry. Co.*, 82 Mo. App. 500; *Kinney v. Springfield*, 35 Mo. App. 97. **N. Y.**—*Smyth v. Lichtenstein*, 137 App. Div. 335, 122 N. Y. Supp. 74. **Tenn.**—*Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101. **Wash.**—*Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888.

[a] **Where a reasonably clear case** for the examination is presented by the circumstances appearing on the record, the court's refusal to order it will warrant a reversal of the judgment. **Ark.**—*Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584. **Colo.**—*Western Glass Mfg. Co. v. Schoeninger*, 42 Colo. 357, 94 Pac. 342, 126 Am. St. Rep. 165, 15 L. R. A. (N. S.) 663. **Ia.** *Hall v. Manson*, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207. **Wash.**—*Lane v. Spokane Falls & N. R. Co.*, 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153.

[b] **Refusal of second examination** held an abuse of discretion. *Rief v. Great Northern R. Co.*, 126 Minn. 430, 148 N. W. 309.

[c] **Presumptions.**—The refusal of the court to allow an examination of the plaintiff will not be presumed to have been made on the ground of a want of power in the court to make

the order, but in the absence of any showing to the contrary, on the ground that under the circumstances the order ought not to have been granted. *Miami & M. Turnpike Co. v. Baily*, 37 Ohio St. 104.

57. *Galveston, H. & S. A. Ry. Co. v. Sherwood (Tex.)*, 67 S. W. 776. See generally 2 STANDARD PROC. 457.

[a] **Error in denying an examination** will be considered harmless, where it appears plaintiff did submit to an examination by several surgeons and physicians of learning and integrity. *International & G. N. Ry. Co. v. Underwood*, 64 Tex. 463.

[b] **That a wrong reason was assigned** by the trial court for its decision will be disregarded, provided the decision itself is correct. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 360, 49 Am. Rep. 724. See generally 2 STANDARD PROC. 413.

58. **Ala.**—*Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442. **Fla.**—*Atlantic Coast Line R. Co. v. Dees*, 56 Fla. 127, 48 So. 28. **Mo.**—*Sidekum v. Wabash, St. L. & P. Ry. Co.*, 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549.

59. *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 8 So. 90, 24 Am. St. Rep. 764, 9 L. R. A. 442. See the title "**Motions.**"

60. *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584.

61. *Goldenberg v. Zirinsky*, 114 App. Div. 827, 100 N. Y. Supp. 251; *Farmers' Nat. Bank v. Underwood*, 90 Hun 342, 25 Civ. Proc. 94, 35 N. Y. Supp. 693, 70 N. Y. St. 491.

62. *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 375.

[a] **If plaintiff withdraws his claim**

procedure to enforce compliance with the court's order is, however, to dismiss the disobedient party's case,⁶³ or to stay the proceedings until he submits to the examination,⁶⁴ or to suppress his testimony,⁶⁵ or refuse him the privilege of giving evidence to establish the injury until he obeys the order;⁶⁶ and the court is also warranted in striking from his pleadings all allegations as to permanent injury and withdrawing from the jury that part of the case.⁶⁷

C. THE EXAMINERS. — That a fair and impartial examination may be assured, the physicians or other examiners should be selected by the court,⁶⁸ and not by either of the litigants.⁶⁹ The parties of course may agree on examiners,⁷⁰ but the court should approve of those se-

for permanent injury, the proceedings as for contempt will be suspended. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 375.

63. Ala.—Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425. Md.—*Scheffler v. Lee*, 126 Md. 373, 94 Atl. 907. Minn.—*Wanek v. Winona*, 78 Minn. 98, 80 N. W. 851, 79 Am. St. Rep. 354, 46 L. R. A. 448. Mo.—*Shepard v. Missouri Pac. Ry. Co.*, 85 Mo. 629, 55 Am. Rep. 390. N. D. *Brown v. Chicago, M. & St. P. R. Co.*, 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564. Ohio.—*Miami & M. Tpk. Co. v. Baily*, 37 Ohio St. 104. Tenn. *Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

[a] A bill for divorce on the ground of physical incapacity may be dismissed if the plaintiff refuses to submit to a physical examination ordered by the chancellor. Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. Rep. 116, 7 L. R. A. 425.

64. N. Y.—*Goldenberg v. Zirinsky*, 114 App. Div. 827, 100 N. Y. Supp. 251. Ohio.—*Miami & M. Turnpike Co. v. Baily*, 37 Ohio St. 104. Pa.—*Cohen v. Philadelphia Rapid Transit Co.*, 250 Pa. 15, 95 Atl. 315; *Hess v. Lake Shore & M. S. R. Co.*, 7 Pa. Co. Ct. 565.

[a] A continuance may be granted defendant until the examination is made. *State ex rel. Carter v. Call*, 64 Fla. 144, 59 So. 789, 41 L. R. A. (N. S.) 1071; *Cincinnati, N. O. & T. P. R. Co. v. Nolan*, 161 Ky. 205, 170 S. W. 650.

[b] Defective Service of Order. Where the order for examination is served on the attorney for plaintiff instead of on the plaintiff himself, the plaintiff will not be stayed in his

action. *Goldenberg v. Zirinsky*, 114 App. Div. 827, 100 N. Y. Supp. 251.

65. Anonymous, 35 Ala. 226.

66. *Miami & M. Turnpike Co. v. Baily*, 37 Ohio St. 104.

67. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 375.

68. Ala.—*Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65. Ga.—*Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808. Kan.—*Southern K. Ry. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938. Ky.—*Keller & Brady Co. v. Berry*, 121 S. W. 1009. Neb.—*Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724. N. Y. *Goldenberg v. Zirinsky*, 114 App. Div. 827, 100 N. Y. Supp. 251. Tenn.—*Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101. Tex.—*Houston & T. C. Ry. Co. v. Berling*, 14 Tex. Civ. App. 544, 37 S. W. 1083.

[a] "The selection of such experts is a matter entirely within the discretion of the trial judge. Neither party has any right, by suggestion, motion, or otherwise, to control his discretion in any degree." *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

69. Ga.—*Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808. N. Y.—*Goldenberg v. Zirinsky*, 114 App. Div. 827, 100 N. Y. Supp. 251. Wash.—*Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888.

70. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724; *Houston & T. C. Ry. Co. v. Berling*, 14 Tex. Civ. App. 544, 37 S. W. 1083.

lected.⁷¹ They should be competent⁷² and disinterested⁷³ physicians or surgeons, and, where possible, of the party's own sex.⁷⁴

Number of Examiners.—The court must of necessity exercise its discretion in respect to the number of physicians to make the examination,⁷⁵ and the order for examination usually designates the number.⁷⁶

D. THE EXAMINATION.—1. Generally.—The examination should be had under the court's order and direction,⁷⁷ and should strictly conform thereto,⁷⁸ the comfort and safety of the subjects being mat-

71. *Railway Co. v. Palmore*, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. (N. S.) 90.

72. *State ex rel. Carter v. Call*, 64 Fla. 144, 59 So. 789, 41 L. R. A. (N. S.) 1071; *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141.

[a] **X-ray examination denied** where it did not sufficiently appear that the person by whom the defendant desired the photograph to be taken had the necessary skill and experience properly and safely to apply the rays without injury to the plaintiff. *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141. See *infra*, III, D, 1.

73. *Ga.*—*Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808. *Ky.* *Keller & Brady Co. v. Berry*, 121 S. W. 1009. *Neb.*—*Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724. *N. Y.*—*Goldenberg v. Zirinsky*, 114 App. Div. 827, 100 N. Y. Supp. 251. *Tenn.*—*Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101. *Wash.*—*Just v. Littlefield*, 87 Wash. 299, 151 Pac. 780; *Lane v. Spokane Falls & N. R. Co.*, 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153; *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888.

[a] **A physician of the movant** (1) should not be appointed (*Goldenberg v. Zirinsky*, 114 App. Div. 827, 100 N. Y. Supp. 251; *Just v. Littlefield*, 87 Wash. 299, 151 Pac. 780), (2) even though the physician of the other party is permitted to attend the examination (*Goldenberg v. Zirinsky*, 114 App. Div. 827, 100 N. Y. Supp. 251), (3) but the matter, it seems, rests in the court's discretion (*Ky.*—*Keller & Brady Co. v. Berry*, 121 S. W. 1009. *Neb.* *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860,

49 Am. Rep. 724. *Pa.*—*Clark v. Northumberland Borough*, 23 Pa. Co. Ct. 555. *Wash.*—*Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888. *Wis.*—*White v. Milwaukee City Ry. Co.*, 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154), and (4) a refusal to order an examination by physicians named by the defendant has even been deemed an abuse of discretion. *Atchison, T. & S. F. Ry. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659.

74. *Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

[a] **Under the statute** a physician of plaintiff's own sex must make the examination. *Lawrence v. Samuels*, 16 Misc. 501, 38 N. Y. Supp. 976.

75. *Shepard v. Missouri Pac. Ry. Co.*, 85 Mo. 629, 634, 55 Am. Rep. 390.

[a] **Three Physicians.**—An application denied because an examination by three physicians requested. *Shepard v. Missouri Pac. Ry. Co.*, 85 Mo. 629, 634, 55 Am. Rep. 390.

[b] **Four Physicians.**—Application denied where an examination by four physicians asked. *Sidekum v. Wabash, St. L. & P. Ry. Co.*, 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549.

76. *Ellsworth v. Fairbury*, 41 Neb. 881, 60 N. W. 336; *Clark v. Northumberland Borough*, 23 Pa. Co. Ct. 555; *Hess v. Lake Shore & M. S. R. Co.*, 7 Pa. Co. Ct. 565.

77. *Fla.*—*State ex rel. Carter v. Call*, 64 Fla. 144, 59 So. 789, 41 L. R. A. (N. S.) 1071. *Kan.*—*Southern K. Ry. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938. *Ky.*—*Belt Electric Line Co. v. Allen*, 102 Ky. 551, 44 S. W. 89, 80 Am. St. Rep. 374.

78. *Hess v. Lake Shore & M. S. R. Co.*, 7 Pa. Co. Ct. 565.

Oral examination in connection with the physical, is sometimes provided for. See *supra*, II, B. 2. b, catchline Oral Examination.

ters of primary consideration.⁷⁹ The examination should proceed in such a manner as to avoid the infliction of pain, the subjection to indignity or the endangering of health or life.⁸⁰

The examiner appointed must himself make the examination; he cannot authorize another to make it.⁸¹

The court may in its discretion refuse to permit an x-ray examination,⁸² particularly where it does not appear that the proposed examiner is qualified to make the examination safely;⁸³ and it has been doubted whether such an examination should be permitted in any case until it has been thoroughly established as a scientific fact that it can be made without injury.⁸⁴ Some statutes providing for examination, have been construed as not extending to x-ray examinations.⁸⁵

2. Time for.⁸⁶—The order may designate a time for the examination, or authorize the party to be examined to arrange the matter.⁸⁷

3. Place of.—The place for holding the examination is necessarily a matter calling for the exercise of the court's discretion.⁸⁸ It is not improper in certain cases to conduct the examination in open court in the presence of spectators,⁸⁹ but the court may, where necessary, order a private examination, designating the place where and in whose presence it shall take place.⁹⁰

4. Report by Examiner.—The examiner or examiners appointed by the court should, it has been said, file a report stating in detail the result of the examination, open for inspection by the parties but not for use as evidence except on cross-examination of the examiner.⁹¹

E. EXPENSE OF EXAMINATION.—The expense of the examination should be borne, at the outset at least, by the party at whose instance it is made.⁹²

79. *Railway Co. v. Palmore*, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. (N. S.) 90.

80. *Kan.*—*Railway Co. v. Palmore*, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. (N. S.) 90. *Pa.*—*Hess v. Lake Shore & M. S. R. Co.*, 7 Pa. Co. Ct. 565. *Tenn.*—*Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

81. *State ex rel. Carter v. Call*, 64 Fla. 144, 59 So. 789, 41 L. R. A. (N. S.) 1071.

82. *Boelter v. Ross Lumb. Co.*, 103 Wis. 324, 79 N. W. 243.

83. *International & G. N. Ry. Co. v. Bartek* (Tex. Civ. App.), 177 S. W. 137.

84. *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141.

85. See *supra*, II, B, 2, b, note.

86. **Time to make application for examination**, see *supra*, III, B, 1, b, (II).

87. *Clark v. Northumberland Borough*, 23 Pa. Co. Ct. 555; *Hess v.*

Lake Shore & M. S. R. Co., 7 Pa. Co. Ct. 565.

88. *Railway Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147.

89. *Hall v. Manson*, 99 Iowa 698, 68 N. W. 922, 34 L. R. A. 207.

90. *Railway Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Clark v. Northumberland Borough*, 23 Pa. Co. Ct. 555; *Hess v. Lake Shore & M. S. R. Co.*, 7 Pa. Co. Ct. 565. See 9 ENCY. OF EV. 811.

[a] **Private examination by jury** (1) not permissible (see *Garvik v. Burlington, C. R. & N. R. Co.*, 124 Iowa 691, 100 N. W. 498), (2) at least in the absence of the judge. *Fordyce v. Key*, 74 Ark. 19, 84 S. W. 797.

[b] **Plaintiff residing in another state** may be directed to submit to examination there instead of requiring him to appear before the jury. *Railway Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147.

91. *Williams v. Chattanooga Iron Works*, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

92. *Ga.*—*Richmond & D. R. Co. v.*

F. INSTRUCTIONS TO JURY.—The court may instruct the jury as to the inferences, if any, to be drawn from the party's refusal to submit to physical examination.⁹³

Childress, 82 Ga. 719, 9 S. E. 602, 14 Am. St. Rep. 189, 3 L. R. A. 808. **Neb.** Ellsworth *v.* Fairbury, 41 Neb. 881, 60 N. W. 336. **Tenn.**—Williams *v.* Chattanooga Iron Works, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101. **Wash.** Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am St. Rep. 821, 46 L. R. A. 153.

[a] **Fee should be fixed in advance and paid into court**, to be paid to the expert when he files his report. See Williams *v.* Chattanooga Iron Works, 131 Tenn. 683, 176 S. W. 1031, Ann. Cas. 1916B, 101.

93. *Elfers v. Woolley*, 116 N. Y. 294, 22 N. E. 548.

[a] **Where no power to compel an examination** exists in the court the defendant is not entitled to an instruction that would tend to show a failure to exhibit her limb should be taken as a circumstance against her. *Schuerger v. City Water Co.*, 183 Ill. App. 469.

[b] **After denial of application for an order** because it was not timely, see *Miami & M. Turnpike Co. v. Baily*, 37 Ohio St. 104.

PHYSICIANS AND SURGEONS

By the Editorial Staff.

I. REVIEW OF REFUSAL TO GRANT LICENSE, 366

- A. *In General*, 366
- B. *Modes of Review*, 366

II. REVOCATION OF LICENSE, 367

- A. *By Boards*, 367
 - 1. *In General*, 367
 - 2. *Notice*, 367
 - 3. *Parties*, 368
 - 4. *Pleading and Variance*, 368
 - 5. *Review of Board's Decision*, 369
- B. *By Court*, 370
 - 1. *In General*, 370
 - 2. *Parties*, 370
 - 3. *Pleadings*, 370
 - 4. *Questions of Law or Fact*, 370

III. ACTIONS FOR MALPRACTICE OR NEGLIGENCE, 370

- A. *Nature and Form of Remedy*, 370
- B. *Joinder of Causes of Action*, 371
- C. *Joinder of Parties*, 372
- D. *Pleading*, 372
- E. *Issues and Proof*, 374
- F. *Questions for Jury*, 375
- G. *Instructions*, 377

IV. ACTIONS FOR COMPENSATION, 378

- A. *Nature and Form of Remedy*, 378
- B. *Pleadings*, 378
 - 1. *Declaration or Complaint*, 378
 - 2. *Plea or Answer*, 379
- C. *Issues and Proof*, 379
- D. *Questions of Law and Fact*, 379
- E. *Instructions*, 380

V. PROSECUTION FOR PRACTICING WITHOUT RIGHT, 380

- A. *By Whom Instituted*, 380

- B. *Indictment, Information or Complaint*, 380
- C. *Joinder of Offenses*, 385
- D. *Variance*, 385
- E. *Questions of Law and Fact*, 386
- F. *Instructions*, 386
- G. *Verdict and Sentence*, 386

VI. ACTIONS FOR PENALTIES, 387

CROSS-REFERENCES:

Abortion;	Penalties, Forfeitures and Fines;
Health;	Physical Examination;
Licenses;	Witnesses;
Negligence;	Work and Labor.

For forms, see 9 STANDARD PROC. 969.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. REVIEW OF REFUSAL TO GRANT LICENSE.—A. IN GENERAL. — Generally the rule applies that the courts will not interfere with the discretionary powers of the boards.¹

B. MODES OF REVIEW. — A method by which one may have a review of the board's decision is provided by statute in many states.² Some statutes provide for an appeal and a trial de novo.³ Mandamus is often recognized as a proper remedy where the board refuses to act,⁴

1. **Cal.**—*Van Vleck v. Board of Dental Examiners*, 48 Pac. 223, holding that it is a judicial rather than a ministerial act to determine what institutions are "reputable" so as to entitle their students to license to practice upon diploma. **Idaho.**—*Barton v. Schmershall*, 21 Idaho 562, 122 Pac. 385; *Raaf v. State Board*, 11 Idaho 707, 84 Pac. 33. **Ohio.**—*Kowenstrot v. State*, 4 Ohio N. P. 257. **Ore.**—*Miller v. Board of Medical Examiners*, 33 Ore. 5, 52 Pac. 763, holding that a new board could not review the decision of a former board.

2. See the statutes and the following: **Idaho.**—*Barton v. Schmershall*, 21 Idaho 562, 122 Pac. 385; *Raaf v. State Board*, 11 Idaho 707, 84 Pac. 33, holding that the statute provides for an inquiry in the nature of a writ of review, but not for an appeal. **Ind.** *In re Coffin*, 152 Ind. 439, 53 N. E. 458. **Minn.**—*Williams v. State Board of Medical Examiners*, 120 Minn. 313,

139 N. W. 500, reviewing various statutes and pointing out that there may be a review in ordinary cases, and yet none where application of physician from other state to be admitted without examination is denied. **Mont.** *State ex rel. Riddell v. District Court*, 27 Mont. 103, 69 Pac. 710, citing Pol. Code, §603, as authorizing an appeal. See also *State v. District Court*, 19 Mont. 501, 48 Pac. 1104.

3. *State ex rel. Riddell v. District Court*, 27 Mont. 103, 69 Pac. 710; *State ex rel. Seres v. District Court*, 19 Mont. 501, 48 Pac. 1104; *In re Littlefield*, 61 Wash. 150, 112 Pac. 234, holding that the trial de novo need not be of all the matters involved, but may be only as to those matters of which the appellant complains, as of his standings in various subjects. And see cases in last preceding note.

4. See the title "**Mandamus**," and the following: **Cal.**—*Van Vleck v. Board of Dental Examiners*, 48 Pac. 223, in

but in so far as the board acts judicially mandamus cannot be invoked to review its action.⁵ The remedy may be by certiorari, where the board has acted without jurisdiction.⁶ The appeal is in the nature of a special proceeding rather than an action, under some statutes.⁷ Pending the hearing of the appeal the court has no right to make an order temporarily permitting the applicant to practice.⁸

After decision by the reviewing court against the board of examiners, the board is the aggrieved party, and may appeal to the supreme court under some statutes.⁹

II. REVOCATION OF LICENSE. — A. BY BOARDS. — 1. In General. — The board's investigation need not be carried on in observance of the technical rules adopted by courts of law.¹⁰ The accused may appear in person or by counsel.¹¹ Costs are not allowed as in ordinary actions.¹²

2. Notice. — The person whose license it is sought to revoke must

so far as the matter to be passed upon is purely ministerial. **Idaho.**—*Raaf v. State Board*, 11 Idaho 707, 84 Pac. 33, "If the board should fail to act when it is their duty to act, the courts are open to enforce action." **Ore.**—*Miller v. Board of Medical Examiners*, 33 Ore. 5, 52 Pac. 763, holding that where a board, from whose decision there was no appeal, has become functus officio there is no way of subjecting its action to review. **Can.**—*Reg. v. College of Physicians & Surgeons*, 44 U. C. Q. B. 564.

5. State ex rel. Powell v. State Medical Board, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575. See the title "**Mandamus.**"

6. See the title "**Certiorari,**" and *State ex rel. Milwaukee M. College v. Chittenden*, 127 Wis. 468, 107 N. W. 500, holding that the writ is issuable on petition of a dental college whose graduates are being prevented from obtaining licenses through the passing of a resolution by the board declaring the college was not reputable, which resolution was passed without giving the college notice and opportunity to be heard.

7. State ex rel. Riddell v. District Court, 27 Mont. 103, 69 Pac. 710, but holding that the mere failure to entitle it as a special proceeding did not vitiate the judgment.

8. State v. First Judicial Dist. Court, 26 Mont. 121, 66 Pac. 754, the court has no such power inherently, nor by analogy to the statute permitting such order on appeal from an order revoking a license.

9. State ex rel. Riddell v. District Court, 27 Mont. 103, 69 Pac. 710, holding that certiorari on the theory that the lower court had no jurisdiction is not the proper procedure.

10. Ia.—*Traer v. State Board*, 106 Iowa 559, 76 N. W. 833, "a more flexible practice must of necessity, be followed in many cases." **Kan.**—*Meffert v. State Medical Board*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, judgment affirmed, 195 U. S. 625, 25 Sup. Ct. 790, 49 L. ed. 350. **Mont.**—*State ex rel. Kellogg v. District Court*, 13 Mont. 370, 34 Pac. 298, the legislature has not defined the procedure, but no doubt "contemplated that such proceedings should be conducted in such an orderly manner as that no substantial right would be denied the accused." **Neb.** *Munk v. Frink*, 81 Neb. 631, 116 N. W. 525, 17 L. R. A. (N. S.) 439. **N. Y.** *People ex rel. Greenberg v. Reid*, 151 App. Div. 324, 136 N. Y. Supp. 428, the proceeding may be summary and not subject to strict rules of evidence.

11. People ex rel. Greenberg v. Reid, 151 App. Div. 324, 136 N. Y. Supp. 428, holding that though one has had notice of and an opportunity to be heard before the board of dental examiners, he is also entitled to a hearing before the board of regents of the university who alone have power to decide, upon the coming in of the report of the examining board.

12. State ex rel. Beekman v. Estes, 34 Ore. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25, the case falls within the rule that there can be no costs where the statute does not allow them.

have notice of the time and place of hearing,¹³ and of the nature of the charge made against him.¹⁴ But where a license was fraudulently obtained the court will not intercede to reinstate it after the board has revoked it without notice.¹⁵

3. Parties.—The proceeding may be brought in the name of the state on the relation of the board or other citizens.¹⁶

4. Pleading and Variance.—The charges against the physician need not be as formal or specific as required in an information or indictment,¹⁷ and a complaint is sufficient if it informs the accused not only of the nature of the wrong, but of the particular instance of its alleged perpetration.¹⁸ The proof before the board must conform

13. Ill.—*People v. McCoy*, 125 Ill. 289, 17 N. E. 786, this is so whether the license be considered property, in a technical sense, or merely a valuable franchise. The statute now requires notice, see *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995, which suggests that the statutory provision for regular notice and a hearing, implies that the board's power is not arbitrary. **Ia.**—*Traer v. State Board*, 106 Iowa 559, 76 N. W. 833, the person whose right is to be revoked "must be given a fair opportunity to meet the charges." **Minn.**—*State ex rel. Powell v. State Medical Board*, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575, a statute conferring power to revoke licenses, and providing that the board shall "take testimony in all matters relating to its duties," and for an appeal, infers that notice shall be given. **Mont.**—*State v. Schultz*, 11 Mont. 429, 28 Pac. 643. **Neb.**—*Mathews v. Hedlund*, 82 Neb. 825, 119 N. W. 17, there must be an "opportunity to appear and defend." **N. Y.**—*People ex rel. Greenberg v. Reid*, 151 App. Div. 324, 136 N. Y. Supp. 428. **Can.**—*Reg. v. College of Physicians and Surgeons*, 44 U. C. Q. B. 146; *Re Washington*, 23 Ont. 299.

[a] Too short notice is cured by adjournment for a longer period than required by the statute in the first instance. *In re Stinson & College of Physicians & Surgeons*, 22 Ont. L. Rep. (Can.) 627.

14. Re Washington, 23 Ont. 299.

[a] Notice is sufficient which contained sufficient to apprise defendant of the charges against him, and required him to answer, though the wording of the notice was not technically correct from a lawyer's viewpoint. *Wolf v. State Board*, 109 Minn. 360, 123 N. W. 1074.

15. Volp v. Saylor, 42 Ore. 546, 71 Pac. 980, the situation is analogous to that of a court vacating a void decree judgment or order entered without jurisdiction or authority. The license had been issued as a temporary license, which the board had no power to issue, and the licensee had then altered it by striking out the qualifying words.

16. State ex rel. Beckman v. Estes, 34 Ore. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

17. Meffert v. State Medical Board, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, judgment affirmed, 195 U. S. 625, 25 Sup. Ct. 790, 49 L. ed. 350.

18. Richardson v. Simpson, 88 Kan. 684, 129 Pac. 1128; *Mathews v. Hedlund*, 82 Neb. 825, 119 N. W. 17; *Munk v. Frink*, 81 Neb. 631, 116 N. W. 525, 17 L. R. A. (N. S.) 439; *Walker v. McMahn*, 75 Neb. 179, 106 N. W. 427; *Munk v. Frink*, 75 Neb. 172, 106 N. W. 425.

[a] Complaint held insufficient which merely charged as unprofessional conduct that the physician had been accused of circulating obscene literature and had admitted the accusation was true. Treated as a charge that he had circulated such literature the complaint is insufficient as failing to so identify the literature as to give him notice of the charge, though it would have been improper, on account of its nature, to embody the literature in the complaint. *Czarra v. Board of Medical Suprs.*, 24 App. Cas. (D. C.) 251.

[b] Complaint held sufficient which charged unprofessional conduct in procuring an abortion, which set out the act with sufficient particularity to apprise defendant of the charge, but did not describe the abortion with as sufficient fullness as might have been necessary in a prosecution for that

to the charge made.¹⁹

5. Review of Board's Decision. — The statutes frequently provide for an appeal from the decision of the board to the courts.²⁰ Mandamus has been recognized as a proper writ to compel the restoration of the physician's name to the register from which it had been erased without authority,²¹ and the writ of prohibition may be invoked where the board is about to proceed without authority.²² Certiorari does not lie where the action of the board has not been arbitrary.²³ That the legislature has not prescribed rules of practice to govern appeals in this class of cases does not render the appeal nugatory.²⁴ Whether the physician has been guilty of unprofessional and dishonorable conduct is a question of fact and hence the finding of the board thereon cannot be reviewed.²⁵

The decision of the court on appeal from the finding of the board, may be reviewed by appeal to the supreme court under some statutes.²⁶

crime. *Lanterman v. Anderson* (Cal. App.), 172 Pac. 625.

19. *People v. McCoy*, 125 Ill. 289, 17 N. E. 786, holding that under a charge of making "statements and promises . . . calculated to deceive and defraud the public," the physician could not be found guilty of "unprofessional and dishonorable conduct," in publicly advertising his business.

20. See the statutes and the following: **Minn.**—*State v. State Medical, etc. Board*, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575. **Mont.**—*State v. District Court*, 13 Mont. 370, 34 Pac. 298. **Neb.**—*Mathews v. Hedlund*, 82 Neb. 825, 119 N. W. 17; *Walker v. McMahon*, 75 Neb. 179, 106 N. W. 427; *Munk v. Frink*, 75 Neb. 172, 106 N. W. 425. **Ore.**—*State ex rel. Beckman v. Estes*, 34 Ore. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25. **R. I.**—*State Board of Health v. Roy*, 22 R. I. 538, 48 Atl. 802. **Can.**—*Re Washington*, 23 Ont. 299.

21. *Reg. v. College of Physicians & Surgeons*, 44 U. C. Q. B. 146.

[a] Cannot be reviewed on application to order the county court to erase the word "annulled" from the physician's registered license. The court's authority over the records in the clerk's office applies only to the records as clerk of the court. *In re Conrad*, 155 App. Div. 590, 140 N. Y. Supp. 630.

[b] Mandamus is the proper remedy to reinstate an appeal from the board where the court refused to take jurisdiction. *State v. District Court*, 13 Mont. 370, 34 Pac. 298.

22. See *infra*, this note.

[a] The writ was recognized as proper to review the question as to whether proper notice had been given or whether the statute of limitations had run; but not to determine whether the acts charged amounted to a charge of crime of which the physician had been acquitted, or were unprofessional or immoral conduct. *In re Stinson & College of Physicians & Surgeons*, 22 Ont. L. Rep. (Can.) 627.

23. *Traer v. State Board*, 106 Iowa 559, 76 N. W. 833, questions of the sufficiency and competency of the evidence cannot be reviewed by such proceedings.

24. *State v. District Court*, 13 Mont. 370, 34 Pac. 298.

Analogous procedure under statute, see *State ex rel. Beckman v. Estes*, 34 Ore. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25. See also *State Board of Health v. Roy*, 22 R. I. 538, 48 Atl. 802.

25. *People v. McCoy*, 125 Ill. 289, 17 N. E. 786 (provided the board acts on regular notice and investigates judicially the charge made); *Richardson v. Simpson*, 88 Kan. 684, 129 Pac. 1128; *Meffert v. State Medical Board*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, judgment affirmed, 195 U. S. 625, 25 Sup. Ct. 790, 49 L. ed. 350.

26. *State ex rel. Beckman v. Estes*, 34 Ore. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25, holding that the board may appeal from a judgment overruling its decision.

[a] Notice of such appeal is sufficient if served upon the state and not upon the relators, nor upon the board of examiners. *State ex rel.*

B. BY COURT. — 1. **In General.** — Under some statutes the courts have original jurisdiction to revoke licenses to practice.²⁷

2. **Parties.** — Under the statute giving the court jurisdiction to set aside licenses for dishonorable or unprofessional conduct, the action is brought in the name of the state,²⁸ but the board of medical examiners is not a necessary party.²⁹ A proceeding to set aside a license as having been irregularly issued should be brought by the attorney-general in the name of the state,³⁰ and the board which issued the license is a necessary party defendant.³¹

3. **Pleadings.** — A petition is sufficient which fully sets forth the unprofessional and dishonorable conduct of defendant.³²

4. **Questions of Law or Fact.** — Whether the defendant has been guilty of conduct which renders him amenable to the statute is one of fact for the jury,³³ subject to instruction by the court as in other cases.³⁴

III. ACTIONS FOR MALPRACTICE OR NEGLIGENCE.³⁵ — A. **NATURE AND FORM OF REMEDY.** — Though a physician or surgeon may be liable, under the same state of facts, both *ex contractu* and *ex delicto*, the plaintiff may at his option declare against him in either form.³⁶ That is he may sue either in *assumpsit* on the contract it-

Beckman *v.* Estes, 34 Ore. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25.

27. See the statutes, and *Berry v. State* (Tex. Civ. App.), 135 S. W. 631 (construing law of 1907 [Gen. Laws, pp. 224-228] which confers jurisdiction on district court); *State v. Schaeffer*, 129 Wis. 459, 109 N. W. 522, holding that the statute (Laws, 1905, ch. 422) is retroactive but provides for a civil action, and not one for a penalty or forfeiture, nor is it a criminal law within the rule as to *ex post facto*.

[a] The superior court as a court of general superintendence to prevent errors and abuses of inferior tribunals has jurisdiction in a case where the license was issued after examination by one member of the board, the statute requiring examination by at least two members. *Brown v. Grenier*, 73 N. H. 426, 62 Atl. 590, citing *P. S.*, ch. 204, §2.

28. *State v. Schaeffer*, 129 Wis. 459, 109 N. W. 522.

[a] In Texas it is done at the written request of any member of the board addressed to the district or county attorney. *Berry v. State* (Tex. Civ. App.), 135 S. W. 631.

29. *State v. Schaeffer*, 129 Wis. 459, 109 N. W. 522.

30. *Brown v. Grenier*, 73 N. H. 426, 62 Atl. 590.

31. *Brown v. Grenier*, 73 N. H. 426, 62 Atl. 590.

32. *Berry v. State* (Tex. Civ. App.), 135 S. W. 631, the petition set forth in detail the defendant's conduct, the false representations made to patients and to the public, the fraud practiced on patients, the knowledge of the falsity of the representations, and the intent to defraud.

33. *Berry v. State* (Tex. Civ. App.), 135 S. W. 631.

34. See the title "Instructions," and *Berry v. State* (Tex. Civ. App.), 135 S. W. 631, an instruction in the statutory language, "other grossly unprofessional or dishonorable conduct of a character likely to deceive the public," is sufficient unless a definition of such language is requested.

35. Judgment in action for services as merger or bar of malpractice claim, see 15 STANDARD PROC. 522, note 53 [f], 554, notes 62 to 64.

As to negligence generally see the title "Negligence."

36. *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60, Ann. Cas. 1912D, 863; *Lane v. Boicourt*, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Reinhardt v. Friederich*, 58 Ind. App. 421, 108 N. E. 258.

[a] At common law might bring *assumpsit* or case. *McCrory v. Skinner*, 2 Ohio Dec. (Reprint) 268, 2 West. L. Monthly 203.

[b] Examples of actions held based

self,³⁷ or in trespass on the tort.³⁸ It has been held, however, that the action must always be *ex contractu*.³⁹

An operation having been performed at the request of the patient, if the representations which induced the retainer were false and fraudulent, or if the proper skill is not employed, case is the proper remedy;⁴⁰ if the operation was performed maliciously, or without consent, trespass would lie.⁴¹ Where there is an express contract for the physician's services requiring him to come whenever called for, the breach of that contract would give rise only to an action for breach of contract,⁴² but if the physician came and was negligent in his treatment an action of tort lies for non-performance of the duty cast upon him by law.⁴³

B. JOINDER OF CAUSES OF ACTION.—Unless the statute permits it,⁴⁴ care must be taken not to join counts *ex contractu* and counts *ex delicto*,⁴⁵ but plaintiff may assert in separate counts, the breach of

on tort and not on contract, see Ind. *Goble v. Dilloh*, 86 Ind. 327, 44 Am. Rep. 308. **Mo.**—*Hales v. Raines*, 162 Mo. App. 46, 141 S. W. 917. **Utah.** *Cross v. Spaulding*, 41 Utah 447, 126 Pac. 468. **Vt.**—*Mullin v. Flanders*, 73 Vt. 95, 50 Atl. 813. **Wis.**—*Loffen v. O'Brien*, 146 Wis. 258, 131 N. W. 361. **Can.**—*Miller v. Ryerson*, 22 Ont. 369.

[c] **Examples of Actions Based on Contract and Not on Tort.**—*Lane v. Boicourt*, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; *Burns v. Barenfield*, 84 Ind. 43; *Staley v. Jameson*, 46 Ind. 159, 15 Am. Rep. 285.

[d] **Where a promise is alleged and counted upon, the gist of the action is contract and not tort.** *Burns v. Barenfield*, 84 Ind. 43.

[e] **Where there is no allegation of a promise on the part of the physician, the mere fact that plaintiff alleges an employment of him for a certain reward is not controlling, the other averments showing the complaint is for negligence.** *Harrod v. Bisson*, 48 Ind. App. 549, 93 N. E. 1093.

[f] **Where there is no allegation of a breach of the contract and the allegations follow the precedents in actions on the case the count is case and not assumpsit, though the physician's contract be set out with some particularity.** *Mullin v. Flanders*, 73 Vt. 95, 50 Atl. 813.

37. *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60, Ann. Cas. 1912D, 863; *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700, holding assumpsit is a proper remedy on the contract whether an expressed contract to cure, or implied contract to use proper skill, etc.

38. *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60, Ann. Cas. 1912D, 863; *Reinhardt v. Friederich*, 58 Ind. App. 421, 108 N. E. 258.

[a] **That an action for malpractice always sounds in tort whether it was for wilful injury, or one caused by negligence or for the doing of an act forbidden by law, see *In re Pillsbury's Estate*, 175 Cal. 454, 166 Pac. 11.**

39. *Finch v. Bursheim*, 122 Minn. 152, 142 N. W. 143, following *Whittaker v. Collins*, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55, where it is said that the gist or gravamen is the breach of the terms. It would be impossible for the plaintiff to state his case without alleging the contract, for the liability grows out of that, and not out of some general common law duty independent of contract.

40. *Cadwell v. Farrell*, 28 Ill. 438, if done skillfully patient has no right of recovery in any form of action.

41. *Cadwell v. Farrell*, 28 Ill. 438, holding that the averments as to malice in the particular action were surplusage.

42. *Randolph's Admr. v. Snyder*, 139 Ky. 159, 129 S. W. 562. Compare *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094, where the court says that assuming one would have a right of action against a physician for failing to be at his office, to give further treatment after an operation, the action would be *ex contractu* and not *ex delicto*.

43. *Randolph's Admr. v. Snyder*, 139 Ky. 159, 129 S. W. 562.

44. See the statutes and the title "Joinder of Actions."

45. *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60, Ann. Cas. 1912D, 863,

defendant's duty as a physician in operating without plaintiff's consent; and the unskillful manner in which the operation was performed,⁴⁶ and allegations of the several details or steps in a course of negligent professional treatment may be alleged in one count.⁴⁷

C. JOINDER OF PARTIES. — Whether one may sue one of two physicians who are partners without joining the other, depends upon whether the action be considered *ex contractu* or *ex delicto* and the rule as to suing partnerships upon their joint contracts.⁴⁸ Whether husband and wife can join in an action for the injury of the wife depends upon the general rules elsewhere treated.⁴⁹

D. PLEADING. — Where negligence is relied on it must be pleaded in accordance with the general rules governing that subject.⁵⁰ The acts or omissions counted upon to show the negligence of the physician should be set out,⁵¹ but the particular facts and circumstances need not be set out in detail,⁵² and the remedy for any defect in this regard is the motion to make more definite and certain, and not de-

holding that even did the statute not permit, all the counts in the case at bar were *ex delicto* and that the allegations as to the contract were only by way of inducement, proper to show the relation and that there was a breach of duty growing out of that relation.

46. *Van Meter v. Crews*, 149 Ky. 335, 148 S. W. 40.

47. *Brown v. Cady*, 91 App. Div. 415, 86 N. Y. Supp. 959, in an action against a dentist it was proper to allege unnecessary removal of teeth, allowing portions to remain in the gum, and placing improper bridgework, the several acts resulting in production of abscesses and necrosis.

48. See *Whittaker v. Collins*, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; *Lee v. Moore* (Tex. Civ. App.), 162 S. W. 437 (as to doctors who treat each other's patients); and the titles "Parties;" "Partnership."

49. See *Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094, and 11 STANDARD PROC. 750, *et seq.*

50. See the title "Negligence."

51. *Ind.*—*Hawley v. Williams*, 90 Ind. 160. *Mo.*—*Carpenter v. McDavitt*, 53 Mo. App. 393. *Ore.*—*Hills v. Shaw*, 69 Ore. 460, 137 Pac. 229.

[a] Examples of Complaints Held Sufficient.—*Ga.*—*Edwards v. Roberts*, 12 Ga. App. 140, 76 S. E. 1054, unskillful and improper diagnosis and unnecessary surgical operation. *Ind.*—*Schillinger v. Savage*, 115 N. E. 321 (improper treatment of fracture); *Lane v. Boicourt*, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442 (improp-

er attention to childbed case); *Burns v. Barenfield*, 84 Ind. 43 (complaint on contract to treat tumor); *Longfellow v. Vernon*, 57 Ind. App. 611, 105 N. E. 178, negligent and unskillful diagnosis and treatment of fracture. *Mich.*—*Hanselman v. Carstens*, 60 Mich. 187, 27 N. W. 18, improper treatment of compound fracture. *Wis.*—*Lueke v. Senn*, 165 Wis. 544, 163 N. W. 171 (complaint sufficient to show negligence, but not gross negligence, in case of blood poisoning after childbirth); *Crowty v. Stewart*, 95 Wis. 490, 70 N. W. 558, as to unskillfully treating a broken leg.

52. *Conn.*—*Grannis v. Branden*, 5 Day 260, 5 Am. Dec. 143, the several particular circumstances need not be set out. There is sufficient precision if the cause of action be so defined that the party may plead in bar of another suit for the same cause. *Mich.*—*Hanselman v. Carstens*, 60 Mich. 187, 27 N. W. 18. *Neb.*—*Morrill v. Tegarden*, 19 Neb. 534, 26 N. W. 202. *N. Y.*—*Brown v. Cady*, 91 App. Div. 415, 86 N. Y. Supp. 959.

[a] Details Need Not Be Stated. The complaint having set out with particularity that the negligence consisted in permitting a drainage tube to slip into the body, failure to set out how and in what manner the tube was negligently inserted, or to specifically state what means, treatment, or operation could have been used to discover the tube "are not defects—if such—which can be reached by demurrer." *Sontag v. Ude*, 191 Mo. App. 617, 177 S. W. 659. See also *Talley*

murrer,⁵³ except in those jurisdictions where special demurrer for uncertainty is allowed.⁵⁴

The complaint must affirmatively show the existence of a disease or condition requiring treatment or advice, and an injury resulting from the physician's treatment or advice.⁵⁵ The disease with which the patient was suffering should be named.⁵⁶ There must be an allegation that the defendant was, or professed to be, a physician or surgeon,⁵⁷ A specific allegation that the physician was possessed of the requisite skill and ability is not necessary,⁵⁸ nor is it necessary

v. Whitlock (Ala.) 73 So. 976, where on a similar state of facts the court says "it is not necessary to define the *quo modo*, or to specify the particular acts of diligence that should have been employed."

53. *De Hart v. Etnire*, 121 Ind. 242, 23 N. E. 77; *Hawley v. Williams*, 90 Ind. 160; *Finch v. Bursheim*, 122 Minn. 152, 142 N. W. 143, an allegation that defendant "negligently and unskillfully" treated the injury after undertaking the case is sufficient as against general demurrer though "perhaps a motion to make more definite and certain might have been sustained." And see: **N. C.**—*Mullinax v. Hord*, 174 N. C. 607, 94 S. E. 426, where the complaint set out with some particularity the nature of a gunshot wound, the negligent treatment thereof, and the court says if more was needed the motion was the proper remedy. **Ore.** *Hills v. Shaw*, 69 Ore. 460, 137 Pac. 229, holding that a motion to make more definite and certain was properly overruled where complaint alleged a particular fracture and that the negligence consisted in not bringing and keeping the broken parts in apposition, and allowing them so to remain for sixteen weeks. **Can.**—*Zirkler v. Robertson*, 30 Nova Scotia 61, which holds that the allegation "negligently, improperly, ignorantly and unskillfully dressed and treated the plaintiff's said wounds," etc., was by itself insufficient and defendant might have had the pleading amended or have demanded particulars.

54. See *Billesbach v. Larkey*, 161 Cal. 649, 120 Pac. 31 (not sufficient to allege physician "negligently and carelessly" gave a prescription without some facts tending to show where in it was so given. Complaint uncertain in that facts not so stated that it can be told whether the negligence was in the prescribing or not in warning as to use); *Osborn v. Carey*, 24

Idaho 158, 132 Pac. 967, complaint uncertain where it cannot be told therefrom whether it is claimed that defendant made an incorrect diagnosis resulting in improper treatment, or that the negligence consisted in a wrong treatment of a disease correctly diagnosed.

55. *Merriam v. Hamilton*, 64 Ore. 476, 130 Pac. 406, mere allegations of mistaken diagnosis as to pregnancy with no averment of facts showing some injury, do not state any cause of action. See also *Schillinger v. Savage* (Ind.), 115 N. E. 321, which held a complaint sufficiently charges that alleged carelessness in the treatment of a fracture was the proximate cause of the injury complained of.

56. *Osborn v. Carey*, 24 Idaho 158, 132 Pac. 967 (complaint insufficient which alleged merely that the patient was suffering from a "well known disease" without naming it. The defendant is entitled to know what disease is claimed so that he may prepare his defense by showing proper treatment, diagnosis, etc.); *Hawley v. Williams*, 90 Ind. 160.

57. *Bower v. Self*, 68 Kan. 825, 75 Pac. 1021 (allegation sufficient "is a physician and surgeon engaged in the practice of medicine and surgery . . . and has been so engaged for several years last past"); *Jones v. Burtis*, 88 Wis. 478, 60 N. W. 785, allegation sufficient where employment as a physician is alleged, and in substance that defendant falsely represented himself to possess the necessary knowledge, etc., as a medical practitioner.

58. *Hills v. Shaw*, 69 Ore. 460, 137 Pac. 229, the allegation that defendant is a practicing physician in a certain county in the state, taken with the laws regulating the practice, "necessarily implies that *prima facie*, at least, he had the requisite skill and ability." Compare *Barney v. Pinkham*, 29 Neb. 350, 45 N. W. 694, 26 Am.

to allege that it became or was the duty of the defendant to act with due and proper skill,⁵⁹ nor, expressly, that the physician was employed,⁶⁰ nor what compensation was to be paid,⁶¹ nor that the patient was not guilty of contributory negligence.⁶² The general rules of amendment apply.⁶³

E. ISSUES AND PROOF.—The question of the general competency of the physician cannot be raised where his want of qualifications is not pleaded,⁶⁴ and the allegation that defendant is a physician is supported by proof that he held himself out as such.⁶⁵ If he has not pleaded the fact defendant cannot introduce evidence of an hereditary predisposition of the patient hampering his recovery.⁶⁶ Whether a specific allegation as to negligent treatment controls a general averment, is governed by rules elsewhere treated.⁶⁷ Plaintiff may recover on proof of any one of several acts of negligence pleaded,⁶⁸ but plaintiff cannot prove an act of negligence not pleaded,⁶⁹ or some other

St. Rep. 389, where an allegation that a veterinary surgeon was "incompetent" was held not sufficient to show lack of the requisite professional skill.

59. *Ind.*—*Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Peck v. Martin*, 17 Ind. 115. *Mich.*—*Hanselman v. Carstens*, 60 Mich. 187, 27 N. W. 18. *Wis.* *Jones v. Burtis*, 88 Wis. 478, 60 N. W. 785.

60. *Schillinger v. Savage* (Ind.), 115 N. E. 321, it sufficiently appeared that the relationship of physician and patient existed.

61. *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Peck v. Martin*, 17 Ind. 115, plaintiff's implied promise to pay is sufficient.

62. *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. 462 (applying general statute on negligence [Act 1899, p. 58]); *Scudder v. Crossan*, 43 Ind. 343. See also *Coon v. Vaughn*, 64 Ind. 89, on theory that action though sounding in tort is based on contract. See the title "Negligence."

[a] Assuming it was necessary, the omission is cured by the issue as made by answer and reply. *Williams v. Nally*, 20 Ky. L. Rep. 244, 45 S. W. 874.

63. See the titles "Amendments and Joefails," "New Cause of Action or Defense," and *Randolph's Admr. v. Snyder*, 139 Ky. 159, 129 S. W. 562 (having sued for breach of a special contract, cannot amend, before trial, and sue for negligent treatment. Proper practice would have been to dismiss and start new suit); *Kuhn v. Brownfield*, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700, holding that a complaint

alleging an express promise to cure may be amended to charge only the engagement to treat patient with the implied obligation to treat to the best of his skill and judgment.

[a] Amendment permitted to conform to proof where complaint was that "elbow and arm" had been "fractured" and "broken" while proof was of a dislocation of the arm at the elbow. *Wormall v. Reins*, 1 Mont. 627.

64. *Mayo v. Wright*, 63 Mich. 32, 29 N. W. 832.

65. *Musser's Exr. v. Chase*, 29 Ohio St. 577.

66. *West v. Martin*, 31 Mo. 375, 80 Am. Dec. 107.

67. See the title "Negligence," and *Hales v. Raines*, 162 Mo. App. 46, 141 S. W. 917 (not controlled by specific allegations of injury by use of "x-ray"); *Zirkler v. Robertson*, 30 Nova Scotia (Can.) 61, generally controlled by special allegation where they are separately stated.

68. *Samuels v. Willis*, 133 Ky. 459, 118 S. W. 339, where a petition charged that defendant negligently cut or perforated the intestines, and that a sponge negligently left in the abdomen ulcerated the intestines and left an opening therein, plaintiff failing to prove the first charge may give evidence of the latter.

69. *Cozine v. Moore*, 159 Iowa 472, 141 N. W. 424; *Spain v. Burch*, 169 Mo. App. 94, 154 S. W. 172, the negligence alleged being in the administration of an anaesthetic, and in failing to make a proper examination and test of the body or organic functions

wrongful act committed by the physician,⁷⁰ except for the specific purpose of showing lack of skill and care.⁷¹ If a complaint declares upon an express promise to cure the evidence must support that promise,⁷² on the other hand in the absence of any such allegation no evidence of warranty of cure should be admitted.⁷³

Where the exact nature of the injury is admitted by the pleadings plaintiff cannot contradict them.⁷⁴

F. QUESTIONS FOR JURY.⁷⁵—Neither the court nor the jury undertake to determine the best mode of treatment, or to decide questions of medical science on which surgeons differ among themselves.⁷⁶ It

of the patient to ascertain ability to stand the strain of the operation and anaesthetic, evidence of failure to properly diet the patient before administering the anaesthetic is improper.

[a] **Manner of Performing Operation.**—Evidence of manner of performing amputation is inadmissible where complaint is for unskillful treatment necessitating the amputation and not for any unskillfulness in the amputation. *Jacobs v. Cross*, 19 Minn. 523. Compare *Wright v. Hardy*, 22 Wis. 348, under allegation of negligent and unskillful performance of an amputation, evidence that the amputation was at a higher point than necessary is admissible.

[b] **Failure To Give Subsequent Treatments.**—Md.—*Dashiell v. Griffith*, 84 Md. 363, 35 Atl. 1094, under allegation of "actual misfeasance, negligence, and want of skill" in treatment of patient's finger, evidence cannot be given of failure of defendant to be at his office to give subsequent treatments. N. Y.—*Carpenter v. Blake*, 60 Barb. 488 (*reversed* on other grounds, 50 N. Y. 696), it was not necessary to allege falsity of representations, to meet defendant's defense of consent to his discharge, but if plaintiff wishes to recover damages for injuries resulting from failure to obtain further surgical aid in reliance on the representations, they must be pleaded. Pa.—*Bemus v. Howard*, 3 Watts 255, mere recital that defendant had ceased to attend plaintiff does not justify evidence of refusal to attend or abandonment. Compare *Lawson v. Conaway*, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

[c] **Under a declaration for want of care and skill in performing an operation**, evidence may be given as to failure to give proper treatment or

advice as to care after the operation. *Williams v. Gilman*, 71 Me. 21.

70. *Booth v. Andrus*, 91 Neb. 810, 137 N. W. 884. Compare, *Grannis v. Branden*, 5 Day (Conn.) 260, 5 Am. Dec. 143, evidence of the untruth of statements as to the patient's having an obnoxious disease is admissible not for the purpose of laying foundation for damages for slander, but for the purpose of showing that defendant was ignorant of the true state of the patient's case.

71. *Kalloch v. Hoagland*, 239 Fed. 252, 152 C. C. A. 240, where evidence of a deformity not pleaded was admitted, but it appeared the deformity had subsequently been cured and no damages were claimed therefor. See also *Ingwersen v. Carr* (Iowa), 164 N. W. 217, though petition did not charge negligence in failing to use an x-ray machine, evidence that such machines were available is proper as bearing on the question as to whether defendants failed to use ordinary care to discover certain conditions.

72. *Hoopingarner v. Levy*, 77 Ind. 455. See also *Vanhooser v. Berghoff*, 90 Mo. 487, 3 S. W. 72.

73. *Goodwin v. Hersom*, 65 Me. 223.

74. *Williams v. Poppleton*, 3 Ore. 139, plaintiff alleged improper treatment of injured ankle. Defendant's answer stated it was a "compound fracture." Plaintiff cannot prove a simple dislocation.

75. See the titles "Negligence;" "Province of Judge and Jury."

76. *Williams v. Poppleton*, 3 Ore. 139.

[a] **In Canada** it seems the practice is to try these cases by the court without a jury where the decision involves the consideration of difficult questions of scientific inquiry. See *Town v. Archer*, 4 Ont. L. Rep. 383, and cases there cited.

is a question of law as to what constitutes ordinary skill, care and diligence on the part of a physician or surgeon.⁷⁷ So it is for the court and not the jury to say whether facts have been proven from which the negligence may be inferred,⁷⁸ but since these rules must then be applied to the evidence the whole question is to be regarded as one of mixed law and fact,⁷⁹ and whether the required degree of care and skill has been exercised in the case at bar, is a question of fact for the jury;⁸⁰ as are the questions whether the plaintiff was guilty of contributory negligence,⁸¹ whether the injury was attributable to the defendant or to some other physician employed in the case,⁸² whether the patient's condition resulted from the lack of skill,⁸³ or necessitated

77. *Tefft v. Wilcox*, 6 Kan. 46, "It is to be stated by the court as defined in the books."

78. *Spain v. Burch*, 169 Mo. App. 94, 154 S. W. 172; *Fields v. Rutherford*, 29 U. C. C. P. 113; *Jackson v. Hyde*, 28 U. C. Q. B. 294.

79. *Kan.*—*Tefft v. Wilcox*, 6 Kan. 46. *Mich.*—*Rogers v. Kee*, 171 Mich. 551, 137 N. W. 260. *Minn.*—*Chamberlain v. Porter*, 9 Minn. 260.

Compare Woodward v. Hancock, 52 N. C. 384.

80. *U. S.*—*Kalloch v. Hoagland*, 239 Fed. 252, 162 C. C. A. 240, treatment of broken leg involving nerve caught between broken ends of bone. *Ala.*—*Talley v. Whitlock*, 73 So. 976, negligence in leaving or placing pus drainage tube without properly securing it. *Cal.*—*Bailey v. Kreutzmann*, 141 Cal. 519, 75 Pac. 104. *Ga.*—*Moon v. McRae*, 111 Ga. 206, 36 S. E. 635; *Edwards v. Roberts*, 12 Ga. App. 140, 76 S. E. 1054. *Ind.*—*Schillinger v. Savage*, 115 N. E. 321, reducing fracture of femur. *Ia.*—*Haase v. Morton*, 138 Iowa 205, 115 N. W. 921 (as to responsibility of physician for accidental injury of patient while being removed from operating room to ward); *Tomer v. Aiken*, 126 Iowa 114, 101 N. W. 769, whether diagnosis properly distinguished between a fracture and a dislocation. *Mo.*—*Vanhooser v. Berghoff*, 90 Mo. 487, 3 S. W. 72 (whether surgeon was justified in using a rude substitute for regular splint in reducing a fracture); *Sontag v. Ude*, 191 Mo. App. 617, 177 S. W. 659; *Reeves v. Lutz*, 179 Mo. App. 61, 162 S. W. 280; *McClarín v. Grenzfelder*, 147 Mo. App. 478, 126 S. W. 817, whether method of treating hernia was proper. See also *Weller v. Lapao Laboratories*, 197 Mo. App. 47, 191 S. W. 1056. *Neb.*—*Griswold v.*

Hutchinson, 47 Neb. 727, 66 N. W. 819, as to whether sufficiently preliminary examination and diagnosis was made prior to operation. *N. C.*—*Mullinax v. Hord*, 174 N. C. 607, 94 S. E. 426; *Long v. Austin*, 153 N. C. 508, 69 S. E. 500, it is for the jury to decide whether the physician had the requisite skill and knowledge and whether he used them. *N. D.*—*Fawcett v. Ryder*, 23 N. D. 20, 135 N. W. 800, whether the acts of the surgeon after the operation were negligent is for the jury. Patient burned by hot water bag. *Vt.* *Baldwin v. Gaines*, 102 Atl. 338 (whether proper method used to reduce fracture; involving use of Liston method); *Rann v. Twitchell*, 82 Vt. 79, 71 Atl. 1045, 20 L. R. A. (N. S.) 1030. *Wash.* *Wynne v. Harvey*, 96 Wash. 379, 165 Pac. 67 (whether negligence to use silk thread to tie arteries instead of catgut); *Ennis v. Banks*, 95 Wash. 513, 164 Pac. 58 (whether it was negligent to change diet of a typhoid patient); *Just v. Littlefield*, 87 Wash. 299, 151 Pac. 780 (whether surgeon proceeded to operate too quickly, the case being one where experts might differ as to diagnosis of pregnancy); *Taylor v. Kidd*, 72 Wash. 18, 129 Pac. 406. *Wis.*—*Schultz v. Tasehe*, 166 Wis. 561, 165 N. W. 292.

[a] Whether the physician's negligence or the patient's contributory negligence was the cause of the injury the question is for the jury. *Dunman v. Raney*, 118 Ark. 337, 176 S. W. 339.

81. *Lee v. Moore* (Tex. Civ. App.), 162 S. W. 437.

82. *Harris v. Fall*, 177 Fed. 79, 100 C. C. A. 497, 27 L. R. A. (N. S.) 1174. See *Samuels v. Willis*, 133 Ky. 459, 118 S. W. 339.

83. *McGray v. Cobb*, 130 Minn. 434, 152 N. W. 262, 153 N. W. 756; *Ennis v. Banks*, 95 Wash. 513, 164

the action taken,⁸⁴ and whether the patient consented to what was done.⁸⁵ Whether the physician was employed is a question of fact for the jury,⁸⁶ as is the question whether the physician's reason for sending a substitute was a sufficient excuse for not giving his personal attention to the case.⁸⁷ Where the testimony, both lay and expert, as to what the physician actually did, was conflicting, the question as to whether he gave the patient the care and attention which the case demanded, is for the jury.⁸⁸ Where the testimony of the expert witnesses is conflicting the question is for the jury.⁸⁹

G. INSTRUCTIONS.⁹⁰—Of course the rules as to comment on the evidence must be observed,⁹¹ and the ordinary rules apply that the instructions must be confined to the pleadings and evidence,⁹² and

Pac. 58, whether death resulted from the malpractice, or from removing the patient to his home by order of his wife, or from the disease independently of either. See *Ingwersen v. Carr* (Iowa), 164 N. W. 217 (where the question was whether a certain nerve was caught between the broken ends of bone at the time the physician first examined the fracture, or became so caught later), *distinguishing* *Adams v. Junger*, 158 Iowa 449, 139 N. W. 1096, where the only proof was as to conditions as they existed at a later period as shown by an x-ray picture, and, applying the doctrine that "presumptions do not relate backwards" there was no question for the jury.

84. *Bennison v. Walbank*, 38 Minn. 313, 37 N. W. 447.

85. *Roteler v. Strain*, 39 Okla. 572, 137 Pac. 96.

86. *Walker v. Holbrook*, 130 Minn. 106, 153 N. W. 305.

87. *Lee v. Moore* (Tex. Civ. App.), 162 S. W. 437.

88. *Acton v. Smith*, 150 Ky. 703, 150 S. W. 854 (as to whether wrong diagnosis and improper treatment caused a miscarriage); *Dailey v. Shaffer*, 178 Mich. 574, 146 N. W. 192. See also *Reynolds v. McManus*, 139 Iowa 242, 117 N. W. 667 where rule was applied as to proper treatment for injuries received during childbirth.

89. Minn.—*Walker v. Holbrook*, 130 Minn. 106, 153 N. W. 305; *McGray v. Cobb*, 130 Minn. 434, 152 N. W. 262, 153 N. W. 736; *Sawyer v. Berthold*, 116 Minn. 441, 134 N. W. 120. N. J.—*Coleman v. Wilson*, 85 N. J. L. 203, 88 Atl. 1059, Ann. Cas. 1915D, 1122, as to whether proper treatment after surgical operation was to continue to cut away a growth, or to permit it to remain. N. Y.—*Link v. Shel-*

don, 136 N. Y. 1, 32 N. E. 696 (involving a "Colles' fracture"); *Dubois v. Decker*, 130 N. Y. 325, 29 N. E. 313, 27 Am. St. Rep. 529, 14 L. R. A. 429, *affirming* 52 Hun 610, 4 N. Y. Supp. 768, 22 N. Y. St. 274, involving necessity for amputation and proper performance of the operation.

90. See the title "Instructions."

91. See 16 STANDARD PROC. 829, *et seq.*

[a] **It is not comment on the evidence** for the judge to state that he does not clearly understand from the medical testimony already given just where a certain ligament is located. *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804.

92. See generally 16 STANDARD PROC. 774, *et seq.*, and *Richards v. Willard*, 176 Pa. 181, 35 Atl. 114 (as to nature of fracture, skill used in reducing and contributory negligence of plaintiff); *Payne v. Francis*, 37 Tex. 75, must not instruct on "carelessness and neglect" where complaint only for unskillful treatment.

[a] **Instructions as to skill as a specialist** should not be given in absence of evidence that defendant held himself out as a specialist. *Johnson v. Powell* (Kan.), 123 Pac. 881; *Prahl v. Gerhard*, 25 Wis. 466, proper to instruct as to non-liability for accident to animal treated by veterinary, there being some evidence of such an accident subsequent to the operation.

[b] **Treatment by Osteopath—Skill.** Complaint being for improper treatment by osteopaths the instructions should not charge on the degree of skill required by physicians not of that school. *Wilkins' Admr. v. Brock*, 81 Vt. 332, 70 Atl. 572.

[c] **Instruction based on "willful negligence"** improper where no evi-

must not ignore issues,⁹³ nor assume facts not proved,⁹⁴ and must not be inconsistent or misleading.⁹⁵ Mere general instructions on the strict accountability of physicians to society in general are objectionable, though the rule stated may be true.⁹⁶ It is proper, however, to instruct upon the degree of skill or care required under the evidence and issues of the particular case,⁹⁷ and upon the question of employment of the physician.⁹⁸

IV. ACTIONS FOR COMPENSATION.—A. NATURE AND FORM OF REMEDY.—The physician may sue upon his contract for services in indebitatus assumpsit,⁹⁹ or upon quantum meruit for the services performed.¹

B. PLEADINGS.—1. **Declaration or Complaint.**—By the weight of authority the physician need not allege his license, or authority to

dence thereof. *Wenger v. Calder*, 78 Ill. 275.

93. See generally 16 STANDARD PROC. p. 786, *et seq.*, and *McClarín v. Grenzfelder*, 147 Mo. App. 478, 126 S. W. 817; *Coleman v. Wilson*, 85 N. J. L. 203, 88 Atl. 1059, Ann. Cas. 1915D, 1122.

[a] **Instruction is too narrow** which limits recovery to negligent placing of patient upon a hot water bottle, where the complaint also charged negligence in permitting the bottle to remain where contact was possible. *Fawcett v. Ryder*, 23 N. D. 20, 135 N. W. 800.

[b] **Should Not Ignore Issue of Contributory Negligence.**—*Haradon v. Sloan*, 157 Iowa 608, 138 N. W. 556. See also *Jones v. Angell*, 95 Ind. 376 (when evidence warranted giving instruction on contributory negligence); *Wilmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338, where instruction on contributory negligence of those having patient in charge, was refused.

94. See 16 STANDARD PROC. 854, *et seq.*, and *Link v. Sheldon*, 64 Hun 632, 18 N. Y. Supp. 815, *affirmed* in 136 N. Y. 1, 32 N. E. 696.

95. See 16 STANDARD PROC. 800, *et seq.*, and **Ia.**—*Whitesell v. Hill*, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830. **Ky.**—*Van Meter v. Crews*, 149 Ky. 335, 148 S. W. 40. **Mich.**—*Spaulding v. Bliss*, 83 Mich. 311, 47 N. W. 210. **Mo.**—*Reeves v. Lutz*, 179 Mo. App. 61, 162 S. W. 280. **Tenn.**—*Sale v. Eichberg*, 105 Tenn. 333, 59 S. W. 1020, 52 L. R. A. 894.

96. *Burnham v. Jackson*, 1 Colo. App. 237, 28 Pac. 250. See generally as to abstract rules in instructions,

16 STANDARD PROC. 772, *et seq.*

97. **Ia.**—*Whitesell v. Hill*, 101 Iowa 629, 70 N. W. 750, 37 L. R. A. 830. **Mo.**—*Robertson v. Wenger*, 131 Mo. App. 224, 110 S. W. 663, example of instructions sufficient as to presenting the question of defendant's unskillfulness or want of care. **Wis.**—*Allen v. Voje*, 114 Wis. 1, 89 N. W. 924, departure from recognized practice or approved methods as constituting negligence.

[a] **Terms Defined.**—(1) "Ordinary" and "reasonable" are practically synonymous in describing degree of skill, and while "ordinary care" is a more accurate word an instruction using "reasonable" is proper. *Kendall v. Brown*, 74 Ill. 232. See also *Jones v. Angell*, 95 Ind. 376, where "fair" and "reasonable" were held practically synonymous as to degree of knowledge required. (2) Use of the word "profession" instead of term "physician in good standing," is unobjectionable. The words are practically synonymous. *Lawson v. Conway*, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

98. *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804, instruction held sufficient.

99. **Ala.**—*Matthews v. Turner*, 2 Stew. & P. 239. **Ark.**—*McLure v. Hart*, 19 Ark. 119. **Cal.**—*Heintz v. Cooper*, 47 Pac. 360. **Mass.**—*Glover v. Le Testue*, Quincy 225, *overruling* in part, *Pynchon v. Brewster*, Quincy 224. **N. Y.**—*Schopen v. Baldwin*, 83 Hun 234, 31 N. Y. Supp. 581.

1. **Ala.**—*Jones v. King*, 81 Ala. 285, 1 So. 591. **Cal.**—*Heintz v. Cooper*, 42 Pac. 360. **N. Y.**—*Schopen v. Baldwin*, 83 Hun 234, 31 N. Y. Supp. 581.

practice,² but there is authority to the contrary.³ If the services have been rendered by another physician provided by the plaintiff that fact must be stated in the complaint.⁴ An allegation in the form of a common count for services rendered to another than defendant but at defendant's special instance and request, is sufficient.⁵ Where the action is on an account the items should be set forth.⁶

2. Plea or Answer.—That the physician did not have authority to practice need not be specially pleaded in an action of assumpsit but may be proved under a plea of non-assumpsit,⁷ but the defense that the physician was guilty of malfeasance or malpractice to defendant's damage is matter of recoupment which must be specially pleaded according to some authorities.⁸

C. ISSUES AND PROOF.—Under the common count for a quantum meruit, the defendant may prove the real value of the physician's services, or that they were of no value,⁹ and for this purpose may show malpractice.¹⁰ Where the only allegation was of services by himself the plaintiff cannot prove services of another physician acting for him.¹¹

D. QUESTIONS OF LAW AND FACT.—It is a question for the jury whether the physician used proper care and skill in his treatment of the case.¹² Where the action is upon a quantum meruit the value

2. *Lyford v. Martin*, 79 Minn. 243, 82 N. W. 479 (non-compliance with law is a matter of defense); *Webster v. Lamb*, 15 S. D. 292, 89 N. W. 473, unless it appears on face of complaint that physician has no license, that fact must be set up by answer not demurrer. See also: **Ia.**—*Lacy v. Kosuth*, 106 Iowa 16, 75 N. W. 689. **N. Y.** *Thompson v. Sayre*, 1 Denio 175. **Wis.** *Rider v. Ashland County*, 87 Wis. 160, 58 N. W. 236.

3. Ga.—*Grantham v. Fleming*, 13 Ga. App. 184, 78 S. E. 1113, holding that the trial court should have sustained a demurrer on this ground, but refusing to reverse because proper exception not taken. **Ind.**—*Bedford Belt Ry. Co. v. McDonald*, 12 Ind. App. 620, 40 N. E. 821. **Kan.**—*Westbrook v. Nelson*, 64 Kan. 436, 67 Pac. 884, allegation as of the time the services were performed.

See *Rider v. Ashland County*, 87 Wis. 160, 58 N. W. 236, which suggests that complaint might be demurrable on that ground but refused to reverse for admission of evidence under the complaint.

[a] **Allegation Held Sufficient.** "The plaintiff is a physician duly registered under the provisions of chapter 103, R. S. N. S., and amendments thereto." *Johnston v. Municipality of Halifax*, 46 Nova Scotia 474.

4. *Sayles v. Fitzgerald*, 72 Conn. 391, 44 Atl. 733, for physicians do not ordinarily act by agents and defendant should be apprised of the intended proof.

5. *McEwen v. Hoffman*, 42 Ind. App. 202, 85 N. E. 364.

6. *Willet Bros. v. Western Naval Stores Co.* (Tex. Civ. App.), 198 S. W. 352, as to necessity for itemizing amounts charged for medicine, for examination, for visits, for prescription, etc.

7. *Matthews v. Turner*, 2 Stew. & P. (Ala.) 239.

Whether plaintiff must allege license to practice, see *supra*, IV, B, 1.

8. *McLure v. Hart*, 19 Ark. 119.

Judgment in action for services as merger or bar of claim for malpractice, see 15 STANDARD PROC. 552, note 53 [f], 554, notes 62-64.

9. *Jones v. King*, 81 Ala. 285, 1 So. 591, so his evidence of customary charges of physicians for like services in the same neighborhood should have been admitted, as should evidence of the worthlessness of the medicine prescribed.

10. *Schopen v. Baldwin*, 83 Hun 234, 31 N. Y. Supp. 581, 64 N. Y. St. 212.

11. *Sayles v. Fitz-Gerald*, 72 Conn. 391, 44 Atl. 733.

12. *Logan v. Field*, 75 Mo. App.

of the services is clearly a question for the jury.¹³

E. INSTRUCTIONS. — The instructions must conform to the pleading and evidence.¹⁴

V. PROSECUTION FOR PRACTICING WITHOUT RIGHT.

A. BY WHOM INSTITUTED. — A statute providing that complaints for the violation of its various provisions shall be made by the secretary of the state board of health does not prevent the grand jury from bringing an indictment without such complaint.¹⁵

B. INDICTMENT, INFORMATION OR COMPLAINT.¹⁶ — The offense of practicing without authority being a statutory one the general rule applies that an indictment or information is sufficient if it charge the offense in the language of the statute, or in terms substantially equivalent thereto.¹⁷ So it is sufficient to allege that defendant "practiced

594, holding that it was for the jury to say whether or not the physician knew or ought to have known that defendant's ailment was incurable, and ought to have so informed him.

13. **Ga.**—*Marshall v. Bahnsen*, 1 Ga. App. 485, 57 S. E. 1006, applied to veterinary. **Mich.**—*Crumrine v. Austin*, 133 Mich. 283, 94 N. W. 1057 (value of operation, there being a conflict as to whether a contract for hospital service included cost of the operation); *Wood v. Barker*, 49 Mich. 295, 13 N. W. 597, but holding that the jury must not ignore the evidence and merely give what they believe to be a reasonable fee. **Wis.**—*Ladd v. Witte*, 116 Wis. 35, 92 N. W. 365, holding that the jury cannot disregard the evidence of experts.

14. *Hinkle v. Burt*, 94 Ga. 506, 19 S. E. 828; *Abbott v. Mayfield*, 8 Kan. App. 387, 56 Pac. 327, holding that where there was a denial of correctness of plaintiff's account and of any indebtedness, an instruction that if malpractice was found there could be no recovery, should have been given.

15. *State v. Flanagan*, 25 R. I. 369, 55 Atl. 876, following *State v. Snell*, 21 R. I. 232, 42 Atl. 869. See 12 STANDARD PROC. 125, 126.

16. See the title "Indictment and Information."

17. **Cal.**—See *People v. Chow Juan*, 28 Cal. App. 124, 151 Pac. 554. **Ind.**—*Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190, following *Benham v. State*, 116 Ind. 112, 18 N. E. 454. **Ia.**—*State v. Frutiger*, 167 Iowa 550, 149 N. W. 634; *State v. Zechman*, 157 Iowa 153, 138 N. W. 387; *State v. Corwin*, 151 Iowa 420, 131 N. W. 659; *State v. Kendig*, 133

Iowa 164, 110 N. W. 463; *State v. Edmunds*, 127 Iowa 333, 101 N. W. 431. **Neb.**—*Denton v. State*, 21 Neb. 445, 32 N. W. 222. **Ore.**—*State v. Brown*, 64 Ore. 473, 130 Pac. 985. **R. I.**—*State v. Flanagan*, 25 R. I. 369, 55 Atl. 876; *State v. Martin*, 23 R. I. 143, 49 Atl. 497. **Tex.**—*Byrd v. State*, 72 Tex. Crim. 265, 162 S. W. 363; following *Singh v. State*, 66 Tex. Crim. 156, 146 S. W. 891; *Antle v. State*, 6 Tex. App. 202. **Wash.**—*State v. Littooy*, 52 Wash. 87, 100 Pac. 170.

See 12 STANDARD PROC. 447.

[a] But where the language used in the statute does not declare any offense an indictment which goes no further is not sufficient. *Com. v. Moyer*, 23 Pa. Dist. 164. Compare *Com. v. Becker*, 23 Pa. Dist. 167.

[b] **Approved Form.**—"The jurors for the state, etc. . . . present that (defendant) in (name county) on the (date) unlawfully and wilfully did practice, or attempt to practice, medicine or surgery, the said (defendant) not then and there having produced and exhibited before the clerk of the superior court of said county a license obtained from the board of medical examiners of the State of North Carolina, or a diploma issued by a regular medical college prior to the 7th day of March, 1885, nor made oath that he was practicing medicine or surgery in the state prior to said 7th day of March, 1885, and not then and there having obtained from the said clerk of the court a certificate of registration, and not then and there having a temporary license so to practice medicine or surgery, contrary to the statute in such cases made and provided, and against the peace and dig-

medicine" where the statute is "practiced as a physician,"¹⁸ or that he "did engage" in the practice where the statutory words are "enter upon."¹⁹ But, as in other cases, it is necessary to aver specifically the facts constituting the crime.²⁰ If the statute declares what the words "practice medicine" mean the indictment should charge that the defendant did practice medicine by doing those very things, following

nity of the state." See *State v. Van Doran*, 109 N. C. 864, 14 S. E. 32, again approved in *State v. Welch*, 129 N. C. 579, 40 S. E. 120, but compare *State v. Call*, 121 N. C. 643, 28 S. E. 517, which says the concluding words are surplusage and that the words "or a diploma issued by a regular medical college," etc. should be stricken out as no longer applicable.

18. *Whitlock v. Com.*, 89 Va. 337, 15 S. E. 893.

19. *Com. v. Campbell*, 22 Pa. Super. 98.

20. *People v. Silver*, 158 App. Div. 217, 143 N. Y. Supp. 43, practice of dentistry. See *State v. Hathaway*, 106 Mo. 236, 17 S. W. 299.

[a] **Christian Science.**—Where the statute describes as "practising medicine or surgery" any person who prescribes, etc., "any drug or medicine or other agency," an information is demurrable which charged defendant with the practice of the "system of Christian Science" without allegations showing that system is either drug, medicine or other agency of the kind described in the statute. *Evans v. State*, 9 Ohio Dec. 222, 6 Ohio N. P. 129.

[b] **Where the statute requires a license to be filed** (1) in the office of the county clerk of the county wherein the licentiate resides, or in the county in which he intends to practice, the prosecutor must charge either that a license was not issued, or that it was not filed in the county where the accused resides. *Wilson v. State*, 89 Neb. 258, 131 N. W. 223; *Jones v. State*, 49 Neb. 609, 68 N. W. 1034; *O'Connor v. State*, 46 Neb. 157, 64 N. W. 719. To same effect, see *Jones v. State*, 8 Ga. App. 411, 69 S. E. 315. (2) So where the law required a verification license to be filed in the county of the physician's residence, an indictment for failure to so file must allege that the county was that of defendant's residence. *Lockhart v. State*, 58 Tex. Crim. 80, 124 S. W. 923. (3) "It probably would be sufficient if the

pleading should allege that the accused's residence is unknown, or that he is a nonresident of the state, as the case may be, and that he has not registered his certificate or authority to practice in the county where it is alleged he has unlawfully practiced." *Young v. State*, 74 Tex. Crim. 133, 167 S. W. 1112, approving *Lockhart v. State*, 58 Tex. Crim. 80, 124 S. W. 923, and of *Marshall v. State*, 56 Tex. Crim. 205, 119 S. W. 310, to the same effect, and expressly overruling so much of *Stiles v. State*, 66 Tex. Crim. 665, 148 S. W. 326, as is to the contrary. See also *State v. Goldman*, 44 Tex. 104; *Person v. State*, 53 Tex. Crim. 334, 109 S. W. 935; *Carribene v. State*, 3 Tex. App. 262.

[c] **But where the statute only requires one license, the operation of which is statewide**, an allegation that defendant has none in a certain county sufficiently charges having none in the state. *State v. Carlisle*, 28 S. D. 169, 132 N. W. 686, Ann. Cas. 1914B, 395.

[d] **Osteopathy.**—Where one section provides that holders of the license shall be authorized "to practice osteopathy as taught and practiced in the legally incorporated reputable colleges of osteopathy, as provided for in this act," and another section provides that it shall be a misdemeanor to practice without such license, the indictment must charge defendant with having practiced osteopathy as taught and practiced in the legally incorporated, etc., colleges described in the act. *Com. v. Moyer*, 23 Pa. Dist. 164.

[e] **Where the statute forbids assuming the title of doctor** by one not having a diploma or license, a complaint is insufficient which alleges only that defendant had no license. *Schaeffer v. State*, 113 Wis. 595, 89 N. W. 481.

[f] **Temporary Certificate.**—It was not necessary to charge that accused did not have a temporary certificate from a single member of the board where it is alleged that he had not obtained and recorded a certificate

the statute as closely as applicable,²¹ and if the statute does not describe the crime an indictment which merely alleges "practicing medicine" is defective as alleging an undefined crime.²² It is not necessary to use the exact language of the statute, nor to refer to the particular section on which the indictment is based,²³ provided it does set forth in what the unlawfulness consisted,²⁴ nor is it necessary to set out the evidence whereby the crime is committed.²⁵ The negation of the defendant's qualifications must be broad enough to meet the full requirements of the statute.²⁶ So where the indictment fails to allege that the practicing was without the registration and certification required by law, it is insufficient.²⁷ Where the statute is aimed generally at the practice of medicine it is not necessary to allege what particular branch thereof defendant practiced.²⁸ The indictment need not specify the particular person practiced upon,²⁹ nor the particular

from the board "or any of its members." *Noble v. State*, 68 Fla. 1, 66 So. 153.

21. *Mich.*—*People v. Watson*, 162 N. W. 943, "Unlawfully did engage in the business of the practice of medicine, and did practice medicine, within the meaning of the act," is not sufficient because it fails to employ the descriptive words by which the act defines the subject matter of the offense. *Miss.*—*Dee v. State*, 68 Miss. 601, 9 So. 356. *Neb.*—*O'Connor v. State*, 46 Neb. 157, 64 N. W. 719; *Denton v. State*, 21 Neb. 445, 32 N. W. 222. *Okla.*—*Feige v. State*, 11 Okla. Crim. 49, 142 Pac. 1044, an information was held insufficient which failed to allege either the administration of some drug included in *materia medica* in the treatment of diseases, etc., or that the accused publicly professed to be a physician and prescribed for the sick; those being the two descriptions in the statute of "practicing medicine and surgery." *Wash.*—*State v. Carey*, 4 Wash. 424, 30 Pac. 729.

22. *State v. Carey*, 4 Wash. 424, 30 Pac. 729.

23. *State v. Flanagan*, 25 R. I. 369, 55 Atl. 876. See 12 STANDARD PROC. 442.

24. *State v. Flanagan*, 25 R. I. 369, 55 Atl. 876. See also *State v. Martin*, 23 R. I. 143, 49 Atl. 497, an indictment was sufficient which charged the practice of dentistry without having received a certificate from the board of registration, etc., but *distinguishing* *State v. Pirlot*, 19 R. I. 695, 36 Atl. 715, where the recitation was merely "did unlawfully practice medicine, for reward and compensation, against the form of the statute."

25. *State v. Corwin*, 151 Iowa 420, 131 N. W. 659; *State v. Kendig*, 133 Iowa 164, 110 N. W. 463. Compare *State v. Wilhite*, 132 Iowa 226, 109 N. W. 730, where an indictment was held faulty, though not fatal, which set forth the evidence.

26. *State v. Goldman*, 44 Tex. 104, followed in *Carribene v. State*, 3 Tex. App. 262.

[a] Information need not be so strictly technical as an indictment. But in the case at bar the failure to register was distinctly alleged. *Driscoll v. Com.*, 93 Ky. 393, 20 S. W. 431, 703.

27. *State v. Call*, 121 N. C. 643, 28 S. E. 517, followed in *State v. Welch*, 129 N. C. 579, 40 S. E. 120, holding that to charge "not then and there having obtained from said Clerk of the Court a certificate of registration," charges that the defendant "did not register and obtain license."

[a] The offense being practicing without registration and the clerk's certificate being only evidence of that registration, no offense is charged where defendant is accused only of failing to have the certificate. *State v. Fussell*, 45 Ark. 65.

28. *Antle v. State*, 6 Tex. App. 202, approved in *Byrd v. State*, 72 Tex. Crim. 265, 162 S. W. 363.

29. *Mich.*—*People v. Phippin*, 70 Mich. 6, 37 N. W. 888. *Mo.*—*State v. Doerring*, 194 Mo. 398, 92 S. W. 489; *State v. Little*, 76 Mo. 52 (giving as a reason that "no individual right is infringed," and it is therefore analogous to selling liquor illegally rather than larceny or other crime against the person or property); *State v. Hellscher*, 150 Mo. App. 230, 129 S. W.

acts or means used by which the defendant practiced,³⁰ nor the exact time,³¹ nor the particular means of "advertising" oneself as a physician.³² The indictment need not charge the defendant with prescribing for or practicing upon human beings as distinguished from domestic animals.³³ There need be no allegation that the practicing was for compensation unless the statute makes that an ingredient of the offense.³⁴ The statute being silent as to the intent, with which the practice is done, no intent need be alleged.³⁵ The usual rule obtains that the unessential portion of the indictment may be dis-

1035; *State v. Smith*, 60 Mo. App. 283. **Mont.**—*State v. Morris*, 45 Mont. 334, 122 Pac. 917. **Pa.**—*Com. v. Moyer*, 23 Pa. Dist. 164.

[a] **Practising dentistry without license being a continuing offense** the same rule does not apply as in assault or an illegal sale of liquor, where the particular person should be named. *State v. Martin*, 23 R. I. 143, 49 Atl. 497, *distinguishing State v. Maloney*, 12 R. I. 251 (where the indictment was for obstructing an officer), and *State v. Doyle*, 11 R. I. 574, where the complaint was for a sale of liquor. See also *State v. Van Doran*, 109 N. C. 864, 14 S. E. 32, where similar distinctions are drawn covering many cases.

30. **Mich.**—*People v. Phippin*, 70 Mich. 6, 37 N. W. 888, *followed in White v. Lapeer*, Circ. Judge, 133 Mich. 93, 94 N. W. 601. **Mont.**—*State v. Morris*, 45 Mont. 334, 122 Pac. 917. **N. Y.** *People v. Ellis*, 162 App. Div. 288, 147 N. Y. Supp. 681. **Wash.**—*State v. Littooy*, 52 Wash. 87, 100 Pac. 170, *dentistry*.

[a] **Indictment in exact language of statute except for the designation of the means used for effecting cures is sufficient.** *State v. Edmunds*, 127 Iowa 333, 101 N. W. 431. See also *State v. Corwin*, 151 Iowa 420, 131 N. W. 659; *State v. Kendig*, 133 Iowa 164, 110 N. W. 463.

[b] **But where the description in the statute defining practicing was prescribing, etc., "any drug, medicine, appliance, or other agency, for the cure, relief or palliation of any ailment or disease of mind or body, or for the cure or relief of any bodily injury or deformity," a mere allegation that defendant "did prescribe various medicines" and "did dose, administer and apply said various medicines to the good people of Tunica county," was held insufficient as not showing the prescribing or administer-**

ing was not for some other purpose than for the relief of ailment or disease, etc. *Dee v. State*, '68 Miss. 601, 9 So. 356.

31. *State v. Kendig*, 133 Iowa 164, 110 N. W. 463. See 12 STANDARD PROC. 411, et seq.

[a] **It is sufficient to charge the practicing without lawful authority between certain dates and in particular upon certain specified days.** *People v. Ellis*, 162 App. Div. 288, 147 N. Y. Supp. 681.

Variance between date alleged and proved, see *infra*, V, D.

32. *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035.

33. *State v. Kendig*, 133 Iowa 164, 110 N. W. 463, "this objection is purely hypercritical and without merit."

34. *Blalock v. State*, 112 Ga. 338, 37 S. E. 361 (the statutory definition "practising medicine" embraces the idea of exacting compensation so there need be no allegation thereof); *State v. Welch*, 129 N. C. 579, 40 S. E. 120; *State v. Call*, 121 N. C. 643, 28 S. E. 517.

[a] **Code providing with or without compensation it is not necessary to allege anything about the compensation.** *Whitlock v. Com.*, 89 Va. 337, 15 S. E. 893.

[b] **Where Indictment Was for Practising Without Having Recorded Certificate.**—*State v. Brown*, 64 Ore. 473, 130 Pac. 985.

[c] **Necessary under statute making that an ingredient of the crime.** *Marshall v. State*, 56 Tex. Crim. 205, 119 S. W. 310. See also *Reg. v. Hessel*, 44 U. C. Q. B. 51.

[d] **Need not state who paid fee where the statute forbids practising dentistry for "a fee, salary or reward paid directly or indirectly."** *People v. Keseling*, 25 Cal. App. Dec. 947.

35. *Harding v. People*, 10 Colo. 387, 15 Pac. 727.

regarded as surplusage.³⁶ The general rules as to exceptions and provisos obtain; that is, if the exception or proviso forms a portion of the description of the offense so that the ingredients thereof cannot be accurately stated if the exception is omitted, then it is necessary to negative the exception,³⁷ but if the exception is separable from the description and is not an ingredient thereof it need not be noticed in the accusation for it is a matter of defense.³⁸ Exceptions which

36. *Territory v. Takamine*, 21 Hawaii 465 (applied to allegations as to defendant's diagnosis and what he believed); *Byrd v. State*, 72 Tex. Crim. 265, 162 S. W. 363.

[a] **Indictment Not Bad for Duplicity.**—To charge that defendant practiced "without having obtained from the State Board of Medical Examiners of the state of Iowa and recording the same in the office of the recorder of Adair county," etc., while technically insufficient to charge the offense of practising as a physician without having recorded the certificate in the proper county, does charge in sufficiently apt terms the offense of practising in said county without obtaining the certificate prescribed by law, and the allegations as to the failure to record may be disregarded as surplusage. *State v. Frutiger*, 167 Iowa 550, 149 N. W. 634, following *State v. Zechman*, 157 Iowa 158, 138 N. W. 387. Compare *State v. Edmunds*, 127 Iowa 333, 101 N. W. 431, where it was held there was no duplicity in an indictment charging defendant to be an itinerant practitioner, but failing to allege that he had no certificate to practice.

[b] **Too Great Particularity Is Harmless.**—*State v. Carlisle*, 28 S. D. 169, 132 N. W. 686, Ann. Cas. 1914B, 395.

37. **Cal.**—*People v. Keseling*, 25 Cal. App. Dec. 947, information for illegal practice of dentistry. **Ga.**—*Herring v. State*, 114 Ga. 96, 39 S. E. 866. **Ill.**—*Williams v. People*, 20 Ill. App. 92. **Ia.**—*State v. Kendig*, 133 Iowa 164, 110 N. W. 463. **Mo.**—*State v. Hellscher*, 156 Mo. App. 63, 135 S. W. 959; *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035. **Neb.**—*Wilson v. State*, 89 Neb. 258, 131 N. W. 223; *O'Connor v. State*, 46 Neb. 157, 64 N. W. 719; *Gee Wo v. State*, 36 Neb. 241, 54 N. W. 513. **N. J.**—*Mayer v. State*, 64 N. J. L. 323, 45 Atl. 624. **N. C.**—*State v. Call*, 121 N. C. 643, 28 S. E. 517. **Ohio.**—*Hale v. State*, 58 Ohio St.

676, 51 N. E. 154. **Tex.**—*Salter v. State*, 44 Tex. Crim. 591, 73 S. W. 395; *McCann v. State*, 40 Tex. Crim. 111, 48 S. W. 512.

See 12 STANDARD PROC. 458.

[a] **Where a statute applies only to itinerant physicians**, the indictment must specify that the defendant was not a resident of the county. *State v. Zechman*, 157 Iowa 158, 138 N. W. 387, approved in *State v. Frutiger*, 167 Iowa 550, 149 N. W. 634.

38. **Colo.**—*Harding v. People*, 10 Colo. 387, 15 Pac. 727. **Ga.**—*Jones v. State*, 8 Ga. App. 411, 69 S. E. 315. **Haw.**—*Territory v. Takamine*, 21 Hawaii 465, exceptions as to application of remedial agency under physician's direction, and prescribing for person certified as being hopelessly sick. **Ill.**—*Williams v. People*, 20 Ill. App. 92. **Ia.**—*State v. Kendig*, 133 Iowa 164, 110 N. W. 463. **Md.**—*Watson v. State*, 105 Md. 650, 66 Atl. 635. **Mo.**—*State v. Doerring*, 194 Mo. 398, 92 S. W. 489; *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035; *State v. Smith*, 60 Mo. App. 283. **Neb.**—*O'Connor v. State*, 46 Neb. 157, 64 N. W. 719; *Gee Wo v. State*, 36 Neb. 241, 54 N. W. 513. **N. C.**—*State v. Welch*, 129 N. C. 579, 40 S. E. 120; *State v. Call*, 121 N. C. 643, 28 S. E. 517. **Ohio.**—*Hale v. State*, 58 Ohio St. 676, 51 N. E. 154; *Krownstrot v. State*, 15 Ohio Cir. Ct. 73, 8 Ohio Cir. Dec. 119. **Pa.**—*Com. v. Willis*, 20 Pa. Dist. 482. **R. I.**—*State v. Flanagan*, 25 R. I. 369, 55 Atl. 876, applied to exceptions of surgeons of the United States army or navy and physicians from another state called to attend a particular case.

[a] **In an indictment against a masseur**, it was not necessary to allege that the treatment defendant practiced was not within the particular sphere of his labors as a masseur, nor to negative that he did not publicly represent himself as a masseur. *Milling v. State*, 67 Tex. Crim. 551, 150 S. W. 434.

are not found in that part of the statute which defines the crime are in the nature of defenses and need not be negatived.³⁹

C. JOINDER OF OFFENSES.—The usual rule may apply that acts enumerated disjunctively as constituting an offense, which are not repugnant to each other may be alleged conjunctively in one count,⁴⁰ all the different acts which go to make up the unlawful practice may be joined in one complaint.⁴¹ The general rule which under some circumstances permits offenses of the same nature to be charged in separate counts of the same accusation,⁴² has been applied to distinct offenses under the statute regulating practice of medicine.⁴³

D. VARIANCE.—Where the pleader undertakes to state particular means used and prescriptions given, they must be proven as laid,⁴⁴ and a variance between the disease alleged to have been prescribed for and that proven is fatal.⁴⁵ If the practicing is alleged to have been done on a particular date and no other, the proof must be limited to that date according to some authorities,⁴⁶ but other courts hold that

39. Ind.—Witty v. State, 173 Ind. 404, 90 N. E. 627, 25 L. R. A. (N. S.) 1297 (applied to a section excepting non-itinerant opticians, nurses, etc.); Ferner v. State, 151 Ind. 247, 51 N. E. 360, applied to a provision that excepted persons having a special permit. Ia.—State v. Kendig, 133 Iowa 164, 110 N. W. 463. Mich.—People v. Allen, 122 Mich. 123, 80 N. W. 991 (exception as to persons "now located and lawfully in actual practice"); People v. Phippin, 70 Mich. 6, 37 N. W. 888, exception as to a person practising under the instructions of another legally qualified. N. J.—Mayer v. State, 64 N. J. L. 323, 45 Atl. 624. Tex.—Antle v. State, 6 Tex. App. 202; Logan v. State, 5 Tex. App. 306; Blasdell v. State, 5 Tex. App. 263.

40. Ia.—State v. Corwin, 151 Iowa 420, 131 N. W. 659 (applying rule to different acts constituting the offense of practising without a license under a statute dividing offenders into three classes; those who "publicly profess to be a physician or surgeon," etc., those who "shall make a practice of prescribing and furnishing medicine," and those who "publicly profess to cure and heal"); State v. Wilhite, 132 Iowa 226, 109 N. W. 730. N. C.—State v. Welch, 129 N. C. 579, 40 S. E. 120; State v. Van Doran, 109 N. C. 864, 14 S. E. 32, following the language of the statute the indictment may read "did practice or attempt to practice." Ohio.—Hale v. State, 58 Ohio St. 676, 51 N. E. 154, holding an indictment not bad for duplicity which charged prescribing and appending to his sub-

scription on the package containing the medicine, the letters "M. D." The statute forbids prescribing or appending the letters. Tex.—Byrd v. State, 72 Tex. Crim. 265, 162 S. W. 363.

And see People v. Ellis, 162 App. Div. 288, 147 N. Y. Supp. 681 (which holds that different acts going to establish the unlawful practice simply make up one continuous offense, following People v. Firth, 157 App. Div. 492, 142 N. Y. Supp. 634), and 12 STANDARD PROC. 507.

[a] "Physician" and "doctor" are synonymous and are so understood and used, and an indictment which alleged that defendant gave a treatment "in the capacity of a physician or doctor, or both," does not charge two offenses. Milling v. State, 67 Tex. Crim. 551, 150 S. W. 434.

41. State v. Carlisle, 28 S. D. 169, 132 N. W. 686, Ann. Cas. 1914B, 395.

42. See 12 STANDARD PROC. 531.

43. Kettles v. People, 221 Ill. 221, 77 N. E. 472.

44. State v. Morris, 45 Mont. 334, 122 Pac. 917, where the means used and patient were both specified and such particularity was unnecessary.

45. Norwood v. State, 70 Tex. Crim. 605, 158 S. W. 270.

46. Stiles v. State, 66 Tex. Crim. 665, 148 S. W. 326, but an indictment charging "on or about" a date named supports proof of any act of practicing throughout the whole period of the statute of limitation prior to the date named. See the title "Variance and Failure of Proof."

the time being not of the essence, it need not be precisely laid nor proved as laid.⁴⁷

Where it is alleged that defendant held himself out as a physician and surgeon, proof that he acted as either supports the charge.⁴⁸ Where the indictment charged the "practice of medicine" it is supported by proof of engaging in the practice of medicine in any of its branches or departments, the act being otherwise unlawful.⁴⁹

E. QUESTIONS OF LAW AND FACT.—It is for the court to construe the terms of the statute,⁵⁰ but whether the committed acts did or did not come within the statute, as construed and defined by the court, is for the jury.⁵¹

F. INSTRUCTIONS.—As in other cases the instructions must be applicable to the evidence,⁵² and such as will clearly and fairly present the whole case to the jury.⁵³

G. VERDICT AND SENTENCE.⁵⁴—Judgment must be arrested where the special verdict fails to find the facts necessary to conviction.⁵⁵ It is not necessary in a judgment imposing a fine for practicing medicine without a license, to make recitals of facts.⁵⁶ Whether more than one fine can be imposed depends upon whether the practicing be a continuing offense under the statute.⁵⁷ Where the offense is continuous, one conviction bars a prosecution for practicing previously to the institution of the first prosecution, though each separate act constituted practicing.⁵⁸

47. *Kettles v. People*, 221 Ill. 221, 77 N. E. 472, dentistry laid as having been practised on the first day of October, 1905, was supported by proof of practice in August and September, 1905. "Any time before the filing of the information and within the period of limitation" is proper rule. To same effect, *State v. Littooy*, 37 Wash. 693, 79 Pac. 1135; *State v. Brown*, 37 Wash. 106, 79 Pac. 638.

48. *Com. v. St. Pierre*, 175 Mass. 48, 55 N. E. 482.

49. *Antle v. State*, 6 Tex. App. 202.

50. *Springer v. District of Columbia*, 23 App. Cas. (D. C.) 59; *State v. Yee Foo Lun*, 45 Utah 531, 147 Pac. 488.

51. *State v. Huff*, 75 Kan. 585, 90 Pac. 279, 12 L. R. A. (N. S.) 1094; *State v. Yee Foo Lun*, 45 Utah 531, 147 Pac. 488.

52. *State v. Heffernan*, 28 R. I. 20, 65 Atl. 284.

53. *Newman v. State*, 61 Tex. Crim. 338, 134 S. W. 688; *Alderhoven v. State*, 42 Tex. Crim. 6, 56 S. W. 914. See *Milling v. State*, 67 Tex. Crim. 551, 150 S. W. 434, for instructions properly defining the offense, quoting the statute, and differentiating between actual payment for services and a payment by subterfuge under the guise of a board bill.

[a] It is the duty of the court to define what is meant by the words "domestic family remedies," as used in an exception in the statute. *State v. Yee Foo Lun*, 45 Utah 531, 147 Pac. 488. See also *State v. Huff*, 75 Kan. 585, 90 Pac. 279, 12 L. R. A. (N. S.) 1094.

54. See the titles "Sentence and Judgment;" "Verdict."

55. *State v. Call*, 121 N. C. 643, 28 S. E. 517.

56. *People v. Moser*, 176 Ill. App. 625.

57. See *infra*, this note.

[a] Continuing Offense.—Where the offense consisted in opening an office and displaying a doctor's sign without a license, there was but one continuing offense, but where the offense was prescribing for different patients, each was a separate offense. For the first but one fine can be imposed; for the latter as many fines as there are individual patients charged and proved. *State v. Cotner*, 87 Kan. 864, 127 Pac. 1, 42 L. R. A. (N. S.) 768. Compare *Wilson v. Com.*, 119 Ky. 769, 82 S. W. 427, where it is held that the statute could not have contemplated that a dentist should be fined every time he pulls a tooth.

58. *Wilson v. Com.*, 119 Ky. 769, 82 S. W. 427.

VI. ACTIONS FOR PENALTIES.⁵⁹ — The statutes sometimes provide for an action for a penalty for illegal practice.⁶⁰ The petition in such action must state the facts and not mere conclusions,⁶¹ and must negative the exceptions in the enacting clause of the statute.⁶² The name of the person treated, or that the name is unknown, need not be stated.⁶³

59. See generally the title "**Penalties, Forfeitures and Fines.**"

60. See the statutes.

[a] In Illinois (1) an action for penalty by the state board of health is provided for. The statute is constitutional (*People v. Dunn*, 255 Ill. 289, 99 N. E. 777), and (2) the action is civil and not criminal in its nature. *People v. Gartenstein*, 248 Ill. 546, 94 N. E. 128.

61. *Steuben County v. Wood*, 24 App. Div. 442, 48 N. Y. Supp. 471, allegation that defendant "practiced veterinary medicine and surgery in violation of the statute," is mere legal conclusion. But compare *People v. Fairfax*, 181 Ill. App. 436. And see *The*

President & College of Physicians v. Salmon, 1 Ld. Raym. 680, 91 Eng. Reprint 1353, holding that it was sufficient to allege in words of statute that defendant was "exercising physie" without specifically alleging the acts.

62. *Steuben County v. Wood*, 24 App. Div. 442, 48 N. Y. Supp. 471. But compare *The President & College of Physicians v. Salmon*, 1 Ld. Raym. 680, 91 Eng. Reprint 1353. If some other act contains matter of benefit to defendant he must plead it as a defense, or may give in evidence under the plea *nil debit*.

63. *People v. Dunn*, 255 Ill. 289, 99 N. E. 577, dates of the treatment were given.

PICKETING. — See **Labor Unions.**

PICTURES. — See **Obscenity; Post Office.**

PILOTS. — See **Ships and Shipping.**

Vol. XXI

PIRACY

By the Editorial Staff.

I. JURISDICTION, 388

II. INDICTMENT, 388

CROSS-REFERENCES:

Robbery.

For form, see 9 STANDARD PROC. 971.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. JURISDICTION.¹ — The federal courts have jurisdiction of robberies committed on the high seas under some circumstances.²

II.—INDICTMENT.³ — In an indictment for piracy, the national character of the vessel need not be alleged.⁴ Where the indictment charges the crime to have been committed from on board of an American vessel by a mariner sailing thereon, it is not necessary that the indictment should allege that the defendant is a citizen of the United States.⁵ An averment that the offense was committed on the high seas within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular state is sufficient without any other des-

1. See generally the title "Jurisdiction."

2. See *United States v. Holmes*, 5 Wheat. (U. S.) 412, 5 L. ed. 122; *United States v. Palmer*, 3 Wheat. (U. S.) 610, 4 L. ed. 471, and generally the title "United States Courts."

[a] Whether the piracy was committed within or without a marine league from the coast of the United States. *United States v. Kessler*, Baldw. 15, 26 Fed. Cas. No. 15,528.

[b] Piracy committed on board a vessel not belonging to any foreign power and in possession of a crew acting in defiance of all law is punishable in the courts of the United States. *United States v. Klintock*, 5 Wheat. (U. S.) 144, 5 L. ed. 55.

[c] But where the offense is committed on board a vessel belonging to a foreign state, the United States

courts have no jurisdiction to try and punish the piracy, even though the stolen property is brought within the United States. *United States v. Kessler*, Baldw. 15, 26 Fed. Cas. No. 15,528.

3. See generally the title "Indictment and Information."

4. *United States v. Demarchi*, 5 Blatchf. 84, 25 Fed. Cas. No. 14,944, as the offense comes within the general jurisdiction of the federal courts and the existence of conditions exempting defendants from such jurisdiction need not be negatived.

[a] An allegation that the vessel was owned by citizens of the United States is sufficient to bring the case within the jurisdiction of the federal courts. *United States v. Demarchi*, 5 Blatchf. 84, 25 Fed. Cas. No. 14,944.

5. *United States v. Furlong*, 5 Wheat. (U. S.) 184, 5 L. ed. 64.

ignation of the locality of the offense.⁶ In an indictment charging that the defendants acting jointly killed a named person, it is not necessary to show which of the defendants committed the alleged assault.⁷

Concluding in the plural, against the form of the statutes of the United States, instead of in the singular, does not render the indictment defective.⁸

6. *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. ed. 936; *United States v. Gibert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204.

7. *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. ed. 936.

8. *United States v. Gibert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204.

PLACE. — See **Certainty in Pleading; Indictment and Information**

PLACE OF TRIAL. — See **Change of Venue; Jurisdiction; Transfer of Causes; Venue.**

PLAINTIFFS. — See **Parties.**

PLEA. — See **Arraignment and Plea; Pleas.**

Vol. XXI

PLEADING

By the Editorial Staff.

- I. DEFINITION AND NATURE GENERALLY, 392
- II. EFFECT OF CODES AND PRACTICE ACTS, 393
- III. NECESSITY FOR WRITTEN OR FORMAL PLEADINGS, 394
- IV. ENTITLING PLEADING, 394
- V. LANGUAGE AND CLERICAL CONSTRUCTION, 395
 - A. *Language Generally*, 395
 - B. *Numerals and Symbols*, 395
 - C. *Grammatical and Clerical Errors*, 396
 - D. *Erasures and Interlineations*, 396
- VI. MATTERS OF IMPLICATION OR PRESUMPTION, 396
- VII. PLEADING TO AMENDED PLEADINGS, 397
 - A. *Demurrer to*, 397
 - 1. *Right To Demur*, 397
 - 2. *Necessity for*, 397
 - 3. *Grounds for*, 398
 - 4. *Scope of Inquiry on Demurrer*, 398
 - B. *Plea or Answer to*, 398
 - 1. *Right to*, 398
 - 2. *Effect of Failure to*, 399
 - 3. *Time for*, 399
- VIII. SIGNATURE AND INDORSEMENT, 399
 - A. *Signature*, 399
 - 1. *Generally*, 400
 - 2. *Requisites and Sufficiency of*, 401
 - B. *Indorsements*, 401
- IX. CURE OF DEFECTS BY SUBSEQUENT PLEADINGS, 402

X. WAIVER OF DEFECTS IN OR OBJECTIONS TO PLEADINGS, 404

- A. *By Demurrer*, 404
- B. *By Taking Depositions*, 404
- C. *By Pleading Over and Proceeding to Trial*, 405
 - 1. *Generally*, 405
 - 2. *Failure To State Cause of Action*, 408
 - 3. *Defects in Plea or Answer*, 409
 - 4. *Failure To File Reply or Replication*, 409
- D. *By Stipulation or Reference*, 410
- E. *By Admission of Evidence*, 411

XI. CONCLUSIVENESS OF PLEADINGS, 412

- A. *Generally*, 412
- B. *Mistake, Inadvertence, or Ignorance*, 414
- C. *Pleadings Amended, Abandoned or Withdrawn*, 414
- D. *Who Concluded*, 414

XII. AID BY VERDICT OR JUDGMENT, 415

- A. *Statement of the Rule*, 415
- B. *Irregularities and Formal Defects Generally*, 417
- C. *Want or Informality of Issue*, 418
- D. *Declaration or Complaint*, 418
 - 1. *General Statement*, 418
 - 2. *Technical and Formal Defects Generally*, 419
 - 3. *Form of Action*, 420
 - 4. *Several Counts or Causes of Action*, 420
 - a. *When Some Counts Bad*, 420
 - b. *Joinder of*, 421
 - 5. *Averments as to Particular Matters*, 421
 - a. *Generally*, 421
 - b. *Venue*, 421
 - c. *Statement of Title or Right of Action Generally*, 421
 - d. *Performance of Conditions Precedent*, 425
 - e. *Promise or Consideration*, 425
 - f. *Non-Payment and Breach of Contract*, 426
 - g. *Time*, 427

- h. *Description of Property*, 427
- i. *Damages and Value of Property*, 428
- E. *Plea or Answer*, 429
- F. *Set-Off, Counterclaim, or Cross-Complaint*, 430
- G. *Replication or Reply and Subsequent Pleadings*, 430
 - 1. *Replication or Reply*, 430
 - 2. *Pleadings Subsequent to Replication*, 432
- H. *Where Judgment Is by Default*, 432

CROSS-REFERENCES:

Abatement, Pleas of;	Inducement;
Affidavits of Merits and Defense;	Information and Belief;
Amendments and Jeofails;	Joinder of Actions;
Answers;	Justices of the Peace;
Bills and Answers;	Multifariousness;
Certainty in Pleading;	New Cause of Action or Defense;
Conclusions of Law;	Pleas;
Confession and Avoidance;	Pleas in Equity;
Construction and Theory of	Records;
Pleadings;	Rejoinder and Subsequent
Cross-Bill;	Pleadings;
Cross-Complaint;	Replication and Reply;
Declaration and Complaint;	Repugnancy;
Demurrer;	Set-Off, Counterclaim and
Denials;	Recoupment;
Duplicity;	Supplemental Pleading;
Exhibits;	Surplusage and Scandal;
Frivolous and Sham Pleadings;	Time To Plead;
Indictment and Information;	Verification.

Forms of pleading, see specific titles and 9 STANDARD PROC.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION AND NATURE GENERALLY.—Pleading is the statement in logical form of the facts constituting a cause of action or a ground of defense.¹ The pleadings in an action raise an

1. U. S.—Tucker v. United States, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. ed. 112. Ala.—Birmingham R., L. & P. Co. v. Nicholas, 181 Ala. 491, 61 So. 361. Colo.—See Cook v. Merritt, 15 Colo. 212, 214, 25 Pac. 176. Del. Campbell v. Walker, 1 Boyce 580, 76 Atl. 475. Ga.—Smith v. Jacksonville Oil Mill Co. (Ga. App.), 94 S. E. 900. Ill. Young v. Gower, 88 Ill. App. 70; Jensen v. Wetherell, 79 Ill. App. 33. Ia. Brainard v. Simmons, 58 Iowa 464, 9

issue for the determination of the court by an affirmation on one side and a denial on the other.² They are forms intended as the foundation of the proof to be submitted upon the trial,³ informing the opposite party, in advance of trial, what is relied upon either to establish the cause of action or to defeat that asserted by the opposite party.⁴

II. EFFECT OF CODES AND PRACTICE ACTS.—Under the codes and practice acts forms and fictions in pleading are abolished, mere formal allegations being no longer necessary; the substance of the pleading rather than its form is the controlling consideration.⁵ The change effected, however, extends to matters of form only,⁶ and

N. W. 382, 12 N. W. 484. **Ky.**—Brumleve v. Cronan, 176 Ky. 818, 197 S. W. 498. **Me.**—Burnham v. Ross, 47 Me. 456. **Miss.**—Bowman v. McLaughlin, 45 Miss. 461. **N. Y.**—Smith v. Fowle, 12 Wend. 9. **Pa.**—Dixon v. Sturgeon, 6 Serg. & R. 25. **Tenn.**—Chattanooga Cotton Oil Co. v. Shamblin, 101 Tenn. 263, 47 S. W. 496; Smith v. Cottrell, 8 Baxt. 62. **Utah.**—Kilpatrick-Koch Dry-Goods Co. v. Box, 13 Utah 494, 45 Pac. 629.

1 Chitty on Pl., 9th Am. ed. 213.

[a] For other definitions, see the following: **Minn.**—Desnoyer v. Hereux, 1 Minn. 17, 19. **Miss.**—Bowman v. McLaughlin, 45 Miss. 461. **Mo.**—Kansas City v. O'Connor, 36 Mo. App. 594, 599.

[b] "The allegations made by the parties to a civil or criminal case, for the purpose of definitely presenting the issue to be tried and determined between them." Tucker v. United States, 151 U. S. 164, 168, 14 Sup. Ct. 299, 38 L. ed. 112.

[c] "Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense; it is the formal mode of alleging on the record that which would be the support or the defense of the party in evidence." 3 Bl. Com. 293, note.

2. **U. S.**—Tucker v. United States, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. ed. 112. **Colo.**—Cook v. Merritt, 15 Colo. 212, 25 Pac. 176. **Dak.**—Parlman v. Young, 2 Dak. 175, 4 N. W. 139, 711. **Ind. Ter.**—Bolen-Darnall Coal Co. v. Williams, 7 Ind. Ter. 648, 104 S. W. 867. **Ia.**—Brainard v. Simmons, 58 Iowa 464, 466, 9 N. W. 382, 12 N. W. 484. **Md.**—Marshall v. Haney, 9 Gill 251. **Minn.**—Desnoyer v. Hereux, 1 Minn. 17. **Mo.**—National Stamping,

et c. Works v. Wicks, 129 Mo. App. 382, 108 S. W. 598. **N. Y.**—Ruderman v. Bloch, 145 N. Y. Supp. 913; Smith v. Bradstreet Co., 134 App. Div. 567, 119 N. Y. Supp. 487. **Utah.**—Tate v. Rose, 35 Utah 229, 99 Pac. 1003; Hong Sling v. Scottish Union, etc. Ins. Co., 7 Utah 441, 27 Pac. 170. **Wis.**—Tarbox v. Adams County, 34 Wis. 558, "Whenever there is submitted to a court for adjudication, a proposition of fact or of law which is affirmed by one party and denied by the other, no matter how the issue is made, whether orally or in writing, whether formally or informally, the affirmation by one party and the denial by the other constitute pleadings, such affirmation being in substance and effect a declaration or complaint, and such denial a plea or answer."

[a] "Pleadings are the mutual alterations between the plaintiff and defendant." 3 Bl. Com. 293.

3. Taylor v. Coppock, 1 Del. Co. (Pa.) 190.

4. **Colo.**—Soden v. Murphy, 42 Colo. 352, 94 Pac. 353. **Dak.**—Parlman v. Young, 2 Dak. 175, 4 N. W. 139, 711. **Del.**—Campbell v. Walker, 1 Boyce 580, 76 Atl. 475. **Md.**—American Express Co. v. State, 103 Atl. 96; Marshall v. Haney, 9 Gill 251. **N. Y.**—Blum v. Bruggemann, 58 App. Div. 377, 68 N. Y. Supp. 1065. **Ore.**—Ball v. Danton, 64 Ore. 184, 129 Pac. 1032. **S. C.**—Shelton v. Southern Ry., 86 S. C. 98, 67 S. E. 899.

5. 6 STANDARD PROC. 656, 659, et seq.

6. **Cal.**—Spect v. Spect, 83 Cal. 437, 26 Pac. 203, 22 Am. St. Rep. 314, 13 L. R. A. 137; Sampson v. Shaeffer, 3 Cal. 196. **Ind.**—Matlock v. Todd, 25 Ind. 128. **Md.**—Stirling v. Garrittee, 18 Md. 468. **N. Y.**—Wamsley v. Atlas Steamship Co., 168 N. Y. 533, 61 N. E.

not to the substantial rules of common law pleading.⁷ Under the codes the same rules of pleading apply in all cases, whether at law or in equity,⁸ but the fundamental distinction between legal and equitable rights and remedies still remains.⁹

III. NECESSITY FOR WRITTEN OR FORMAL PLEADINGS.¹⁰

Except in inferior courts,¹¹ pleadings must, irrespective of statute, generally be in writing,¹² and by statute, pleadings are sometimes expressly,¹³ or impliedly,¹⁴ required to be in writing. It has been held that the parties may waive written pleadings if there is no statute requiring pleadings to be in writing.¹⁵

IV. ENTITLING PLEADING.—The entitling of particular pleadings will be found discussed elsewhere in this work.¹⁶ At common

896, 85 Am. St. Rep. 699, "the substantial differences which control and determine the rights of parties are still in force." **Ore.**—Weber *v.* Rothchild, 15 Ore. 385, 15 Pac. 650, 3 Am. St. Rep. 162. **Wis.**—Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

7. Cal.—Sampson *v.* Shaeffer, 3 Cal. 196. **N. Y.**—Knowles *v.* Gee, 8 Barb. 300, 4 How. Pr. 317, 3 Code Rep. 31, the legislature in adopting the code of procedure, intended to preserve as many of the rules of the common law as are consistent with the new forms of pleading. **N. C.**—Parsley & Co. *v.* Nicholson, 65 N. C. 207; Crump *v.* Mims, 64 N. C. 767, the court saying: "We take occasion here to suggest to pleaders that the rules of the common law as to pleading, which are only the rules of logic, have not been abolished by the code. Pleas should not state the evidence, but the facts, which are the conclusions from the evidence, according to their legal effect; and complaints should especially avoid wandering into matter which if traversed would not lead to a decisive issue. It is the object of all pleading to arrive at some single, simple and material issue." **Ohio.**—Dennistoun, Wood & Co. *v.* Merchants' Bank, 2 Disn. 52, 13 Ohio Dec. 33.

8. Bowen v. Aubrey, 22 Cal. 566; **Shepard v. Ford**, 10 Iowa 502. See 6 STANDARD PROC. 661, et seq.

Effect of code provisions, see 6 STANDARD PROC. 659.

Use of common law forms, see 6 STANDARD PROC. 667.

9. Cal.—De Witt *v.* Hays, 2 Cal. 463, 56 Am. Dec. 352, "Cases legal and equitable have not been consolidated, and though there is no difference between the form of a bill in chancery, and a common law declara-

tion, under our system, where all relief is sought in the same way from the same tribunal; the distinction between law and equity is as naked and broad as ever." **N. Y.**—Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75. **Wash.**—Overlock *v.* Shinn, 28 Wash. 205, 68 Pac. 436.

See 6 STANDARD PROC. 666.

10. See the title "Agreed Case."

Necessity for declaration or equivalent pleading, see 6 STANDARD PROC. 642.

11. See 18 STANDARD PROC. 31, et seq.

12. Colo.—Beckett *v.* Cuenin, 15 Colo. 281, 25 Pac. 167, 22 Am. St. Rep. 399. **Ga.**—See Bishop *v.* Woodward, 103 Ga. 281, 29 S. E. 968. **Ky.**—Handley *v.* Travis, Ky. Dec. 138. See also Smith *v.* Dungey, 178 Ky. 702, 199 S. W. 777. **N. J.**—See Baldauf *v.* Nathan Russell, 88 N. J. L. 303, 96 Atl. 96, Ann. Cas. 1917D, 1191.

13. Bracy v. Bracy's Admr., 12 Bush (Ky.) 153; **McCormick Harvesting Mach. Co. v. Harned**, 7 Ky. L. Rep. 139; **Sevey v. Chappuis Co.**, 113 La. 65, 36 So. 889.

14. People v. Superior Court, 114 Cal. 466, 46 Pac. 383 (in view of statute requiring pleading to be signed); **Grove v. Campbell**, 9 Yerg. (Tenn.) 7, statute requiring that pleading be verified by affidavit.

15. Kelsey v. Lamb, 21 Ill. 559; **Vider v. City of Chicago**, 60 Ill. App. 595.

[a] Court may in its discretion dispense with written pleadings and allow issue to be made upon the record, where there is no statute requiring them to be in writing. **Givin v. Williams**, 27 Miss. 327.

16. See titles dealing with particular

law the caption designated the court in which the action was brought and the title gave the names of the parties and stated the nature of the action.¹⁷ Under the codes and practice acts of most states the pleading should state the title of the action, including the names of the court, and county where the action is, and the names of the parties.¹⁸ The object of the title is to identify the pleading with the action and court,¹⁹ and, unless made so by statute, it is no part of the pleading unless referred to in the body thereof.²⁰ Errors in the title relate to mere matters of form and do not vitiate the pleading.²¹ Under modern rules of pleading the name or title given a pleading is immaterial, it will be considered what it in fact is.²²

V. LANGUAGE AND CLERICAL CONSTRUCTION.²³ — A. LANGUAGE GENERALLY. — Pleadings should be in the English language,²⁴ and need not contain the technical terms of the old common-law system.²⁵

B. NUMERALS AND SYMBOLS.²⁶ — Generally the use of figures in a pleading does not render it defective;²⁷ thus dates,²⁸ or sums of money,²⁹ may be expressed in figures. The dollar mark (\$) may be used instead of the word "dollar."³⁰

pleadings, and also 9 STANDARD PROC., under appropriate heads.

17. Andrews' Steph. Pl. (2nd ed.) 153.

18. See the codes and statutes.

19. Adams v. Kelly, 44 Ore. 66, 74 Pac. 399.

20. 6 STANDARD PROC. 645.

21. Ewing v. Hatfield, 17 Ind. 513; Thompson v. Voss, 16 Ind. 297. See Gordon v. City Nat. Bank, 140 Ky. 47, 130 S. W. 818.

22. Colo.—See Mastin v. Bartholomew, 41 Colo. 328, 92 Pac. 682. Ind. Thompson v. Voss, 16 Ind. 297; Patterson v. State, 10 Ind. 296; Cleveland, C. C. & St. L. Ry. Co. v. Rudy (Ind. App.), 87 N. E. 555. S. C.—Charlotte, C. & A. R. Co. v. Gibbs, 23 S. C. 370, pleading styled "answer" raising only a question of law will be treated as a demurrer. S. D.—Green v. Hughitt School Twp., 5 S. D. 452, 59 N. W. 224.

[a] If the pleading is good, the name given it is immaterial. Ind. Thompson v. Voss, 16 Ind. 297; Patterson v. State, 10 Ind. 296. S. C. Charlotte, C. & A. R. Co. v. Gibbs, 23 S. C. 370. S. D.—Green v. Hughitt School Twp., 5 S. D. 452, 59 N. W. 224.

23. Use of abbreviations, see 1 STANDARD PROC. 74.

24. Colo.—Dunton v. Montoyo, 1 Colo. 99. Ill.—See Liberty & Co. v. Almini Co., 195 Ill. App. 417. N. H.

Smith v. Butler, 25 N. H. 521 (use of "versus" or its abbreviation "v." in title of pleading is not objectionable); Hale v. Vesper, Smith 283, use of "Anno Domini" in setting forth a date is not ground of demurrer. Ohio. Meigs & Co. v. Guiraud, 3 Ohio Dec. (Reprint) 328. Vt.—Clark v. Stoughton, 18 Vt. 50, 44 Am. Dec. 361.

See also Generes v. Simon, 21 La. Ann. 653; Fleming v. Conrad, 11 Mart. O. S. (La.) 301.

Indictment or Information.—See 12 STANDARD PROC. 308.

25. Prewitt v. Clayton, 5 Mon. (Ky.) 4; Cohen v. Ottenheimer, 13 Ore. 220, 10 Pac. 20.

26. Use of abbreviations in pleadings see the title "Abbreviations."

27. Ind.—Medsker v. Pogue, 1 Ind. App. 197, 27 N. E. 432. Mo.—Fulenwider v. Fulenwider, 53 Mo. 439. Vt. Clark v. Stoughton, 18 Vt. 50, 44 Am. Dec. 361; Hyde v. Moffat, 16 Vt. 271.

28. Hyde v. Moffat, 16 Vt. 271.

[a] Alleging act to have been committed in '88" is sufficient, and it will be read as "1888." Medsker v. Pogue, 1 Ind. App. 197, 27 N. E. 432.

29. Fulenwider v. Fulenwider, 53 Mo. 439; Hyde v. Moffat, 16 Vt. 271.

30. Fulenwider v. Fulenwider, 53 Mo. 439, the indication of money in arabic figures preceded by the dollar mark, the last two figures being cut off by a dot to indicate cents, is per-

C. GRAMMATICAL AND CLERICAL ERRORS. — Mere errors in grammar,³¹ spelling,³² or clerical errors,³³ not going to the substance of the pleading do not vitiate it and will be disregarded.

D. ERASURES AND INTERLINEATIONS. — Pleadings should be plainly written and not interlined or blotted to any considerable extent.³⁴

VI. MATTERS OF IMPLICATION OR PRESUMPTION. — Facts the existence of which are necessarily inferred or implied from the existence of other facts specifically alleged, or which the law presumes from such facts, need not be pleaded.³⁵ But this rule must,

missible. See also *Goodall v. Harrison*, 2 Mo. 153.

[a] *Contra*, see *Clark v. Stoughton*, 18 Vt. 50, 44 Am. Dec. 361, that the mark commonly used to denote dollars (\$) is not a part of the English language, and a pleading in which the amount for which a note was given is expressed only in figures with the dollar mark prefixed is insufficient on demurrer.

31. *Ala.*—*White v. W. B. Bean & Co.* (Ala. App.), 77 So. 924. *D. C.*—*Guundersheimer v. Earnshaw*, 13 App. Cas. 178. *Ill.*—*Cutting v. Conklin*, 28 Ill. 506. *Ind.*—*Moore v. Beem*, 83 Ind. 219. *Mo.*—*Parsons v. Mayfield*, 73 Mo. App. 309. *N. H.*—*Hovey v. Brown*, 59 N. H. 114.

32. *Yeater v. Jennings Oil Co.*, 75 W. Va. 346, 84 S. E. 904.

33. *Ala.*—*Gardiner v. Solomon*, 75 So. 621. *Ill.*—*Monmouth Min. & Mfg. Co. v. Erling*, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187, transposition of words "plaintiff" and "defendant" is not a fatal error. *Ind.*—*Praigg v. Western Paving & Supply Co.*, 143 Ind. 358, 42 N. E. 750 (use of "west" instead of "east" may be cured); *Indiana, B. & W. Ry. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631. *Ky.*—*Avent Beattyville Coal Co. v. King Powder Co.*, 19 Ky. L. Rep. 920, 41 S. W. 433; *Kentucky Central R. Co. v. Carr*, 19 Ky. L. Rep. 1172, 43 S. W. 193. *Mo.*—*State ex rel. Fisher v. Rodecker*, 145 Mo. 450, 46 S. W. 1083; *Johnston v. Missouri Pac. R. Co.*, 96 Mo. 340, 9 S. W. 790, 9 Am. St. Rep. 351; *Haggerty v. St. Louis, K. & N. W. R. Co.*, 100 Mo. App. 424, 74 S. W. 456. *Mont.* *State v. Quantic*, 37 Mont. 32, 94 Pac. 491. *Neb.*—*Conner v. Becker*, 62 Neb. 856, 87 N. W. 1065. *N. Y.*—*King v. Mail & Express Co.*, 113 App. Div. 90, 98 N. Y. Supp. 891; *Kenney v. New York Cent. & H. R. R. Co.*, 49 Hun 535, 2 N. Y. Supp. 512, 15 Civ. Proc.

347, 18 N. Y. St. 441; *Burstein v. Levy*, 49 Misc. 469, 98 N. Y. Supp. 853; *German Exch. Bank v. New Jersey & S. D., etc. Co.*, 13 Misc. 192, 34 N. Y. Supp. 133, 68 N. Y. St. 219; *Chamberlin v. Kaylor*, 1 E. D. Smith 134. *Ore.* *Crossen v. Grandy*, 42 Ore. 282, 70 Pac. 906. *Tex.*—*Hall & Brown W.-W. Mach. Co. v. Brown*, 82 Tex. 469, 17 S. W. 715. *Vt.*—*Briggs v. Mason*, 31 Vt. 433.

34. *Napper v. Short*, 17 Ill. 119. See *Garrity v. Wilcox*, 83 Ill. 159, that the fact that an affidavit was interlined before it was sworn to in order to more strictly and literally conform to the statute affords no ground for striking it from the files.

35. *Ala.*—*Wells v. Gallagher*, 144 Ala. 363, 39 So. 747, 113 Am. St. Rep. 50, 3 L. R. A. (N. S.) 759; *O'Neil v. Birmingham Brewing Co.*, 101 Ala. 383, 13 So. 576. *Cal.*—*Osborne v. Clark*, 60 Cal. 622; *Hooper v. Smith*, 30 Cal. App. 460, 158 Pac. 556; *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926; *Pettit v. Forsyth*, 15 Cal. App. 149, 113 Pac. 892. *Conn.*—See *Lee v. Stiles*, 21 Conn. 500; *Case v. Humphrey*, 6 Conn. 130. *Ill.*—*Warner v. Flack*, 278 Ill. 303, 116 N. E. 197; *People v. Frost*, 32 Ill. App. 242. *Ind.*—*Adams Express Co. v. State*, 161 Ind. 328, 67 N. E. 1033; *Chicago & E. R. Co. v. Thomas*, 55 N. E. 861; *Over v. Greenfield*, 107 Ind. 231, 5 N. E. 872; *Albertson v. State ex rel. Wells*, 95 Ind. 370; *Drum v. Stevens*, 94 Ind. 181; *Indiana Natural Gas & Oil Co. v. Lee*, 34 Ind. App. 119, 72 N. E. 492. *Ind. Ter.*—*Rogers Lumber Co. v. McRea*, 7 Ind. Ter. 468, 104 S. W. 803. *Ia.*—*Worez v. Des Moines City R. Co.*, 175 Iowa 1, 156 N. W. 867. *Ky.* *Chesapeake & N. R. Co. v. Venable*, 111 Ky. 41, 63 S. W. 35; *Terry v. Johnson*, 109 Ky. 589, 60 S. W. 300. *Mass.*—*McGee v. Barber*, 14 Pick. 212; *Dunning v. Owen*, 14 Mass. 157; *Tilston v. Newell*, 13 Mass. 406. *Mich.*

of course, be applied in connection with the rule which requires the ultimate facts, rather than mere evidence, to be alleged.³⁸

VII. PLEADING TO AMENDED PLEADINGS.³⁷ — A. DEMURRER TO. — 1. **Right To Demur.** — An amended pleading may generally be demurred to the same as if it were an original pleading,³⁸ but it is not error to refuse to allow a demurrer to be filed where the amendment was merely formal,³⁹ or the issues are not changed by the amendment.⁴⁰

2. **Necessity for.** — Where an amendment is made after demurrer filed, the amended pleading cannot generally be tested unless a new demurrer is filed;⁴¹ except where the amendments make no change in the issues and do not cure the objections urged against the original pleading.⁴²

Hale v. Chandler, 3 Mich. 531. Minn. Farrant v. First Division St. P. & P. R. Co., 13 Minn. 311. Mo.—Cooley v. Kansas City, P. & G. Ry. Co., 149 Mo. 487, 51 S. W. 101; MacMurray-Judge Architectural Iron Co. v. St. Louis, 138 Mo. 608, 39 S. W. 467; Czezewzka v. Benton-Bellefontaine Ry. Co., 121 Mo. 201, 25 S. W. 911; Unionville v. Martin, 95 Mo. App. 28, 68 S. W. 605; State ex rel. Hull v. Gray, 91 Mo. App. 438; Weaver v. Harlan, 48 Mo. App. 319. Neb.—Nicholas v. Farwell, 24 Neb. 180, 38 N. W. 820. N. J.—Esslinger v. Boehm, 81 N. J. L. 82, 79 Atl. 267. N. M.—Bent v. Maxwell Land Grant & Ry. Co., 3 N. M. 227, 3 Pac. 721. N. Y.—Spies v. Michelsen, 2 App. Div. 226, 37 N. Y. Supp. 720, 73 N. Y. St. 394; Mann v. Morewood 5 Sandf. 557. See also Van De Sande v. Hall, 13 How. Pr. 458; Hand v. Supervisors of Columbia County, 31 Hur 531; Bearns v. Gould, 8 Daly 384. Okla. Oklahoma Fire Ins. Co. v. Wagerster, 38 Okla. 291, 132 Pac. 1071. Ore.—State v. Clatsop County, 63 Ore. 377, 125 Pac. 271; Stark v. Epler, 59 Ore. 262, 117 Pac. 276. Tex.—International & G. N. Ry. Co. v. Greenwood, 2 Tex. Civ. App. 76, 21 S. W. 559. See also International & G. N. Ry. Co. v. Carter (Tex. Civ. App.), 180 S. W. 663. See Malone v. Craig, 22 Tex. 609. Wash.—Duryee v. Friars, 18 Wash. 55, 50 Pac. 583. W. Va.—Thomas v. Wheeling Electrical Co., 54 W. Va. 395, 46 S. E. 217. Wis. See Madison, W. & M. Plank Road Co. v. Watertown & P. P. Road Co., 5 Wis. 173.

As to conclusions of law generally, see the title "Conclusions of Law."

36. See 4 STANDARD PROC. 846; 6 STANDARD PROC. 695.

37. **Remedy where new cause of action is stated in the amendment, see the title "New Cause of Action or Defense."**

38. U. S.—Conroy v. Oregon Const. Co., 23 Fed. 71, 10 Sawy. 630. Ala. Bentley v. Barnes, 155 Ala. 659, 47 So. 159. Fla.—Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 37 So. 62, 110 Am. St. Rep. 118, 67 L. R. A. 518. Ga.—Kinard v. George, 142 Ga. 111, 82 S. E. 560. Ia.—Hamill, R. & Co. v. Phenicie, 9 Iowa 525. Miss.—Shaw v. Brown, 42 Miss. 309. Tex.—Hatler v. Hunter, 1 White & W. Civ. Cas., §9.

[a] Though the original pleading has been answered a demurrer may be filed to the amended pleading. Shaw v. Brown, 42 Miss. 309.

39. Flood v. Templeton, 148 Cal. 374, 83 Pac. 148; Carroll v. O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

40. Hawthorne v. Siegel, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291; Stanton v. Kenrick, 135 Ind. 382, 35 N. E. 19. See also Flood v. Templeton, 148 Cal. 374, 83 Pac. 148.

41. Ala.—Birmingham Ry., L. & P. Co. v. Fox, 174 Ala. 657, 56 So. 1013; Louisville & N. R. Co. v. Woods, 105 Ala. 561, 17 So. 41 (may refile first demurrer); Voltz v. Voltz, 75 Ala. 555. Cal.—Morris v. Hartley, 26 Cal. App. 61, 804, 146 Pac. 73, 78. Ga.—General Acc., Fire & Life Assur. Corp. v. Way, 20 Ga. App. 106, 92 S. E. 650. Ia. Kelly v. Chicago, M. & St. P. R. Co., 93 Iowa 436, 61 N. W. 957. R. I. Sweeney v. McKendall, 32 R. I. 347, 79 Atl. 940.

See, however, White v. Hall (Vt.), 99 Atl. 274.

42. Flood v. Templeton, 148 Cal. 374, 83 Pac. 148.

3. Grounds for.—Generally the same grounds may in a proper case be urged to the amended pleading as are properly urged against an original.⁴³ Stating a cause of action in the amended pleading which has accrued since the commencement of the suit,⁴⁴ departure between the amended and original pleading,⁴⁵ that a party is surprised or less ready for trial by reason of an amendment,⁴⁶ or that the amended declaration may require a change in the defendant's pleas,⁴⁷ are not grounds for demurrer. Nor can the permissibility of the amendment be raised by demurrer to the pleading as amended.⁴⁸

4. Scope of Inquiry on Demurrer.—The original pleading cannot be considered on demurrer to the amended one,⁴⁹ nor will matters not a part of the pleading be looked to.⁵⁰

B. PLEA OR ANSWER TO.—1. Right to.—When the plaintiff is allowed to amend in such manner as to materially change the issues already formed, or so as to affect the substantial rights of the parties, a new plea or answer may be filed,⁵¹ but an immaterial amendment

43. Grounds of demurrer, see 6 STANDARD PROC. 888, et seq.

[a] If the same fault be in the amended pleading as in the original, a motion to strike is proper. *Bush v. McMann*, 12 Colo. App. 504, 55 Pac. 956; *Hamill, R. & Co. v. Phenicie*, 9 Iowa 525.

44. Farrington v. Hawkins, 24 Ind. 253.

45. Curry v. Southern Ry. Co., 148 Ala. 57, 42 So. 447; *Hord v. Chandler*, 13 B. Mon. (Ky.) 403.

46. Wells v. Wells, 118 Ga. 812, 45 S. E. 669.

47. Bavington v. Pittsburg & S. R. Co., 34 Pa. 358.

48. North Italian Colonial Co. v. Janovich-Calafiore Co., 166 Ala. 201, 52 So. 339; *Moore v. First Nat. Bank*, 139 Ala. 595, 36 So. 777; *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632, 36 So. 517; *Nashville, C. & St. L. Ry. Co. v. Parker*, 123 Ala. 683, 27 So. 323; *Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503. See *Pottkamp v. Buss*, 114 Cal. xvii, 46 Pac. 169.

[a] Should be raised by objection to its allowance or motion to strike. *Nashville, C. & St. L. Ry. Co. v. Parker*, 123 Ala. 683, 27 So. 323.

[b] Variance between the original and the amended pleading should be reached by motion to strike rather than demurrer. *Springfield Fire & M. Ins. Co. v. De Jarnett*, 111 Ala. 248, 19 So. 995; *Turner v. Roundtree*, 30 Ala. 706.

49. State v. Simpkins, 77 Iowa 676, 42 N. W. 516; *Kehm v. Insurance Co.*, 8 Ohio Cir. Ct. (N. S.) 486.

[a] The court will not look beyond the pleading to which the demurrer is directed. *Null v. Jones*, 5 Neb. 500.

[b] Sufficiency of an amended declaration which does not refer to nor make the original declaration a part of it, must be determined by its own averments. *Norfolk & W. R. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465.

50. Norfolk & W. R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465.

51. U. S.—*Wright v. Hollingsworth*, 1 Pet. 165, 7 L. ed. 96; *American Alkali Co. v. Campbell*, 113 Fed. 398. **Cal.**—*Morton v. Bartning*, 68 Cal. 306, 9 Pac. 146; *Harney v. Applegate*, 57 Cal. 205. See also *Glougie v. Glougie*, 174 Cal. 126, 162 Pac. 118. **Conn.** *Bennett v. Collins*, 52 Conn. 1. See also *Monson v. Beecher*, 45 Conn. 299. **Ga.** *Brooke v. Lowry Nat. Bank*, 141 Ga. 493, 81 S. E. 223; *Jones v. Grantham*, 80 Ga. 472, 5 S. E. 764. **Ill.**—*Milwaukee Mechanics' Ins. Co. v. Schallman*, 188 Ill. 213, 59 N. E. 12; *Sinsheimer v. William Skinner Mfg. Co.*, 165 Ill. 116, 46 N. E. 262; *McCarthy v. Neu*, 91 Ill. 127; *Griswold v. Shaw*, 79 Ill. 449; *Brown v. Tuttle*, 27 Ill. App. 389; *Nelson v. Akeson*, 1 Ill. App. 165. **Ia.**—*Logan v. Tibbott*, 4 G. Gr. 389. **Ky.**—*Bogard v. Johnstone*, 21 Ky. L. Rep. 965, 53 S. W. 651; *Colston v. Chenault*, 20 Ky. L. Rep. 226, 45 S. W. 664. See also *Preston v. Beall*, 14 Ky. L. Rep. 61, 19 S. W. 175. **Md.**—*Schulze v. Fox*, 53 Md. 37. **Mass.**—*Green v. Gill*, 5 Mass. 379. **Miss.**—*Shaw v. Brown*, 42 Miss. 309; *Miller v. Northern Bank*,

not affecting the issues or the rights of the parties confers no right to plead anew.⁵² Any defense may be set up which would be open if the action had been commenced at the time of amendment,⁵³ and the defendant cannot be restricted to any particular form of plea.⁵⁴

2. Effect of Failure to.—Allegations in an amended pleading which are unanswered by the defendant stand as admitted.⁵⁵ This, however, is not true of amendments made after the evidence to conform the pleading to the proof,⁵⁶ or to amendments made during the course of the trial.⁵⁷

3. Time for.—In the absence of statute or rule of court the time to be allowed for pleading to an amended pleading lies in the discretion of the court.⁵⁸ Usually the same time will be allowed as is given in which to plead to the original pleading.⁵⁹

VIII. SIGNATURE AND INDORSEMENT.—A. SIGNATURE.

34 Miss. 412; *Summers v. Foote*, 28 Miss. 671. **N. Y.**—*Harriott v. Wells*, 9 Bosw. 631; *Penny v. Van Cleef*, 1 Hall 165; *Lilianthal v. Levy*, 4 App. Div. 90, 38 N. Y. Supp. 936; *Newman v. Bradley Contracting Co.*, 100 Misc. 1, 164 N. Y. Supp. 757. **N. C.**—*Gill v. Young*, 88 N. C. 58. **S. C.**—*Cleveland v. Cohrs*, 13 S. C. 397. **Tex.** *Speake v. Prewitt*, 6 Tex. 252. **Wis.** *Devereux v. Peterson*, 126 Wis. 558, 106 N. W. 249.

52. Ark.—*St. Louis, I. M. & S. R. Co. v. State*, 85 Ark. 561, 109 S. W. 545. **Cal.**—*Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024. **Conn.**—*Santo v. Maynard*, 57 Conn. 157, 17 Atl. 700. **Ill.** *Milwaukee Mechanics' Ins. Co. v. Schallman*, 188 Ill. 213, 59 N. E. 12; *Chicago, A. R. R. Co. v. Murphy*, 99 Ill. App. 126. **Ind.**—*Stanton v. Kenrick*, 135 Ind. 382, 35 N. E. 19. **Kan.** *Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933; *Butcher v. Brownsville Bank*, 2 Kan. 70, 83 Am. Dec. 446. **Ky.** *Colston v. Chenault*, 20 Ky. L. Rep. 226, 45 S. W. 664. **Mo.**—*Weigand v. Schrick*, 34 Mo. 510. **Okla.**—*Dixon v. Helena Society*, 166 Pac. 114. **Ore.** *Wild v. Oregon Short Line, etc. R. Co.*, 21 Ore. 159, 27 Pac. 954. **Tex.**—*Walling v. Williams*, 4 Tex. 427, amendment merely correcting a description of a note gives no right to plead anew. **Wash.**—*Maney v. Hart*, 11 Wash. 67, 39 Pac. 268. **Wis.**—*Harris v. Wicks*, 28 Wis. 198.

53. *Gill v. Young*, 88 N. C. 58; *Ayre v. Hixson*, 53 Ore. 19, 98 Pac. 515, 123 Am. St. Rep. 819.

54. *Fink v. Manhattan Ry. Co.*, 15 Daly 479, 8 N. Y. Supp. 327, 24 Abb. N. C. 81, 18 Civ. Proc. 141, 29 N. Y.

St. 153; *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515.

55. Colo.—*Putnam v. Lyon*, 3 Colo. App. 144, 32 Pac. 492. **Ia.**—*Beard v. Guild*, 107 Iowa 476, 78 N. W. 201. See also *Peacock v. Gleeson*, 117 Iowa 291, 90 N. W. 610; *Willets v. Ida County Sav. Bank*, 117 Iowa 386, 90 N. W. 729; *Eslich v. Mason City, etc. R. Co.*, 75 Iowa 443, 39 N. W. 700. **Mo.**—*Robards v. Munson*, 20 Mo. 65. **N. Y.**—*McCloskey v. Goldman*, 62 Misc. 462, 115 N. Y. Supp. 189. **Wis.**—*Kelly v. Bliss*, 54 Wis. 187, 11 N. W. 488.

56. *Willets v. Ida County Sav. Bank*, 117 Iowa 386, 90 N. W. 729; *Fish & Hunter Co. v. New England Homestake Co.*, 27 S. D. 221, 130 N. W. 841.

57. *Hudson v. Hudson*, 119 Ga. 637, 46 S. E. 874. See *A. D. Granger Co. v. Berkeley*, 162 N. Y. Supp. 680.

[a] **Defendant entitled to time in which to answer** where complaint is amended during trial. *Hayes v. Kerr*, 39 App. Div. 529, 57 N. Y. Supp. 323.

58. Cal.—*People v. Rains*, 23 Cal. 127. **Colo.**—See *Miller v. City & County of Denver*, 167 Pac. 767. **Dak.** *Warder v. Patterson*, 6 Dak. 83, 50 N. W. 484. **Ind.**—*Leib v. Butterick*, 68 Ind. 199. **Ohio.**—*Neininger v. State*, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674. **S. C.**—*Gadsden v. Catawba Water Power Co.*, 71 S. C. 340, 51 S. E. 121; *Lockwood v. Charleston Bridge Co.*, 60 S. C. 492, 38 S. E. 112.

59. *People v. Rains*, 23 Cal. 127; *Brooks Bros. v. Tiffany*, 117 App. Div. 470, 102 N. Y. Supp. 626; *Dickerson v. Beardsley*, 1 Code Rep. (N. Y.) 37, 2 Edm. Sel. Cas. 21.

1. **Generally.**⁶⁰—Pleadings must be signed by the party or his attorney in the action.⁶¹ Signature by an attorney in fact is held insufficient.⁶² A plea to the jurisdiction must be signed by the defendant in person, and not by his attorney,⁶³ but a plea in abatement may be signed by the attorney.⁶⁴ In some jurisdictions a pleading not signed as required by law may be stricken from the case on motion,⁶⁵ and generally unless the pleading contains the required signature it will not be permitted to be filed.⁶⁶ But such a defect is a mere irregularity which if not seasonably objected to does not vitiate the pleading.⁶⁷

60. See 6 STANDARD PROC. 720.

Verification of pleadings, see the title "Verification."

Signature to answer in equity, see 4 STANDARD PROC. 175.

Signatures to indictment or information, see 12 STANDARD PROC. 216, et seq.

Signature to bill in equity, see 4 STANDARD PROC. 146, et seq.

Amendments of pleadings as to signature of party or counsel, see 1 STANDARD PROC. 905.

61. **Ala.**—Prim *v.* Davis, 2 Ala. 24. **Ark.**—Carrington *v.* Hamilton, 3 Ark. 416. **Colo.**—Perras *v.* Denver & R. G. R. Co., 5 Colo. App. 21, 36 Pac. 637. **Ill.**—Streff *v.* Colteaux, 64 Ill. App. 179; Grand Lodge, Brotherhood of Locomotive Firemen *v.* Cramer, 60 Ill. App. 212. **Ind.**—Riley *v.* Murray, 8 Ind. 354. **Me.**—Blaisdell *v.* Roberts, 37 Me. 239. **Mich.**—Bernier *v.* Bernier, 72 Mich. 43, 40 N. W. 50. **N. Y.**—Alexander *v.* Miller, 10 Wend. 603; Feist *v.* New York, 15 App. Div. 495, 44 N. Y. Supp. 497. **Tex.**—Hemming *v.* Zimmerschitte, 4 Tex. 159.

[a] **Where name is signed by mark,** the party being unable to write, a mistake in writing the party's name by her mark is immaterial. *Inhabitants of Wellington v. Inhabitants of Corinna*, 104 Me. 252, 71 Atl. 889.

[b] **Must Be Signed by Resident Attorney.**—Nobach *v.* Scott, 20 Idaho 558, 119 Pac. 295.

[c] **Double pleas** must be signed by counsel. *Satterlee v. Satterlee*, 8 Johns. (N. Y.) 327.

[d] **A general replication to a plea** need not be signed by counsel. *Pumpelly v. Crosby*, 8 Johns. (N. Y.) 322.

[e] **Plea of general issue** need not be signed by anyone. *Meras v. Adinamis*, 195 Ill. App. 92.

[f] **Under Connecticut practice** a plea in abatement need not be signed by the party. *Colburn v. Tolles*, 13 Conn. 524.

62. *Kelly v. Herb*, 147 Pa. 563, 23 Atl. 889.

63. **U. S.**—Adams *v.* White, 2 Pittsb. 21, 1 Fed. Cas. No. 68. **Ill.**—Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124. **Mass.**—Guild *v.* Richardson, 6 Pick. 364. **Vt.**—Kenney *v.* Howard, 67 Vt. 375, 31 Atl. 850. **Va.**—Hortons *v.* Townes, 6 Leigh (33 Va.) 47. **W. Va.**—Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

See, however, *Bank of Tennessee v. Anderson*, 3 Sneed (Tenn.) 669, that a plea to the jurisdiction may be signed by attorney where it purports to be made by the defendant in person, stating that the defendant "in proper person, comes and prays judgment," etc.

[a] **The reason for the rule** is that if it is signed by an attorney, who is an officer of the court, he is supposed to have signed by leave of the court, and the asking of leave is considered as a tacit admission of the jurisdiction. *Gould Pl.*, ch. 5, §27; *Kenney v. Howard*, 67 Vt. 375, 31 Atl. 850; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

[b] **A corporation may appear** in such a plea by its president. *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

64. *Prim v. Davis*, 2 Ala. 24; *Holloway v. Freeman*, 22 Ill. 198.

[a] **Plea of misnomer** is a plea in abatement and is well pleaded by attorney. *Guild v. Richardson*, 6 Pick. (Mass.) 364.

65. **U. S.**—Moreland *v.* Marion, 17 Fed. Cas. No. 9,794. **Mich.**—Bernier *v.* Bernier, 72 Mich. 43, 40 N. W. 50. **Tenn.**—Cook *v.* Dews, 2 Tenn. Ch. 496.

66. *Allen v. Bagnell*, 12 Civ. Proc. (N. Y.) 426; *Johnson v. Murray*, 12 Lea (Tenn.) 109.

67. See 6 STANDARD PROC. 721.

[a] **The omission of the signature** (1) does not invalidate the judgment

2. Requisites and Sufficiency of.—The word "signature" as applied to pleadings refers to the proper person's name written at the end of the pleading.⁶⁸ The signature of a party to the verification annexed to a pleading is a sufficient signature to the pleading itself,⁶⁹ but the name of the attorney on the outside of the pleading, below the indorsement on its back, is not a sufficient signature to the pleading.⁷⁰ A printed signature of the attorney has been held not sufficient as his signature,⁷¹ but the signature by the firm name of the attorneys, omitting their Christian names, is sufficient,⁷² and the signing of their names by the attorneys without describing themselves as such is sufficient.⁷³

B. INDORSEMENTS.—Statutes or rules of court requiring certain matters, such as the nature of the action, to be indorsed upon the pleadings, must be complied with,⁷⁴ otherwise they may be stricken.⁷⁵

Address of Attorney.—In some jurisdictions the post office address of the party's attorney is required to be indorsed on the pleading by which he appears.⁷⁶

(*Cochran v. Thomas*, 131 Mo. 258, 33 S. W. 6), (2) and to support a judgment the omission will be supplied by reference to the preceding part of the record, and proceedings. The name of the plaintiff is to be found in the body of the declaration, and in the writ, and the name of the attorney on the writ—the omission is therefore cured. *Phillips v. Malone*, Minor (Ala.) 110.

[b] **Failure to sign may be remedied** (1), and when remedied dates back to date of filing. *Baird v. Prewitt*, 158 Ky. 793, 166 S. W. 771. (2) Court may permit pleading to be signed by counsel when attention is called to omission. *McIntyre v. Smyth*, 108 Va. 736, 62 S. E. 930.

68. *Ashbrook v. Roberts*, 82 Ky. 298.

[a] **Under statute requiring "Christian and surname,"** a signature with the surname and the initials of the Christian name is sufficient. *Clark v. Paine*, 11 Pick. (Mass.) 66.

[b] **A plea which states the names of the parties at its head and is signed at the bottom with the word "Defendant,"** is sufficient in view of the customary practice of signing as "Defendant," "Defendant for himself," or "Defendant by A. B. his attorney." *Wileox v. Chambers*, 34 Conn. 179.

69. **La.**—*Zollicoffer v. Briggs*, 3 Rob. 236. **Mich.**—*Johnson v. Johnson*, Walk. Ch. 309. **Neb.**—*In re Graff's Estate*, 86 Neb. 535, 125 N. W. 1091. **N. Y.** *Barrett v. Joslynn*, 9 Misc. 407, 29 N. Y. Supp. 1070, 61 N. Y. St. 695; *Harrison v. Wright*, 1 N. Y. St. 736, if af-

fidavit verifying pleading is subscribed by the party it is a sufficient compliance with the provision requiring the pleading to be subscribed by him.

See also *Klein v. Turner*, 66 Ore. 369, 133 Pac. 625.

70. *Ashbrook v. Roberts*, 82 Ky. 298; *Schiller v. Maltbie*, 11 Civ. Proc. 304. But see *Wood v. Holden*, 45 Me. 374.

71. *Nightingale v. Oregon Cent. Ry. Co.*, 2 Sawy. 338, 18 Fed. Cas. No. 10,264. But see *Hancock v. Bowman*, 49 Cal. 413.

[a] **Attorney May Sign by Making Impression With Rubber Stamp.**—*Streff v. Colteaux*, 64 Ill. App. 179, the court saying: "It is ordinarily the act of making a paper one's own that is important, rather than the manner of so doing."

[b] **Typewritten names of attorneys** attached to petition and signing of verification by one of them held to be sufficient signature. *McTyre v. Stearns*, 142 Ga. 850, 83 S. E. 955.

72. *Zimmerman v. Wead*, 18 Ill. 304; *Nave v. First Nat. Bank*, 87 Ind. 204.

73. *Nave v. First Nat. Bank*, 87 Ind. 204 ("Cason & Kelsey for pltf."); *Merrill v. Lattimore*, 12 Rob. (La.) 138.

74. See the statutes and rules of court, and *Gainer v. Pollock*, 96 Ala. 554, 11 So. 539; *Bank of Camden v. Thompson*, 46 S. C. 499, 24 S. E. 332.

75. See generally the title "Striking Out and Withdrawal."

76. *Feist v. New York*, 15 App. Div. 495, 44 N. Y. Supp. 497; *Allen v. Bag-*

IX. CURE OF DEFECTS BY SUBSEQUENT PLEADINGS.—It is a general rule that a pleading bad for the omission of a material matter will be cured by a subsequent pleading by the other party supplying such matter.⁷⁷ So too, allegations not of themselves sufficient may, by admission or allegation of the adverse party supplementing the defective allegations, be rendered sufficient.⁷⁸ Thus an ad-

nell, 12 Civ. Proc. (N. Y.) 426; *German American Bank v. Champlin*, 11 Civ. Proc. (N. Y.) 452; *Drucker v. McCallum*, 21 Abb. N. C. (N. Y.) 209.

77. U. S.—*Texas & N. O. R. R. Co. v. Miller*, 221 U. S. 408, 31 Sup. Ct. 534, 55 L. ed. 789; *United States v. Morris*, 10 Wheat. 246, 6 L. ed. 314. **Ala.**—See *Feibelman v. Manchester Fire Assur. Co.*, 108 Ala. 180, 19 So. 540. **Ark.**—*Ogden v. Ogden*, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151. **Cal.**—See *De Flores v. Santa Cruz*, 86 Cal. 191, 24 Pac. 1026; *Schenk v. Hartford Fire Ins. Co.*, 71 Cal. 28, 11 Pac. 807; *Burnham v. Abrahamson*, 21 Cal. App. 248, 131 Pac. 338; *Brown v. Ratliff*, 21 Cal. App. 282, 131 Pac. 769. **Colo.**—*Rocky Mountain Fuel Co. v. George N. Sparkling Coal Co.*, 26 Colo. App. 260, 143 Pac. 815; *Nathan v. Crouse*, 24 Colo. App. 32, 131 Pac. 287; *Mountain Supply Ditch Co. v. Lindenkugel*, 24 Colo. App. 100, 131 Pac. 789. **Conn.**—*Wall v. Toomey*, 52 Conn. 35. **Ill.**—*Wallace v. Curtiss*, 36 Ill. 156. **Ind.**—*Watkins v. Gregory*, 6 Blackf. 113; *Euler v. Euler*, 55 Ind. App. 547, 102 N. E. 856. **Ia.**—See *Cotes v. Davenport*, 9 Iowa 227. **Kan.**—*Bierer v. Fretz*, 32 Kan. 329, 4 Pac. 284; *Irwin v. Paulett*, 1 Kan. 418. **Ky.**—*Interstate Coal Co. v. Trivett*, 155 Ky. 795, 160 S. W. 731; *Heck v. Northwestern Mfg. Co.*, 7 Ky. Op. 143; *Riggs v. Maltby & Co.*, 2 Mete. 88. **Mass.**—*Dorr v. Fenno*, 12 Pick. 521; *Slack v. Lyon*, 9 Pick. 62; *Dunning v. Owen*, 14 Mass. 157. **Mo.**—*Stivers v. Horne*, 62 Mo. 473; *Krum v. Jones*, 25 Mo. App. 71, sufficient after verdict. **Mont.**—*Stephens v. Conley*, 48 Mont. 352, 371, 138 Pac. 189, Ann. Cas 1915D, 958. **Neb.**—*Snyder v. Collier*, 85 Neb. 552, 123 N. W. 1023, 133 Am. St. Rep. 682. **N. Y.**—*Miller v. White*, 4 Hun 62, 6 Thomp. & C. 255. **N. C.**—*Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813. **N. D.**—*Scott v. Northwestern Port Huron Co.*, 17 N. D. 91, 115 N. W. 192. **Ore.**—*Treadgold v. Willard*, 81 Ore. 658, 160 Pac. 803, 805. **Pa.**—*Low-*

rie's Estate, 19 Pa. Co. Ct. 600; *Roberts v. Dobbins*, 12 Phila. 178. **S. C.**—*Stoll v. Ryan*, 3 Brev. 238, 1 Tread. Const. 96. **Tenn.**—*De Graffinread v. Mays*, 6 Yerg. 465. **Tex.**—*Hill v. George*, 5 Tex. 87; *Childress v. Robinson* (Tex. Civ. App.), 161 S. W. 78; *Cox v. Thompson* (Tex. Civ. App.), 160 S. W. 604; *Looney v. Simpson* (Tex. Civ. App.), 25 S. W. 476. **Vt.**—See *Strong v. Richardson*, 19 Vt. 194. **Wash.**—*Cerf, Schloss & Co. v. Wallace*, 14 Wash. 249, 44 Pac. 264. **Wis.**—*Danley v. Williams*, 16 Wis. 581.

[a] Such Allegations Not Deemed Denied.—A statute providing that the allegations of the answer shall be deemed denied applies only to the allegations inconsistent with the complaint and not to allegations which operate to cure a defective complaint. *Erwin v. Shaffer*, 9 Ohio St. 43, 72 Am. Dec. 613; *Houston Trans. Co. v. Paine* (Tex. Civ. App.), 193 S. W. 188.

[b] Subsequent Withdrawal of Pleading.—Even though the pleading containing the admissions curing the defect be withdrawn and a pleading not containing such admissions filed in lieu thereof, the judgment will be supported by the admissions as first made. *Enterprise Coal Co. v. Liberty Brewing Co.*, 20 Mo. App. 16.

78. Ark.—*Thompson v. Jacoway*, 97 Ark. 508, 134 S. W. 955. **Colo.**—*Tarbell v. Tarbell*, 48 Colo. 71, 108 Pac. 976. **Idaho.**—*Ludwig v. Ellis*, 22 Idaho 475, 126 Pac. 769. **Kan.**—*Bierer v. Fretz*, 32 Kan. 329, 4 Pac. 284. **Ky.**—*Howland Coal & Iron Works v. Brown*, 13 Bush 681; *Riggs v. Maltby*, 2 Mete. 88. **La.**—*State v. Mechanics' & Traders' Bank*, 35 La. Ann. 562; *Burland v. Carrollton Bank*, 14 La. 189. **Minn.**—*Mosness v. German-American Ins. Co.*, 50 Minn. 341, 52 N. W. 932. **Mont.**—*Storer v. Graham*, 43 Mont. 344, 116 Pac. 1011. **Neb.**—*Frazer v. Myers*, 95 Neb. 194, 145 N. W. 357.

[a] Vague and uncertain allegations may be thus rendered sufficient. *Burland v. Carrollton Bank*, 14 La. 189.

mission or averment of a fact in an answer will cure the failure to allege that fact in the complaint or its defective allegation,⁷⁹ and a defective plea may be aided by a subsequent pleading of the adverse party.⁸⁰ However, the pleadings of one party are not cured by his

79. U. S.—United States *v. Morris*, 10 Wheat. 246, 6 L. ed. 314. **Ala.**—See Feibelman *v. Manchester Fire Assur. Co.*, 108 Ala. 180, 19 So. 540. **Ark.**—Ogden *v. Ogden*, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151. **Cal.**—Hegard *v. California Ins. Co.*, 11 Pac. 594. **Colo.**—Salazar *v. Taylor*, 18 Colo. 538, 33 Pac. 369; First Nat. Bank *v. Schmidt*, 6 Colo. App. 216, 40 Pac. 479. **Conn.**—Vickery *v. New London N. R. Co.*, 87 Conn. 634, 89 Atl. 277. **Ill.**—Wallace *v. Curtiss*, 36 Ill. 156; Barrett *v. Lingle*, 33 Ill. App. 91. **Ind.**—Wiles *v. Lambert*, 66 Ind. 494; Watkins *v. Gregory*, 6 Blackf. 113. **Kan.**—Grandstaff *v. Brown*, 23 Kan. 176; Irwin *v. Paulett*, 1 Kan. 418. **Ky.**—Chesapeake & O. Ry. Co. *v. Thiemann*, 96 Ky. 507, 29 S. W. 357. **Me.**—Elliot *v. Stuart*, 15 Me. 160. **Md.**—See Prutzman *v. Pitesell*, 3 Har. & J. 77. **Mass.**—Vinal *v. Richardson*, 13 Allen 521; Slack *v. Lyon*, 9 Pick. 62. **Minn.**—Hedderly *v. Downs*, 31 Minn. 183, 17 N. W. 274; Warner *v. Lockerby*, 28 Minn. 28, 8 N. W. 879; Shartle *v. City of Minneapolis*, 17 Minn. 308. **Mo.**—Henry *v. Sneed*, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580. See also Gurley *v. Missouri Pac. Ry. Co.*, 164 Mo. 211, 16 S. W. 11; Wood *v. Harris*, 12 Mo. 74. **Mont.**—Ellinghouse *v. Ajax Live Stock Co.*, 51 Mont. 275, 152 Pac. 481, L. R. A. 1916F, 836; State *ex rel. Dwyer v. Duncan*, 49 Mont. 54, 140 Pac. 95. **Nev.**—Riverside Fixture Co. *v. Quigley*, 35 Nev. 17, 126 Pac. 545. **N. J.**—Marine Trust Co. *v. St. James African, etc. Church*, 85 N. J. L. 272, 88 Atl. 1075. **N. Y.**—Cohu *v. Husson*, 113 N. Y. 662, 21 N. E. 703; Bate *v. Graham*, 11 N. Y. 237; Miller *v. White*, 6 Thomp. & C. 255, 4 Hun 62; Strauss *v. Trotter*, 6 Misc. 77, 26 N. Y. Supp. 20, 55 N. Y. St. 489. **N. C.**—See Johnson *v. Finch*, 93 N. C. 205; Pearce *v. Mason*, 78 N. C. 37. **Ohio.**—Erwin *v. Shaffer*, 9 Ohio St. 43, 72 Am. Dec. 613; Meier *v. Herancourt*, 6 Ohio Dec. (Reprint) 1164. **Ore.**—Skinner *v. Furnas*, 82 Ore. 414, 161 Pac. 962. **Pa.**—Zerger *v. Sailer*, 6 Bin. 24. **S. C.**—Stoll *v. Ryan*, 3 Brev. 238, 1 Tread. Const. 96. **Tenn.**—Nashville, C. & St. L. R. Co. *v. Anderson*,

134 Tenn. 666, 185 S. W. 677, Ann. Cas. 1917D, 902; Sullivan *v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317. **Tex.**—Wright *v. McCampbell*, 75 Tex. 644, 13 S. W. 293; Thomas *v. Bonnie*, 66 Tex. 635, 2 S. W. 724; Grimes *v. Hagood*, 19 Tex. 246; Willis *v. Lockett* (Tex. Civ. App.), 26 S. W. 419. **Utah.**—White *v. Shipley*, 48 Utah 496, 160 Pac. 441. **Vt.**—White's Admx. *v. Central Vermont R. Co.*, 87 Vt. 330, 89 Atl. 618. **Va.**—See Turberville *v. Long*, 3 Hen. & M. (13 Va.) 309. **Wis.**—Danley *v. Williams*, 16 Wis. 581. **Wyo.**—Engen *v. Olson*, 22 Wyo. 522, 145 Pac. 756.

[a] **Failure to allege conditions precedent to recovery** cured by answer showing them to have been performed.

U. S.—United States *v. Morris*, 10 Wheat. 246, 6 L. ed. 314. **Mo.**—Beckmann *v. Phoenix Ins. Co.*, 49 Mo. App. 604. **Pa.**—Zerger *v. Sailer*, 6 Bin. 24.

[b] **Failure of one of two joint obligees to allege death of other in action on the agreement is cured by an answer stating that fact.** Hedderly *v. Downs*, 31 Minn. 183, 17 N. W. 274.

[c] **Allegation of incorporation omitted from complaint** supplied by averment in answer setting up fact of incorporation. First Nat. Bank *v. Schmidt*, 6 Colo. App. 216, 40 Pac. 479.

[d] **Insufficient description of a judgment in complaint to restrain execution sale** cured by answer setting forth accurate description of the judgment. Wiles *v. Lambert*, 66 Ind. 494.

[e] **Defective description of land in a complaint** cured by answer giving correct description. Willis *v. Lockett* (Tex. Civ. App.), 26 S. W. 419.

[f] **Failure to make profert of a note sued on** is cured by the defendant craving over of, and setting it out in his demurrer. De Graffinreid *v. Mays*, 6 Yerg. (Tenn.) 465.

80. U. S.—United States *v. Morris*, 10 Wheat. 246, 6 L. ed. 314. **Colo.**—Rosebud Min. & Mill. Co. *v. Hughes*, 21 Colo. App. 247, 121 Pac. 674. **Ky.**—Mowbray *v. Kelley*, 170 Ky. 271, 185 S. W. 1130; Brooks *v. Mayssville*, 151 Ky. 707, 152 S. W. 788. **Mass.**—Jenkins *v. Stanley*, 10 Mass. 226. See also

own subsequent pleadings.⁸¹ And if plaintiff by his reply, denies the allegations in the answer, he cannot rely upon such allegations to cure insufficient averments in his complaint.⁸² In some states a party's express denial of the existence of a fact cures the adverse party's failure to allege that fact;⁸³ but in other jurisdictions the rule is to the contrary.⁸⁴

X. WAIVER OF DEFECTS IN OR OBJECTIONS TO PLEADINGS.⁸⁵—A. BY DEMURRER.—By demurring on certain grounds, all objections to the pleading not thereby presented, but which might be raised by demurring on other grounds,⁸⁶ or by motion,⁸⁷ are waived. However, objections as to substance are not so waived.⁸⁸

B. BY TAKING DEPOSITIONS.—The mere taking of depositions in a cause which had not been set for hearing cannot be considered as

Keay v. Goodwin, 16 Mass. 1. *Wash. See Cerf, Schloss & Co. v. Wallace*, 14 Wash. 249, 44 Pac. 264.

[a] A plea bad in substance is not aided by a replication. *Griswold v. Nat. Ins. Co.*, 3 Cow. (N. Y.) 96.

[b] A counterclaim defectively stated may be cured by a reply which contains the allegations omitted therefrom. *Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 44 Am. St. Rep. 439, 25 L. R. A. 813.

81. *Colo.*—See *Denver & Rio Grande Ry. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285, that plaintiff cannot supply a necessary averment to his complaint by setting it up in his replication, but where this is done and defendant makes no objection he will be held to have waived it. *Ind.*—*Phoenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. 865, plaintiff's complaint cannot be aided by his reply. *Minn.*—*Webb v. Bidwell*, 15 Minn. 479; *Tullis v. Orthwein*, 5 Minn. 377; *Bernheimer v. Marshall & Co.*, 2 Minn. 78, 72 Am. Dec. 89. *Mo.* *Schwabe v. Moore*, 187 Mo. App. 74, 172 S. W. 1157. *Mont.*—See *Elijah v. Wright*, 52 Mont. 438, 158 Pac. 475. *Tex.*—*Fink v. San Augustine Grocery Co.* (Tex. Civ. App.), 167 S. W. 35.

82. *Mosness v. German-American Ins. Co.*, 50 Minn. 341, 52 N. W. 932; *Greenberg v. German American Ins. Co.*, 83 Ore. 662, 160 Pac. 536, 163 Pac. 820.

83. *Ky.*—*Louisville & N. R. Co. v. Lawson*, 88 Ky. 496, 11 S. W. 511; *Worthley's Admr. v. Hammond*, 13 Bush 510; *Dean v. Dean's Admr.*, 1 S. W. 811. *Minn.*—*Ritchie v. Ege*, 58 Minn. 291, 59 N. W. 1020. *Mo.*—*Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512, 108 W. 486, 3 L. R. A. 156; *Steph-*

ens v. Frampton, 29 Mo. 263. *Mont.* *Hamilton v. Great Falls, etc. R. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713. *N. C.*—*Knowles v. Norfolk Southern R. Co.*, 102 N. C. 59, 9 S. E. 7. *Vt.*—*Strong v. Richardson*, 19 Vt. 194.

84. *VanAlstine v. Whelan*, 135 Cal. 232, 67 Pac. 125; *Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386. See also *Merryman v. Kirby*, 13 Cal. App. 344, 109 Pac. 635; *Tooker v. Arnoux*, 76 N. Y. 397, 20 Alb. Law. J. 97; *Scotfield v. Whitelegge*, 49 N. Y. 259, 12 Abb. Pr. (N. S.) 320.

85. Waiver of failure to serve pleading within prescribed time, see the title "Service of Process and Papers."

86. *Ala.*—*Sloss-Sheffield Steel & Iron Co. v. Long*, 169 Ala. 337, 53 So. 910; *Turner Coal Co. v. Glover*, 101 Ala. 289, 13 So. 478. *Ark.*—*Roach v. Scogin*, 2 Ark. 128. *Ga.*—*Lyons v. Planters' Loan & Savings Bank*, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155. *Ill.*—*Kenyon v. Sutherland*, 8 Ill. 99. *Ind.*—See *Live Stock Ins. Co. v. Edgar*, 56 Ind. App. 489, 105 N. E. 641. *Ia.*—See *Bridgman v. Wileut*, 4 G. Gr. 563. *Mass.*—*Smith v. Milton*, 133 Mass. 369; *Proctor v. Stone*, 1 Allen 193. *Minn.*—See *Monette v. Cratt*, 7 Minn. 234. *Mont.*—*Pryor v. Walkerville*, 31 Mont. 618, 79 Pac. 240. *N. Y.* *Malone v. Stilwell*, 15 Abb. Pr. 421. *Tex.*—*Crayton v. Munger*, 9 Tex. 285.

87. *Van Etten v. Medland*, 53 Neb. 569, 74 N. W. 33; *Fritz v. Grosnicklaus*, 20 Neb. 413, 30 N. W. 411; *Garrabrant v. Disbrow*, 155 App. Div. 456, 140 N. Y. Supp. 242.

88. See *Crayton v. Munger*, 9 Tex. 285.

a waiver of any rights parties may have on questions of pleading.⁸⁹

C. BY PLEADING OVER AND PROCEEDING TO TRIAL.—1. Generally. By pleading over and proceeding to trial without objection a party waives any formal defects or defective allegations in a pleading.⁹⁰

.9. Price v. Marks, 103 Va. 18, 48 S. E. 499.

[a] But a decree will not be reversed for want of a replication to the answer when the defendant has taken depositions as if there had been a replication. *Kirchner v. Smith*, 61 W. Va. 434, 58 S. E. 614.

90. U. S.—*Bell v. Mobile & O. R. Co.*, 4 Wall. 598, 18 L. ed. 338; *Dashley v. Daniel*, 202 Fed. 426, 120 C. C. A. 532; *Bolton-Pratt Co. v. Chester*, 210 Fed. 253, 127 C. C. A. 71; *Black v. Black*, 74 Fed. 978. Ala.—*Exchange Underwriters' Agency v. Bates*, 195 Ala. 161, 69 So. 956; *Ware v. Bradford*, 2 Ala. 676, 36 Am. Dec. 427; *Sturdevant v. Murrell's Heirs*, 8 Port. 317. Ariz.—See *Sandoval v. Randolph*, 11 Ariz. 371, 95 Pac. 119. Ark.—*Pekin Stave & Mfg. Co. v. Ramey*, 104 Ark. 1, 147 S. W. 83. Cal.—*Rose v. Rose*, 112 Cal. 341, 44 Pac. 658; *Waldrip v. Black*, 74 Cal. 409, 16 Pac. 226. Colo.—*Haynie v. Sites*, 56 Colo. 115, 138 Pac. 42. Conn.—*Cole v. Jeraman*, 77 Conn. 374, 59 Atl. 424; *Jacobs v. Holmgenson*, 70 Conn. 68, 38 Atl. 914; *New England Mfg. Co. v. Starin*, 60 Conn. 369, 22 Atl. 953. Del.—*Star Loan Assn. v. Moore*, 4 Penne. 308, 55 Atl. 946; *Mitchell's Admr. v. Woodward*, 2 Marv. 311, 43 Atl. 165; *Addicks v. Addicks*, 1 Marv. 338, 41 Atl. 78, 2 Hardesty 78. Ga.—*Bank of Norwood v. Chapman*, 19 Ga. App. 709, 92 S. E. 225. Idaho.—*Ludwig v. Ellis*, 22 Idaho, 475, 126 Pac. 769. Ill.—*Illinois Cent. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521; *Chicago & A. R. Co. v. Jennings*, 114 Ill. App. 622. Ind.—*Ades v. Levi*, 137 Ind. 506, 37 N. E. 388; *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565. Ia.—*Fairbairn v. Haislet*, 90 Iowa 143, 57 N. W. 702; *Ream v. Jack*, 44 Iowa 325; *Rivereau v. St. Ament*, 3 G. Gr. 118. Kan.—*Conaway v. Gore*, 24 Kan. 389. Ky.—*Williams v. Hays*, 175 Ky. 170, 193 S. W. 1046; *Barlow v. Wiley*, 3 A. K. Marsh. 457; *Rees v. Middleton*, 1 A. K. Marsh. 6. La.—*Lotz v. Folger*, 10 La. Ann. 20. Md.—*Dryden v. Barnes*, 101 Md. 346, 61 Atl. 342. See also *Farmers' & Mechanics' Nat. Bank v. Hunter*, 97 Md. 148, 54 Atl. 650. Mass.—*Buck*

v. Hall, 170 Mass. 419, 49 N. E. 658; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445; *Spear v. Bicknell*, 5 Mass. 125. Mich.—*McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668; *Bauman v. Bean*, 57 Mich. 1, 23 N. W. 451; *Heymes v. Champlin*, 52 Mich. 25, 17 N. W. 226. Minn.—*Seibert v. Minneapolis & St. L. Ry. Co.*, 58 Minn. 39, 59 N. W. 822; *Dean v. Leonard*, 9 Minn. 190. Mo.—*Karle v. Kansas City, etc. R. Co.*, 55 Mo. 476; *Cox v. Capron*, 10 Mo. 691; *Banchor v. Gregory*, 9 Mo. App. 102; *Wilson v. Chicago Great Western R. Co. (Mo. App.)*, 190 S. W. 22. Mont.—*Ivanhoff v. Teale*, 47 Mont. 115, 130 Pac. 972; *Pryor v. City of Walkerville*, 31 Mont. 618, 79 Pac. 240; *Kleinschmidt v. McDermott*, 12 Mont. 598, 31 Pac. 541. Neb.—*Marvin v. Weider*, 31 Neb. 774, 48 N. W. 825; *Powers v. Powers*, 20 Neb. 529, 31 N. W. 1. Nev.—*Reese v. Kinkad*, 20 Nev. 65, 14 Pac. 871. N. J.—*Hopper v. Hopper*, 21 N. J. L. 543. N. M.—*Bullard v. Lopez*, 7 N. M. 561, 37 Pac. 1103. N. Y.—*Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308; *Bicknell v. Spier*, 7 Misc. 108, 27 N. Y. Supp. 386, 57 N. Y. St. 485. N. C.—*Cook v. American Exch. Bank*, 129 N. C. 149, 39 S. E. 746; *Warner v. Western North Carolina R. Co.*, 94 N. C. 250; *Garrett v. Trotter*, 65 N. C. 430. N. D.—*Ward v. Gradin*, 15 N. D. 649, 109 N. W. 57. See also *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511. Ohio.—*Pugh v. Calloway*, 10 Ohio St. 488. Okla.—*Guthrie v. Finch*, 13 Okla. 496, 75 Pac. 288; *Ryndak v. Seawell*, 13 Okla. 737, 76 Pac. 170. Ore.—*Graham v. Corvallis & Eastern R. Co.* 71 Ore. 477, 142 Pac. 774; *Chan Sing v. Portland*, 37 Ore. 68, 60 Pac. 718. Pa.—*Barrington v. Bank of Washington*, 14 Serg. & R. 405; *Ballard v. Fitch*, 3 Grant Cas. 268. R. I.—*Vickery v. City of Providence*, 17 R. I. 651, 24 Atl. 148. S. C.—*Burns v. Southern Ry. Co.*, 65 S. C. 229, 43 S. E. 679. S. D.—*Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069. Tenn.—*Nashville & C. R. Co. v. Conk*, 11 Heisk. 575; *Anderson v. Read*, 2 Overt. 205. 5 Am. Dec. 661. Tex.—*Baker v. Hamblen (Tex. Civ. App.)*, 75 S. W. 362;

Thus among the matters which may be so waived, are indefiniteness, uncertainty, and want of precision;⁹¹ irrelevant and redundant mat-

Pfeuffer v. Burns (Tex. Civ. App.), 24 S. W. 36. **Utah**.—National Union Fire Ins. Co. v. Denver, etc. R. Co., 44 Utah 26, 137 Pac. 653; Child v. Gillis Const. Co., 42 Utah 120, 129 Pac. 356. **Vt.**—Osborne v. Grand Trunk R. Co., 87 Vt. 104, 88 Atl. 512, Ann. Cas. 1916C, 74; Card v. Sargeant, 15 Vt. 393. **Va.**—Richmond v. McCormack, 120 Va. 552, 91 S. E. 767. See also Dixon Livery Co. v. Bond, 117 Va. 656, 86 S. E. 106. **Wash.**—Yamamoto v. Puget Sound L. Co., 84 Wash. 411, 146 Pac. 861; Kelly v. Lum, 75 Wash. 135, 134 Pac. 819, 49 L. R. A. (N. S.) 1151; Wappenstein v. Aberdeen, 39 Wash. 189, 81 Pac. 686. **W. Va.**—Gartin v. Draper Coal & Coke Co., 72 W. Va. 405, 78 S. E. 673; Hartman v. Evans, 38 W. Va. 669, 18 S. E. 810. **Wis.**—Bell v. Peterson, 105 Wis. 607, 81 N. W. 279; Mead v. Bagnall, 15 Wis. 156. **Wyo.**—E. D. Metcalf Co. v. Gilbert, 19 Wyo. 331, 116 Pac. 1017. See 6 STANDARD PROC. 1005.

91. U. S.—Bolten-Pratt Co. v. Chester, 210 Fed. 253, 127 C. C. A. 71; Glaspie v. Keater, 56 Fed. 203, 5 C. C. A. 474, 12 U. S. App. 281. **Ark.**—Pekin Stave & Mfg. Co. v. Ramey, 104 Ark. 1, 147 S. W. 83; Briggs v. Steel, 91 Ark. 458, 121 S. W. 754. **Cal.**—Eachus v. City of Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497 (general allegation of fraud); King v. Davis, 34 Cal. 100; Brown v. Martin, 25 Cal. 82. **Colo.**—Colorado City v. Liafe, 28 Colo. 468, 65 Pac. 630; Rosenfeld v. Rosenfeld, 21 Colo. 16, 40 Pac. 49; Orman v. Mannix, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602. **Conn.**—McNerney v. Barnes, 77 Conn. 155, 58 Atl. 714. **Ga.**—Gatlın v. Ed Matthews & Co., 16 Ga. App. 645, 85 S. E. 953. **Idaho.**—Ludwig v. Ellis, 22 Idaho 475, 126 Pac. 769; Chemung Min. Co. v. Hanley, 9 Idaho 786, 77 Pac. 226; Aulbach v. Dahler, 4 Idaho 654, 43 Pac. 322. **Ill.**—Pittsburgh, C. & St. L. Ry. Co. v. Robson, 204 Ill. 254, 68 N. E. 468; Jack v. Weiennett, 115 Ill. 105, 3 N. E. 445, 56 Am. Rep. 129; Clayton v. Feig, 179 Ill. 534, 54 N. E. 149. **Ind.**—Louisville, N. A. & C. R. Co. v. Bates, 146 Ind. 564, 45 N. E. 108; Huntington v. Mendenhall, 73 Ind. 460. **Ia.**—Goucher

v. Sioux City, 115 Iowa 639, 89 N. W. 24; Horner v. Rowley, 51 Iowa 620, 2 N. W. 436. **Kan.**—Provident Loan Trust Co. v. McIntosh, 68 Kan. 452, 75 Pac. 498; Moody v. Arthur, 16 Kan. 419; Meagher v. Morgan, 3 Kan. 372, 87 Am. Dec. 476. **Ky.**—Williams v. Hays, 175 Ky. 170, 193 S. W. 1046. **La.**—Doullut v. McManus, 37 La. Ann. 800; Ludeling v. Frellsen, 4 La. Ann. 534. **Md.**—Gardiner v. Miles, 5 Gill 94, ambiguity. **Mass.**—George N. Pierce Co. v. Beers, 190 Mass. 199, 76 N. E. 603; Beatty v. Randall, 5 Allen 441. **Mich.**—Jolman v. Alberts, 186 Mich. 643, 153 N. W. 11; Campbell v. Kalamazoo, 80 Mich. 655, 45 N. W. 652. **Minn.**—Cathcart v. Peck, 11 Minn. 45. **Miss.**—Citizens' Bank v. Buddig, 65 Miss. 284, 4 So. 94. **Mo.**—Coombs & Bro. Com. Co. v. Block, 130 Mo. 668, 32 S. W. 1139; Burke Mfg. Co. v. The A. Saltzman, 42 Mo. App. 85; Selden v. Hughes (Mo. App.), 195 S. W. 524. **Mont.**—Keffler v. Wilds, 50 Mont. 387, 146 Pac. 1105; Sanderson v. Billings Water Power Co., 19 Mont. 236, 47 Pac. 998; Spencer v. Montana Cent. Ry. Co., 11 Mont. 164, 27 Pac. 681. **Neb.**—Welsh v. Burr, 56 Neb. 361, 76 N. W. 905; Morris v. Haas, 54 Neb. 579, 74 N. W. 828; Darst v. Perfect, 42 Neb. 574, 60 N. W. 928.

See also **N. J.**—Tipton v. Randall, 101 Atl. 204; O'Hagan v. Crossman, 50 N. J. L. 516, 14 Atl. 752. **N. Y.**—Tuthill v. Skidmore, 124 N. Y. 148, 26 N. E. 348; Huber v. Wilson, 58 Hun 603, 11 N. Y. Supp. 377, 33 N. Y. St. 849. **N. C.**—Mizell v. Ruffin, 118 N. C. 69, 23 S. E. 927; Morgan v. First Nat. Bank, 93 N. C. 352. **N. D.**—Christofferson v. Wee, 24 N. D. 506, 139 N. W. 689. **Ore.**—Boelk v. Nolan, 56 Ore. 229, 107 Pac. 689; Sturgis v. Baker, 43 Ore. 236, 72 Pac. 744; Durkee v. Carr, 38 Ore. 189, 63 Pac. 117; Osborn v. Graves, 11 Ore. 526, 6 Pac. 227. **Pa.**—Morgan v. Westmoreland Electric Co., 213 Pa. 151, 62 Atl. 638; Bixler v. Kunkle, 17 Serg. & R. 298; McGeary v. Leader Pub. Co., 52 Pa. Super. 35. **Tenn.**—Stainback v. Junk Bros. Lumber etc. Co., 98 Tenn. 306, 39 S. W. 530. **Tex.**—Bexar Bldg. & L. Assn. v. Newman, 86 Tex. 380, 25 S. W. 11. **Vt.**—Baker v. Sherman, 73 Vt. 26, 50 Atl. 633. **Wash.**—Rightor

ter;⁹² duplicity;⁹³ argumentative allegations;⁹⁴ alleging conclusion of law, under some circumstances;⁹⁵ pleading in the alternative;⁹⁶ that allegations are on information and belief;⁹⁷ failure to file a pleading within the prescribed time;⁹⁸ failure to paragraph the pleading;⁹⁹ the leaving of blanks in a pleading;¹ failure to aver venue;² or erroneous allegation as to venue;³ irregularity in the form of action;⁴ misjoinder of causes of action;⁵ failure to separately state two causes

r. Ward, 87 Wash. 621, 152 Pac. 332. **W. Va.**—George v. Crim, 66 W. Va. 421, 66 S. E. 526. **Wis.**—Sell v. Mississippi River Logging Co., 88 Wis. 581, 60 N. W. 1065; Haseltine v. Simpson, 58 Wis. 579, 17 N. W. 332.

See 4 STANDARD PROC. 864.

92. **Ala.**—Browder v. Irby, 112 Ala. 379, 21 So. 351; Castles v. McMath, 1 Ala. 326. **Kan.**—Savage v. Challiss, 4 Kan. 319. **Okla.**—Hunt v. Jones, 35 Okla. 252, 128 Pac. 1094. **S. D.**—Woodford v. Kelley, 18 S. D. 615, 101 N. W. 1069.

93. **Ala.**—Castles v. McMath, 1 Ala. 326. **Ill.**—Hamilton v. Eisen-drath, 185 Ill. App. 502. See also Royls v. Chicago City Ry. Co., 182 Ill. App. 486. **Ind.**—Prenatt v. Runyon, 12 Ind. 174. **Ia.**—Scott v. Chicago, M. & St. P. Ry. Co., 68 Iowa 360, 24 N. W. 584, 27 N. W. 276. See also Robbins v. Bosserman Bros., 133 Iowa 318, 110 N. W. 587. **N. H.**—Joy v. Simpson, 2 N. H. 179. **Vt.**—Dubois v. Roby, 84 Vt. 465, 80 Atl. 150.

Compare 7 STANDARD PROC. 947, 948.

94. Gordon v. Bankard, 37 Ill. 147.

95. **U. S.**—Western Real Estate Trustees v. Hughes, 172 Fed. 206, 96 C. C. A. 658. **Cal.**—Dillon v. Cross, 5 Cal. App. 766, 91 Pac. 439. **Ia.**—Doherty v. Des Moines City R. Co., 144 Iowa 26, 121 N. W. 690. **Ore.**—Creedy v. Joy, 40 Ore. 28, 66 Pac. 295.

Compare 5 STANDARD PROC. 226.

96. Johnson v. Birmingham Ry., L. & P. Co., 149 Ala. 529, 43 So. 33.

97. Dalrymple v. Schwartz, 177 App. Div. 650, 164 N. Y. Supp. 496.

Compare the title "Information and Belief." See also generally the title "Fivolous and Sham Pleadings."

98. **Fla.**—Manley v. Union Bank, 1 Fla. 160. **Ill.**—Donnelly v. Chicago City R. Co., 124 Ill. App. 18; Beck v. Independent Brewing Assn., 60 Ill. App. 423, waived by procuring extension of time in which to plead. **Ia.**—Paddleford v. Cook, 74 Iowa 423, 38 N. W. 137. **Kan.**—Jeffs v. Flickenger, 14 Kan. 308. **Ky.**—Wright v.

Haddock, 7 Dana 253; Bradley v. Steele, Hard. 559. **Md.**—Wilkin Mfg. Co. v. Melvin, 116 Md. 97, 81 Atl. 879; Benson v. Davis' Admr., 6 Har. & J. 272. **N. J.**—Camden Fire Ins. Co. v. Reed (N. J. Eq.), 38 Atl. 667. **Ohio.** Hill v. Supervisor of Road District, 10 Ohio St. 621. **Wis.**—Kirby v. Corning, 54 Wis. 599, 12 N. W. 69.

99. Mullikin v. Mullikin, 15 Ky. L. Rep. 609, 23 S. W. 352, 25 S. W. 598.

1. Richardson v. Farnsworth, 1 Stew. (Ala.) 55; Crowder v. Reed, 80 Ind. 1.

2. Roberts v. Corby, 86 Ill. 182; Marx v. Croisan, 17 Ore. 393, 21 Pac. 310.

3. Crouse v. Duffield, 12 Mart. O. S. (La.) 539.

4. **U. S.**—Carson v. Hood's Exr's., 4 Dall. 108, 1 L. ed. 762. **Ga.**—See Central R. & B. Co. v. Pickett, 87 Ga. 734, 13 S. E. 750. **Ind.**—Grand Trunk Western Ry. Co. v. Thrift Trust Co. (Ind. App.), 115 N. E. 685. **Ia.**—Dodge v. Davis, 85 Iowa 77, 52 N. W. 2. **La.**—Lotz v. Folger, 10 La. Ann. 20. **Me.**—Googins v. Gilmore, 47 Me. 9, 74 Am. Dec. 472. **Mich.**—See Fuller v. Jackson, 82 Mich. 480, 46 N. W. 721; McCoy v. Brennan, 61 Mich. 362, 28 N. W. 129, 1 Am. St. Rep. 589. **Neb.**—Downie v. Ladd, 22 Neb. 531, 35 N. W. 388. **S. C.**—McEwen v. Joy, 7 Rich. L. 33.

See, however, Conroy v. Equitable Acc. Co., 27 R. I. 467, 63 Atl. 356, that the objection plaintiff has mistaken his action is not waived by submitting the case to the jury.

5. **Ala.**—Madden v. Blythe, 7 Port. 258. **Ark.**—Lake v. Combs, 84 Ark. 21, 104 S. W. 544, 1094; Organ v. Memphis & L. R. R. Co., 51 Ark. 235, 11 S. W. 96. **Cal.**—Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16. **Colo.**—Stuart v. County Comrs., 25 Colo. App. 568, 139 Pac. 577. **Ind.**—Rennick v. Chandler, 59 Ind. 354. **Ia.**—Woodworth v. Iowa Cent. R. Co., 149 N. W. 522; McDonald v. Second Nat. Bank, 106 Iowa 517, 76 N. W. 1011; Flynn v.

of action or defenses;⁶ joinder of inconsistent defenses;⁷ and departure in pleading.⁸

2. Failure To State Cause of Action.—However, as defects in substance are not cured by pleading over,⁹ the failure to aver facts

Des Moines & St. L. Ry. Co., 63 Iowa 490, 19 N. W. 312. **Kan.**—Blodgett v. Yocum, 80 Kan. 644, 103 Pac. 128; Berry v. Carter, 19 Kan. 135. **Ky.** Castleman-Blakemore Co. v. Brucker, 167 Ky. 269, 180 S. W. 360; Caldwell v. Caldwell, 2 Bush 446; Pepper's Admx. v. Harper, 20 Ky. L. Rep. 837, 47 S. W. 620. **La.**—Kenney v. Dow, 10 Mart. (O. S.) 577, 13 Am. Dec. 342. **Mich.**—Diel v. Kellogg, 163 Mich. 162, 128 N. W. 420. **Minn.**—Stolorow v. National Council, 132 Minn. 27, 155 N. W. 756; Sleepy Eye Mill Co. v. Chicago & N. W. R. Co., 119 Minn. 199, 137 N. W. 813; Campbell v. Railway Transfer Co., 95 Minn. 375, 104 N. W. 547. **Mo.**—Norton v. Reed, 253 Mo. 236, 161 S. W. 842; Mead v. Brown, 65 Mo. 552; O'Neill v. Blase, 94 Mo. App. 648, 68 S. W. 764; Wank v. Peet (Mo. App.), 190 S. W. 88. **Neb.**—Curran v. Hagerman, 3 Neb. (Unof.) 779, 92 N. W. 1003; Porter v. Sherman County Banking Co., 36 Neb. 271, 54 N. W. 424; Claire v. Claire, 10 Neb. 54, 4 N. W. 411. **N. H.**—Mellon v. Read, 73 N. H. 153, 59 Atl. 946. **N. Y.**—Hunt v. Armstrong, 166 App. Div. 311, 151 N. Y. Supp. 850; Mulinos v. Walkof, 95 Misc. 165, 159 N. Y. Supp. 16, 20; Barnard v. Brown, 63 Hun 625, 17 N. Y. Supp. 313, 43 N. Y. St. 602; Wright v. Storrs, 6 Bosw. 600. **N. C.**—Cooper v. Southern Express Co., 165 N. C. 538, 81 S. E. 743; Finley v. Hayes, 81 N. C. 368. **Okla.**—Oates v. Freeman, 157 Pac. 74; Tucker v. Hudson, 38 Okla. 790, 134 Pac. 21; Reynolds v. Hill, 28 Okla. 533, 114 Pac. 1108. **Ore.**—Elling v. Blake-McFall Co., 85 Ore. 91, 166 Pac. 57; Short v. Short, 62 Ore. 118, 123 Pac. 388. **Pa.**—Erie City Iron Works v. Barber, 118 Pa. 6, 12 Atl. 411. See also Stoker v. Philadelphia & R. R. Co., 254 Pa. 494, 99 Atl. 28. **S. C.** Kickbusch v. Ruggles, 105 S. C. 525, 90 S. E. 163; Savannah Chem. Co. v. Johnson, 105 S. C. 213, 89 S. E. 810. **S. D.**—Adams Co. v. Nesbit, 38 S. D. 11, 159 N. W. 871; Lee v. Mellette, 15 S. D. 586, 90 N. W. 855. **Tex.** Southwestern Surety Ins. Co. v. Thompson (Tex. Civ. App.), 180 S. W. 947; Killfoil v. Moore (Tex. Civ. App.),

39 S. W. 646. See also Madden v. Shane (Tex. Civ. App.), 185 S. W. 908. **Wis.**—Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909; Phillips v. Carver, 99 Wis. 561, 75 N. W. 432. **Wyo.**—Mau v. Stoner, 15 Wyo. 109, 87 Pac. 434, 89 Pac. 466.

See 14 STANDARD PROC. 727.

6. U. S.—Shepherd v. Baltimore & O. R. Co., 130 U. S. 426, 9 Sup. Ct. 598, 32 L. ed. 970. **Cal.**—Camozzi v. Colusa Sandstone Co., 26 Cal. App. 74, 147 Pac. 107. **Colo.**—Possell v. Smith, 39 Colo. 127, 88 Pac. 1064; Brewer v. McCain, 21 Colo. 382, 41 Pac. 822. **Ia.**—Joy v. Bitzer, 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184; Cruver v. Chicago, M. & St. P. Ry. Co., 62 Iowa 460, 17 N. W. 661. **Kan.**—Truit v. Baird, 12 Kan. 420. **Mass.**—Com. v. Inhabitants of Dracut, 8 Gray 455. **Minn.**—Davis v. Hamilton, 85 Minn. 209, 88 N. W. 744. **Mo.**—Thompson v. School Dist. No. 4, 71 Mo. 495; Murphy v. St. Louis Transit Co., 96 Mo. App. 272, 70 S. W. 159. See, however, Reed v. Kansas Condensed Milk Co., 187 Mo. App. 542, 174 S. W. 110. **Nev.** Gardner v. Gardner, 23 Nev. 207, 45 Pac. 139. **N. J.**—See Ellis Co. v. Eyth, 69 N. J. L. 579, 55 Atl. 54. **N. Y.** Schultz v. Greenwood Cemetery, 190 N. Y. 276, 83 N. E. 41; Gearity v. Strasbourger, 133 App. Div. 701, 118 N. Y. Supp. 257; Lane v. Wheelwright, 69 Hun 180, 23 N. Y. Supp. 576, 53 N. Y. St. 368. **Ore.**—Harvey v. Southern Pac. Co., 46 Ore. 505, 80 Pac. 1061. **S. D.**—Redwater Land & Canal Co. v. Reed, 26 S. D. 466, 128 N. W. 702; Smith v. Jones, 16 S. D. 337, 92 N. W. 1084.

7. Ala.—Cleveland v. Chandler, 3 Stew. 489. **Cal.**—Klink v. Cohen, 13 Cal. 623. **Okla.**—Kaufman v. Bois-mier, 25 Okla. 252, 105 Pac. 326. **Wash.** Lynch v. Richter, 10 Wash. 486, 39 Pac. 125.

8. Loucks v. Davies, 43 Colo. 490, 96 Pac. 191. See 7 STANDARD PROC. 140.

9. Ind.—Allyn v. Allyn, 108 Ind. 327, 9 N. E. 279. **N. H.**—Otis v. Currier, 17 N. H. 463; Joy v. Simpson, 2 N. H. 179. **N. Y.**—White v. Delavan, 21 Wend. 26.

sufficient to constitute a cause of action is not waived,¹⁰ though there is authority to the contrary.¹¹

3. Defects in Plea or Answer.—According to some authorities the failure of a plea to state a defense is waived by pleading over or going to trial without objection,¹² but in other states a plea not stating a defense is not so cured.¹³ Defective allegations in a plea or answer will be waived the same as in any other pleading.¹⁴

4. Failure To File Reply or Replication.—The failure to file a

10. U. S.—Victor American Fuel Co. v. Eidson, 237 Fed. 999, 150 C. C. A. 649; Rush v. Newman, 58 Fed. 158, 7 C. C. A. 136. **Ala.**—Central of Georgia R. Co. v. Gross, 192 Ala. 354, 68 So. 291. **Ariz.**—McPherson v. Hat-tich, 10 Ariz. 104, 85 Pac. 731. **Cal.**—Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 Pac. 564; Weinreich v. Johnson, 78 Cal. 254, 20 Pac. 556. **Colo.**—Hall v. Cudahy, 46 Colo. 324, 104 Pac. 415; Stevenson v. Lord, 15 Colo. 131, 25 Pac. 313. **Fla.**—Sylves-ter v. Lichtenstein, 61 Fla. 441, 55 So. 282; Dekle v. Calhoun, 60 Fla. 53, 53 So. 14; Florida Cent. & P. R. Co. v. Ashmore, 43 Fla. 272, 32 So. 832. **Ga.**—Kelly v. Strouse, 116 Ga. 872, 43 S. E. 280. **Ind.**—Harris v. Harris, 61 Ind. 117; Campbell v. Routt, 42 Ind. 410. See, however, Fish v. Hetherington & Berner, 61 Ind. App. 645, 112 N. E. 391. **Ia.**—*In re* East Minors, 143 Iowa 370, 122 N. W. 153; see also Enix v. Iowa Cent. Ry. Co., 114 Iowa 508, 87 N. W. 417. **Kan.**—See Moody v. Arthur, 16 Kan. 419. **Ky.**—Bogenschutz v. Smith, 84 Ky. 330, 1 S. W. 578. **Mass.**—Murphy v. Russell, 202 Mass. 480, 89 N. E. 107. **Mich.**—Hartung v. Shaw, 130 Mich. 177, 89 N. W. 701; Stoflet v. Marker, 34 Mich. 313. **Minn.**—Stratton v. Allen, 7 Minn. 502. **Miss.**—Southern R. Co. v. Grace, 95 Miss. 611, 49 So. 835. **Mo.**—Gruender v. Frank, 267 Mo. 713, 186 S. W. 1004; Ivory v. Carlin, 30 Mo. 142; Wank v. Peet (Mo. App.), 190 S. W. 88. **Mont.**—Badovinae v. Northern Pac. R. Co., 39 Mont. 454, 104 Pac. 543; Thornton v. Kaufman, 35 Mont. 181, 88 Pac. 796. **Neb.**—Edney v. Baum, 70 Neb. 159, 97 N. W. 252; Vila v. Grand Island Electric Light etc. Co., 68 Neb. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791; Ball v. La Clair, 17 Neb. 39, 22 N. W. 118. **N. Y.**—Troy Automobile Exch. v. Home Ins. Co., 221 N. Y. 58, 116 N. E. 786; Coffin

v. Reynolds, 37 N. Y. 640; Burnham v. DeBevorse, 8 How. Pr. 159. **N. C.**—Rosenbacher & Bro. v. Martin, 170 N. C. 236, 86 S. E. 785; McDonald v. MacArthur Bros. Co., 154 N. C. 122, 69 S. E. 832. See Hines v. Wilmington & W. R. Co., 95 N. C. 434, 59 Am. Rep. 250. **N. D.**—Scully Steel & Iron Co. v. Hann, 18 N. D. 528, 123 N. W. 275. **Ohio.**—Youngstown v. Moore, 30 Ohio St. 133. **Ore.**—Haworth v. Jack-son, 80 Ore. 132, 156 Pac. 590; Wool-ley v. Plaindealer Pub. Co., 47 Ore. 619, 84 Pac. 473, 5 L. R. A. (N. S.) 499; see also Hayes v. Horton, 46 Ore. 597, 81 Pac. 386. **S. C.**—Garrett v. Weinberg, 50 S. C. 310, 27 S. E. 770. **Tex.**—Redland Fruit Co. v. Sargent, 51 Tex. Civ. App. 619, 113 S. W. 330. **Wash.**—Benjamin v. Ernst, 83 Wash. 59, 145 Pac. 79; Ward v. Magaha, 71 Wash. 679, 129 Pac. 395; Lyen v. Bond, 3 Wash. Ter. 407, 19 Pac. 35. **W. Va.**—Brogan v. Union Traction Co., 76 W. Va. 698, 86 S. E. 753. **Wis.**—Cox v. Groshong, 1 Pin. 307. See also Bige-low v. Town of Washburn, 98 Wis. 553, 74 N. W. 362.

See 6 STANDARD PROC. 1005, 1008.

11. Rea v. Eslick, 87 Wash. 125, 151 Pac. 256. See Noakes v. City of Los Angeles, 56 Cal. Dec. 303; Sten-son v. Elfmann, 26 S. D. 134, 128 N. W. 588; Jenkinson v. Vermillion, 3 S. D. 238, 52 N. W. 1066.

12. Ala.—Western Ry. Co. v. Walk-er, 113 Ala. 267, 22 So. 182; Lewis v. Simon, 101 Ala. 546, 14 So. 331; McKinnon v. Lessley, 89 Ala. 625, 8 So. 9. **Ind.**—See Purcell v. Hosey, 44 Ind. App. 448, 89 N. E. 520. **Ia.**—Bachus v. Staebler, 91 Iowa 736, 60 N. W. 128. **Ore.**—See Watson v. Mc-Lench, 57 Ore. 446, 110 Pac. 482, 112 Pac. 416.

13. Becker v. Boon, 61 N. Y. 317; Title Ins. Co. v. Hawes, 76 Misc. 478, 135 N. Y. Supp. 608. See Borden v. Houston, 2 Tex. 594.

14. See *supra*, X, C, 1.

replication or reply is waived by proceeding to trial without objection.¹⁵

D. BY STIPULATION OR REFERENCE.¹⁶ — By trying a cause¹⁷ on an

15. **U. S.**—Keator Lumber Co. v. Thompson, 144 U. S. 434, 12 Sup. Ct. 669, 36 L. ed. 495. **Ark.**—Streudle v. Leroy, 122 Ark. 189, 182 S. W. 898; Daniels v. Brodie, 54 Ark. 216, 15 S. W. 467, 11 L. R. A. 81; Winters v. Fain, 47 Ark. 493, 1 S. W. 711. **Colo.** Paulson v. Bergman, 160 Pac. 189; Florence & C. C. R. Co. v. Jensen, 48 Colo. 28, 108 Pac. 974; Quimby v. Boyd, 8 Colo. 194, 6 Pac. 462. **D. C.** Steven v. Saunders, 34 App. Cas. 321. **Ga.**—Central of Georgia R. Co. v. Tankersley, 133 Ga. 153, 65 S. E. 367; Beard v. White, 120 Ga. 1018, 48 S. E. 400. **Idaho.**—Joyce v. Rubin, 23 Idaho 296, 130 Pac. 793; Conant v. Jones, 3 Idaho 606, 32 Pac. 250. **Ill.** Spencer v. Langdon, 21 Ill. 192; People v. Ward, 41 Ill. App. 464. See also Farley v. Dean, 196 Ill. App. 389. **Ind.**—Wilcox v. Majors, 88 Ind. 203; Irvinson v. Van Riper, 34 Ind. 148; Crum v. Yundt, 12 Ind. App. 308, 40 N. E. 79. **Ia.**—Ware v. Delahaye, 95 Iowa 667, 64 N. W. 640. **Kan.**—Kepley v. Carter, 49 Kan. 72, 30 Pac. 182; Netcott v. Porter, 19 Kan. 131. **Ky.** Reading v. Ford's Heirs, 1 Bibb 338; Porter v. Martin, 1 Litt. 158. **Miss.** Kinney v. Mobile, J. & K. C. R. Co., 99 Miss. 795, 56 So. 165. **Mo.**—Murphy v. Wabash R. Co., 228 Mo. 56, 128 S. W. 481; Luna v. Williams, 190 Mo. App. 266, 176 S. W. 550; Sharp v. Niagara Fire Ins. Co., 164 Mo. App. 475, 147 S. W. 154. **Mont.**—Russell v. Hoyt, 4 Mont. 412, 2 Pac. 25. **Neb.** Baker v. Racine-Sattley Co., 86 Neb. 227, 125 N. W. 587. **N. M.**—Lohman v. Raymond, 18 N. M. 225, 137 Pac. 375. **Okla.**—Leach v. Altus State Bank, 155 Pac. 875; Patterson v. Choate, 50 Okla. 761, 151 Pac. 620; Allison v. Bryan, 26 Okla. 520, 109 Pac. 934, 30 L. R. A. (N. S.) 146. **Pa.**—Clement v. Hayden, 4 Pa. 138. **S. D.**—Grant v. Whorton, 28 S. D. 599, 134 N. W. 803. **Tex.**—Gulf Live Stock Ins. Co. v. Love (Tex. Civ. App.), 181 S. W. 766; Texarkana & Ft. S. Ry. Co. v. Rea (Tex. Civ. App.), 180 S. W. 945; Memphis Cotton Oil Co. v. Tolbert (Tex. Civ. App.), 171 S. W. 309. **Vt.** Nye v. Stewart, 83 Vt. 521, 77 Atl. 340. **W. Va.**—Kirehner v. Smith, 61 W. Va. 434, 58 S. E. 614. **Wis.**—My Laundry Co. v. Schmeling, 129 Wis. 597, 109 N. W. 540. **Wyo.**—See Engen v. Rambler Copper & P. Co., 20 Wyo. 95, 121 Pac. 867, 123 Pac. 413. *Contra*, see Asia v. Hiser, 22 Fla. 378.
16. See generally the title "Stipulations."
17. **U. S.**—Saltonstall v. Russell, 152 U. S. 628, 14 Sup. Ct. 733, 38 L. ed. 576. See also Adam v. Norris, 103 U. S. 591, 36 L. ed. 583; Snow v. Miles, 3 Cliff. 608, 22 Fed. Cas. No. 13,146, objection to form of action. **Ill.**—Smith v. Chicago, 107 Ill. App. 270; Gaines v. McAdam, 79 Ill. App. 201. **Ind.**—Farmers' Loan & T. Co. v. Canada & St. L. Ry. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740. **Kan.** State Bank v. Norduff, 2 Kan. App. 55, 43 Pac. 312. **Ky.**—See Bank of Columbia v. Bush, 3 Ky. L. Rep. 692. **Mass.**—West Roxbury v. Minot, 114 Mass. 546; Esty v. Currier, 98 Mass. 500; Scudder v. Worster, 11 Cush. 573. See also Johnson v. Shed, 21 Pick. 225. **Neb.**—Bennett v. Bennett, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994. **N. Y.** See *In re Steele*, 154 App. Div. 860, 139 N. Y. Supp. 550. **Okla.**—Powell v. Crittenden, 156 Pac. 661. See also Enid City Ry. Co. v. City of Enid, 43 Okla. 778, 144 Pac. 617. **Va.**—See Sawyer v. Corse, 17 Gratt. (58 Va.) 230, 94 Am. Dec. 445. **Wis.**—See Flanagan v. Earnest, 1 Chand. 149, 2 Pin. 196.
- [a] Want of an answer is immaterial where case is submitted on agreed statement of facts. **U. S.**—Saltonstall v. Russell, 152 U. S. 628, 14 Sup. Ct. 733, 38 L. ed. 576. **Ark.**—Cribbs v. Walker, 74 Ark. 104, 85 S. W. 244. **Ill.**—Godfrey v. Wingert, 110 Ill. App. 563. **Ind.**—Cogswell v. State, 65 Ind. 1; Taylor v. Short, 40 Ind. 506. See also **Ia.**—Bailey v. Landingham, 52 Iowa 415, 3 N. W. 460. **Minn.**—Berman v. Cosgrove, 95 Minn. 353, 104 N. W. 534. **Va.**—Sawyer v. Corse, 17 Gratt. (58 Va.) 230, 94 Am. Dec. 445.
- [b] But see Gaston v. Modern Woodmen of America, 116 Ill. App. 291, that a stipulation as to the facts in a case cannot avail to make a plea good which does not set out or rely upon those facts.

agreed statement of facts, referring it to a referee,¹⁸ securing stipulation extending time to answer,¹⁹ or the entering of a judgment by agreement of the parties,²⁰ formal defects in the pleadings are waived. But defects in substance are not waived.²¹ A stipulation that all evidence may be introduced under the general issue or general denial is a waiver of the proper pleadings,²² as is an agreement to accept a plea in short or an incomplete plea.²³

E. BY ADMISSION OF EVIDENCE.—The admission of evidence under a defective allegation, without objection, will generally operate as a waiver of the defects;²⁴ and the same rule has been applied where

[c] **Want of replication or reply waived** by submitting cause on agreed statement. *Earnhart v. Robertson*, 10 Ind. 8; *Vanderline v. Smith*, 18 Mo. App. 55; *Frank v. Frank*, 6 Mo. App. 589.

18. Cal.—*Ritchie, Osgood & Co. v. Davis*, 5 Cal. 453. **Ind.**—See *Dickerson v. Hays*, 4 Blackf. 44. **Mass.** *Ames v. Stevens*, 120 Mass. 218; *Page v. Monks*, 5 Gray 492. **N. J.**—*Taylor v. Sayre*, 24 N. J. L. 647; *Smith v. Minor*, 1 N. J. L. 16.

19. Sherman v. McCarthy, 90 App. Div. 542, 85 N. Y. Supp. 727.

20. Collins v. Rose, 59 Ind. 33.

21. Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352, failure of complaint to state cause of action not waived. See *Wells v. Covenant Mut. Ben. Assn.*, 126 Mo. 630, 29 S. W. 607. See *McKay v. Darling*, 65 Vt. 639, 27 Atl. 324, that defendant does not lose the right to object that assumpsit is brought for the breach of a contract under seal, by consenting to a reference.

22. Talcott v. Jackson, 41 Ind. 201. See the title "**Stipulations.**"

23. Governor v. Baneroft, 16 Ala. 605; *Lacy v. Rockett*, 11 Ala. 1002.

24. U. S.—*Renner v. Bank of Columbia*, 9 Wheat. 581, 6 L. ed. 166. **Ala.** See *Knights of Modern Maccabees v. Gillespie*, 14 Ala. App. 493, 71 So. 67. **Ariz.**—*Smith v. King of Arizona Mining, etc. Co.*, 9 Ariz. 228, 80 Pac. 357. **Cal.**—*Henderson v. Northam*, 168 Pac. 1044; *Reclamation District v. Hershey*, 160 Cal. 692, 117 Pac. 904; *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806; *Christensen v. Jessen*, 107 Cal. xvii, 40 Pac. 747, defective allegation which did not mislead opposite party. See also *Dow v. City of Oroville*, 22 Cal. App. 215, 134 Pac. 157. **Conn.**—See *Sanford v. Sanford*, 2 Day 559. **Ga.**—*Pittsburgh Spring*

Co. v. Smith, 115 Ga. 764, 42 S. E. 80; *Seabrook v. Brady*, 47 Ga. 650, if defect could have been reached by amendment. **Ill.**—*Illinois Steel Co. v. Novak*, 84 Ill. App. 641. **Ind.**—*Toner v. Wagner*, 158 Ind. 447, 63 N. E. 859. **Ia.**—*Montgomery v. American Emigrant Co.*, 47 Iowa 91. See also *Roberts v. Ozias*, 162 N. W. 584. **Kan.** See *Long-Bell Lumber Co. v. Webb*, 7 Kan. App. 406, 52 Pac. 64. **Ky.** *Louisville & N. R. Co. v. Miller*, 154 Ky. 236, 157 S. W. 8; *Louisville & N. R. Co. v. Taylor*, 92 Ky. 55, 17 S. W. 198. **La.**—*State v. Lundie*, 47 La. Ann. 1596, 18 So. 636. **Md.**—*Belt v. Blackburn*, 28 Md. 227. **Mass.** *Blanchard v. Cooke*, 147 Mass. 215, 17 N. E. 313. See also *Saco Brick Co. v. J. P. Eustis Mfg. Co.*, 207 Mass. 312, 93 N. E. 629. **Mich.**—*Jenks v. Brown*, 38 Mich. 651. See also *Niles v. Lee*, 169 Mich. 474, 135 N. W. 274. **Minn.**—See *Woodruff v. Bearman Fruit Co.*, 108 Minn. 118, 121 N. W. 426. **Miss.**—See *Kinney v. Mobile, J. & K. C. R. Co.*, 99 Miss. 795, 56 So. 165. **Mo.**—*Reilly v. Cullen*, 159 Mo. 322, 60 S. W. 126. **Neb.**—*Parker v. Parker*, 73 Neb. 4, 102 N. W. 85. **N. H.**—*Folsom v. Brawn*, 25 N. H. 114. **N. Y.**—*Harriman v. Yonkers*, 181 N. Y. 24, 73 N. E. 493; *Rogers v. New York, etc. Land Co.*, 134 N. Y. 197, 32 N. E. 27. **N. D.**—*Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792. **Okla.**—*Bailey v. Parry Mfg. Co.*, 158 Pac. 581. **Ore.** *Kohler & Chase Co. v. Savage*, 86 Ore. 639, 167 Pac. 789. **Pa.**—*Young v. Geiske*, 209 Pa. 515, 58 Atl. 887. **S. C.** See *Nelson v. Atlantic, Gulf & P. R. Co.*, 107 S. C. 1, 92 S. E. 194. **S. D.** *Wright v. Sherman*, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792. See also *Langford v. Issenhuth*, 28 S. D. 471, 134 N. W. 88. **Wash.**—*Jensen v. Kohler*, 93 Wash. 8, 159 Pac. 978; *Wagnolds v. Dickson*, 48 Wash. 407, 92 Pac. 910. **W. Va.**—*Trump v. Tidewater Co.*

the complaint omits some fact essential to a cause of action but which might be supplied by amendment,²⁵ although there is authority to the contrary.²⁶

XI. CONCLUSIVENESS OF PLEADINGS.²⁷ — A. GENERALLY. Generally a party is bound by the statements of fact in his pleadings and will not be heard to controvert them.²⁸ Averments as to

& Coke Co., 46 W. Va. 238, 32 S. E. 1035.

Instructing on matters not in issue by the pleadings, but as to which evidence has been introduced without objection, see the title "**Objections and Exceptions.**"

Aider by verdict, see *infra*, XII.

25. Cal.—Slaughter *v.* Goldberg, Bowen & Co., 26 Cal. App. 313, 147 Pac. 90. See also Noakes *v.* City of Los Angeles, 56 Cal. Dec. 303; Boyle *v.* Coast Imp. Co., 27 Cal. App. 714, 151 Pac. 25. Ky.—Louisville & N. R. Co. *v.* Taylor, 92 Ky. 55, 17 S. W. 198. N. Y.—Lounsbury *v.* Purdy, 18 N. Y. 515; Wright *v.* Deering, 2 Misc. 296, 21 N. Y. Supp. 929, 50 N. Y. St. 328; Morton *v.* Pinckney, 8 Bosw. 135. S. C.—Hogg *v.* Pinckney, 16 S. C. 387. But see Garrett *v.* Weinberg, 50 S. C. 310, 27 S. E. 770. S. D.—Sherwood *v.* City of Sioux Falls, 10 S. D. 405, 73 N. W. 913; Martin *v.* Graff, 10 S. D. 592, 74 N. W. 1040; Jenkinson *v.* Vermillion, 3 S. D. 238, 52 N. W. 1066. See Stenson *v.* Elfmann, 26 S. D. 134, 128 N. W. 588. Wash.—See Rea *v.* Eslick, 87 Wash. 125, 151 Pac. 256.

But see *infra*, XII.

Making issues outside the pleadings by failure to object to evidence, see the title "**Objections and Exceptions,**" and 14 STANDARD PROC. 524.

[a] **But where the evidence is admissible under the pleading as it stands** the fact that it also bears on the fact omitted from the pleading does not waive the omission. Myers *v.* Paine, 13 App. Div. 332, 43 N. Y. Supp. 133, *affirmed*, 162 N. Y. 593, 57 N. E. 1118. See also Gunther *v.* Liverpool & London & Globe Ins. Co., 85 Fed. 846; Rogers *v.* Southern Fiber Co., 119 La. 714, 44 So. 442, 121 Am. St. Rep. 537.

26. Pollard *v.* Thomason, 5 Humph. (Tenn.) 56; Gulf, C. & S. F. R. Co. *v.* Vieno, 7 Tex. Civ. App. 347, 26 S. W. 230; Texas & P. Ry. Co. *v.* Johnson (Tex. Civ. App.), 34 S. W.

186. See Kinney *v.* Hosea, 3 Har. (Del.) 456, and *infra*, XII.

27. **Admission by failure to deny,** see 7 STANDARD PROC. 109; 1 ENCY. OF EV. 401.

28. U. S.—Balloch *v.* Hooper, 146 U. S. 363, 13 Sup. Ct. 128, 36 L. ed. 1008; Historical Pub. Co. *v.* Jones Bros. Pub. Co., 231 Fed. 638, 145 C. C. A. 524; Winter *v.* United States, Hempst. 344, 30 Fed. Cas. No. 17,895. Ala.—Nichols *v.* Nichols, 192 Ala. 206, 68 So. 186. Ariz.—Nogales Elec. Light, etc. Co. *v.* International Gas Co., 168 Pac. 504; Crane *v.* Franklin, 16 Ariz. 501, 147 Pac. 718. Ark.—See Breining *v.* Lippincott, 129 Ark. 406, 196 S. W. 795. Cal.—Coulter Dry Goods Co. *v.* Wentworth, 171 Cal. 500, 153 Pac. 939; Gabriel *v.* Tonner, 138 Cal. 63, 70 Pac. 1021; Murphy *v.* Coppieters, 136 Cal. 317, 68 Pac. 970. Colo.—Benford *v.* Yockey, 164 Pac. 725; Kutcher *v.* Love, 19 Colo. 542, 36 Pac. 152. Dak.—Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268. Ga.—Wells *v.* Ragsdale, 102 Ga. 53, 29 S. E. 165. Ill.—Severy *v.* McDougall, 259 Ill. 272, 102 N. E. 407; Sanitary District *v.* Pittsburgh, Ft. W., etc. R. Co., 216 Ill. 575, 75 N. E. 248; Jo Daviess *v.* Staples, 108 Ill. App. 539. Ind.—Denison & N. R. Co. *v.* Ranney-Alton Merc. Co., 3 Ind. Ter. 104, 53 S. W. 496. Ind.—Boyd *v.* Bloom, 152 Ind. 152, 52 N. E. 751; Frazer *v.* Boss, 66 Ind. 1; Adams Express Co. *v.* Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279. Ia.—Russell *v.* Dilley, 177 Iowa 522, 159 N. W. 189; McCormick *v.* McCormick Harvesting Mach. Co., 120 Iowa 593, 95 N. W. 181; Murdy *v.* Skyles, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411. Kan.—Niquette *v.* Green, 81 Kan. 569, 106 Pac. 270; Butler *v.* Kaulback, 8 Kan. 668; Stone *v.* Young, 4 Kan. 17. Ky.—Nicola Bros. Co. *v.* Hurst, 28 Ky. L. Rep. 87, 88 S. W. 1081; Sievers *v.* Martin, 26 Ky. L. Rep. 904, 82 S. W. 631. La.—Toledo Bridge & Crane Co. *v.* D. K. Jeffries & Co., 141 La. 168, 74 So. 893; Hall *v.* Board of Commis-

sioners, 111 La. 913, 35 So. 976; Kraeutler v. United States Bank, 11 Rob. 213. **Md.**—Armstrong v. Fahnestock, 19 Md. 58. **Mass.**—Sullivan v. Inhab. of Ashfield, 227 Mass. 24, 116 N. E. 565; Morton v. Clark, 181 Mass. 134, 63 N. E. 409; Tyler v. Mather, 9 Gray 177. **Mich.**—Brinkerhoff v. Peek, 114 Mich. 628, 72 N. W. 621; Emerson v. Atwater, 12 Mich. 314. **Minn.**—Wadsworth v. Walsh, 128 Minn. 241, 150 N. W. 870. **Miss.**—Parkhurst v. McGraw, 24 Miss. 134. **Mo.**—Knoop v. Kelsey, 102 Mo. 291, 14 S. W. 110, 22 Am. St. Rep. 777; McAdow v. Miltenerberger, 75 Mo. App. 346; Burnham v. Ellmore, 66 Mo. App. 617. **Mont.**—Willöburn Ranch Co. v. Yegen, 49 Mont. 101, 149 Pac. 231; Wulf v. Manuel, 9 Mont. 276, 23 Pac. 723. See also Babcock v. Maxwell, 21 Mont. 507, 54 Pac. 943. **Nev.**—Manning v. Bowman, 26 Nev. 451, 69 Pac. 995. **N. H.**—See Hall v. Clement, 41 N. H. 166. **N. J.**—Lippincott v. Ridgway, 11 N. J. Eq. 526. **N. M.**—See Enderstein v. Atchison, T. & S. F. R. Co., 21 N. M. 548, 157 Pac. 670. **N. Y.**—Contractors' Supply Co. v. City of New York, 153 App. Div. 60, 138 N. Y. Supp. 242; Pennacchio v. Greco, 107 App. Div. 225, 94 N. Y. Supp. 1061 (if evidence has been received to controvert an admission it should be disregarded); Commercial Bank v. Foltz, 35 App. Div. 237, 54 N. Y. Supp. 764; Paige v. Willet, 38 N. Y. 28. **N. C.**—Roe v. Journegan, 95 S. E. 495; Hunter v. West, 172 N. C. 160, 90 S. E. 130; Cummings v. Hoffman, 113 N. C. 267, 18 S. E. 170. **Ohio.**—Fisher v. Tryon, 15 Ohio Cir. Ct. 541, 8 Ohio Cir. Dec. 556. **Okla.**—St. Louis & S. F. R. Co. v. Ziekafoose, 39 Okla. 302, 135 Pac. 406; Rogers v. Brown, 15 Okla. 524, 86 Pac. 443; Lane Implement Co. v. Lowder, 11 Okla. 61, 65 Pac. 926. **Ore.**—Grants Pass Hdware Co. v. Calvert, 71 Ore. 103, 142 Pac. 569. See also Miller v. Head Camp, 45 Ore. 192, 77 Pac. 83; Landigan v. Mayer, 32 Ore. 245, 51 Pac. 649, 67 Am. St. Rep. 521. **Pa.**—Fidelity Title & Trust Co. v. Illinois Life Ins. Co., 213 Pa. 415, 63 Atl. 51; Corey v. Borough of Edgewood, 18 Pa. Super. 228. **S. C.**—Conner v. Grand Lodge, 107 S. C. 308, 92 S. E. 1032. **S. D.**—Leggett v. Moore, 36 S. D. 298, 154 N. W. 804; Gallup v. Chelsea State Bank, 35 S. D. 367, 152 N. W. 338. **Tenn.**—Lee v. Maxwell, 1 Head. 365. **Tex.**—Hancock

v. Dimon, 17 Tex. 369; Johnson v. Johnson (Tex. Civ. App.), 191 S. W. 366. **Utah.**—Busby v. Century Gold Min. Co., 27 Utah 231, 75 Pac. 725. **Vt.**—Holbrook v. J. J. Quinlan & Co., 84 Vt. 411, 80 Atl. 339; Sills Stove Works v. Brown, 71 Vt. 478, 45 Atl. 1040. **Va.**—Noel v. Noel, 93 Va. 433, 25 S. E. 242. **Wash.**—Scott v. Matthews, 25 Wash. 486, 65 Pac. 756; Goldwater v. Burnside, 22 Wash. 215, 60 Pac. 409. See also Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849. **W. Va.**—See Downey v. National Fire Ins. Co., 77 W. Va. 386, 87 S. E. 487. **Wis.**—Seifert v. Mueller, 156 Wis. 629, 146 N. W. 787; Sims v. Mutual Fire Ins. Co., 101 Wis. 586, 77 N. W. 908. **Wyo.**—Pardee v. Kuster, 15 Wyo. 368, 89 Pac. 572, 91 Pac. 836.

For a full discussion of judicial admissions see the ENCY. OF EV., title "Admissions," and particularly 1 ENCY. OF EV. 397, et seq., 613.

[a] **Allegations taken as admissions must be considered as a whole, and the entire pleading considered.** Smith v. Chapter General, 143 App. Div. 532, 128 N. Y. Supp. 288; Young v. Katz, 22 App. Div. 542, 48 N. Y. Supp. 187, 5 N. Y. Ann. Cas. 58; Vanderbilt v. Schreyer, 21 Hun (N. Y.) 537; Goodyear v. De La Vergne, 10 Hun (N. Y.) 537.

[b] **A finding contrary to a fact admitted by the pleading must be disregarded.** Hibernia Savings & L. Soc. v. Dickinson, 167 Cal. 616, 140 Pac. 265.

[c] **Where the allegation is denied by the answer and evidence taken on the issue thus made, there is no binding admission by the party making the allegation.** Groth v. Kersting, 23 Colo. 213, 47 Pac. 393; Winslow v. McCall, 32 Barb. (N. Y.) 241; Oneida Steel Pulley Co. v. New York Leather Belting Co., 120 App. Div. 625, 105 N. Y. Supp. 534. See also Mantle v. White, 47 Mont. 234, 132 Pac. 22.

[d] **One setting up two causes of action is not estopped by inconsistent declarations therein where he is not required to elect on which cause he will rely.** Hulst v. Doerstler, 11 S. D. 14, 75 N. W. 270.

[e] **Admission in one plea does not conclude party upon any other plea.** Hall v. Clement, 41 N. H. 166.

[f] **Where allegations of answer are inconsistent with each other, the defendant is bound by those against**

the law, however, do not bind the pleader.²⁹

B. MISTAKE, INADVERTENCE, OR IGNORANCE. — Admissions made through mistake,³⁰ inadvertence,³¹ or ignorance of material facts,³² will not conclude the pleader.

C. PLEADINGS AMENDED, ABANDONED, OR WITHDRAWN. — Matter alleged in pleadings which have been abandoned,³³ withdrawn,³⁴ or amended so as to exclude the admission,³⁵ is not conclusive as to the party pleading it. However, it may still be used in evidence as an admission.³⁶

D. WHO CONCLUDED. — The admission of one party in his pleading does not bind co-parties,³⁷ and the allegation of a personal represen-

him. *Harshbarger v. Eby*, 28 Idaho 753, 156 Pac. 619, Ann. Cas. 1917C, 753; *Bierer v. Fretz*, 32 Kan. 329, 4 Pac. 284; *Mitchell v. Ripley*, 5 Kan. App. 818, 49 Pac. 153. See also *Sheppard v. Daniel Miller Co.*, 11 Ga. App. 514, 75 S. E. 907; *White Sewing Mach. Co. v. Horkan*, 7 Ga. App. 283, 66 S. E. 811. But see 2 STANDARD PROC. 26, et seq.

[g] **Matter which is merely descriptio personae** does not bind party pleading it. *Greig v. Clement*, 20 Colo. 167, 37 Pac. 960; *Gentry v. McMinnis*, 3 Dana (Ky.) 382.

29. See *Succession of McLain*, 141 La. 376, 75 So. 85; *Union Bank v. Bush*, 36 N. Y. 631. See, however, *Louder v. Hunter* (S. D.), 163 N. W. 686.

[a] **Insistence as to erroneous construction of written instrument** made in a pleading does not estop the defendant to set up correct construction on trial. *Thayer v. Arnold*, 32 Mich. 336; *Verhine v. Ragsdale*, 96 Tenn. 532, 35 S. W. 556.

30. **Ia.**—See *Johnson v. McGrew*, 42 Iowa 555. **N. Y.**—*Hoover v. Hubbard*, 202 N. Y. 289, 95 N. E. 702. **Okla.** *Lane Implement Co. v. Lowder*, 11 Okla. 61, 65 Pac. 926. **Tex.**—*Coats v. Elliott*, 23 Tex. 606.

See 1 ENCY. OF EV. 614.

31. *Morse's Heirs v. Williams* (Tex. Civ. App.), 142 S. W. 1186.

32. *Smith v. Fowler*, 12 Lea (Tenn.) 163. See also *Brandeis v. Neustadt*, 13 Wis. 142, that admissions through ignorance of our language will not bind.

33. *Mahoney v. Butte Hdw. Co.*, 19 Mont. 377, 48 Pac. 545; *Houston, E. & W. T. Ry. Co. v. De Walt* (Tex. Civ. App.), 71 S. W. 774; *Willey Lodge v. City of Paris* (Tex. Civ. App.), 81 S. W. 99; *Dailey v. Coker*, 33 Tex. 815, 7 Am. Rep. 279. See

also *Coles' Admr. v. Perry*, 7 Tex. 109. See 1 ENCY. OF EV. 442.

34. *Caldwell v. Drummond* (Iowa), 96 N. W. 1122. See 1 ENCY. OF EV. 442.

[a] But see *McDonald v. Grice*, 9 Kan. App. 657, 58 Pac. 1035 (a party having once solemnly admitted a fact, cannot, by merely withdrawing the pleading from the files, though by leave of court, deny such admission, but is estopped thereby); *Carr v. Huffman*, 1 Kan. App. 713, 41 Pac. 982.

35. **Ga.**—*Alabama Midland Ry. Co. v. Guilford*, 119 Ga. 523, 46 S. E. 655. **Ia.**—*Sheldon v. Crane*, 146 Iowa 461, 125 N. W. 238. **Kan.**—*Reemsnyder v. Reemsnyder*, 75 Kan. 565, 89 Pac. 1014. **Ky.**—*Sievers v. Martin*, 26 Ky. L. Rep. 904, 82 S. W. 631. **Neb.**—*Miller v. Nicodemus*, 58 Neb. 352, 78 N. W. 618.

See also 1 ENCY. OF EV. 437.

[a] But see *Johnson v. McGrew*, 42 Iowa 555 (a party making allegations which constitute distinct items of proof will be bound by such allegations, notwithstanding he may have superseded the petition by an amended one, but *contra* where averments are made of the ultimate facts to be established by the evidence); *Oregon R. & Nav. Co. v. Dacres*, 1 Wash. 195, 23 Pac. 415.

36. **Ia.**—*McClure v. Great Western Acc. Assn.*, 141 Iowa 350, 118 N. W. 269; *Caldwell v. Drummond*, 96 N. W. 1122. **Neb.**—*Miller v. Nicodemus*, 58 Neb. 352, 78 N. W. 618. **N. Y.**—*Ranken v. Probey*, 136 App. Div. 134, 120 N. Y. Supp. 413.

But see 1 ENCY. OF EV. 437, 438, 441, 442.

37. **Ky.**—*Covington & L. R. Co. v. Bowler's Heirs*, 9 Bush 468; *Long v. Kerrigan*, 13 Ky. L. Rep. 433, 16 S. W. 708, 17 S. W. 441. **Miss.**—See *Pigott*

tative capacity will not bind him personally,³⁸ but will bind the estate he represents.³⁹

XII. AIDER BY VERDICT OR JUDGMENT.—A. STATEMENT OF THE RULE.—The general rule is frequently stated that where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively stated, or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect or omission is cured by the verdict;⁴⁰ and this is true under the codes

v. Pigott, 112 Miss. 873, 73 So. 800. Wash.—*Graham v. Smart*, 42 Wash. 205, 84 Pac. 824.

[a] Admission of defendant does not bind co-defendant denying the matter admitted. **Ky.**—*Long v. Kerrigan*, 13 Ky. L. Rep. 433, 16 S. W. 708, 17 S. W. 441. **La.**—*Brown v. Madison*, 4 La. Ann. 180. **Mass.**—*Harvey v. Smith*, 179 Mass. 592, 61 N. E. 217.

38. *Martin v. Boler*, 13 La. Ann. 369.

39. *Carr's Exrx. v. Rowland*, 14 Tex. 275.

40. This statement of the rule is made or the rule recognized in the following cases: **U. S.**—*Cache Creek Mining Co. v. Brahenberg*, 217 Fed. 240, 133 C. C. A. 234; *Stanley v. Whipple*, 2 McLean 35, 22 Fed. Cas. No. 13,286. **Ala.**—*Kendrick v. Colyar*, 143 Ala. 597, 42 So. 110. **Ark.**—*Burke v. Sharpe*, 88 Ark. 433, 115 S. W. 145; *St. Louis, I. M. & S. R. Co. v. Wynne Hoop & C. Co.*, 81 Ark. 373, 99 S. W. 375; *Collins v. Paepeke-Leicht Lumber Co.*, 74 Ark. 81, 84 S. W. 1044. **Cal.**—*Orton v. Brown*, 117 Cal. 501, 49 Pac. 583, but must be a material issue raised by pleadings. See also *Maggini v. Pezzoni*, 76 Cal. 631, 18 Pac. 687; *Barron v. Frink*, 30 Cal. 486; *Dillon v. Cross*, 5 Cal. App. 766, 91 Pac. 439. **Colo.**—*Possell v. Smith*, 39 Colo. 127, 88 Pac. 1064; *McConathy v. Deck*, 34 Colo. 232, 82 Pac. 702. **Conn.**—*Levidow v. Starin*, 77 Conn. 600, 60 Atl. 123; *Dale v. Dean*, 16 Conn. 579; *Griffin v. Pratt*, 3 Conn. 513. **Ga.**—*Dykes v. Jones*, 129 Ga. 99, 58 S. E. 645; *Central of Georgia R. Co. v. Banks*, 128 Ga. 785, 58 S. E. 352; *Dotterer v. Harden*, 88 Ga. 145, 13 S. E. 971. **Ill.**—*Chicago Cons. Traction Co. v. Mahoney*, 230 Ill. 562, 82 N. E. 868; *Palestine v. Siler*, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205; *Consolidated*

Coal Co. v. Scheiber, 167 Ill. 539, 47 N. E. 1052; *Lake Shore & M. S. Ry. Co. v. O'Conner*, 115 Ill. 254, 3 N. E. 501; *Baltimore & O. S. W. Ry. Co. v. Keck*, 84 Ill. App. 159. **Ind.**—*Lake Erie, etc. R. Co. v. Ford*, 167 Ind. 205, 78 N. E. 969; *Major v. Miller*, 165 Ind. 275, 75 N. E. 159; *Reid v. Mitchell*, 95 Ind. 397; *Indianapolis, etc. R. Co. v. Petty*, 30 Ind. 261. **Ia.**—*Davis v. Central Land Co.*, 162 Iowa 269, 143 N. W. 1073, 49 L. R. A. (N. S.) 1219; *Caldwell v. Drummond*, 127 Iowa 134, 102 N. W. 842. **Kan.**—*Smith v. Burnes*, 8 Kan. 197. **Ky.**—*Coleman v. Croysdale*, 3 J. J. Marsh. 541; *Carter Dry Goods Co. v. Carson*, 28 Ky. L. Rep. 837, 90 S. W. 578; *Forbes v. Hunter*, 31 Ky. L. Rep. 285, 102 S. W. 246; *Dean v. Dean's Admr.*, 8 Ky. L. Rep. 419, 1 S. W. 811; *Davis, Moody & Co. v. Wiley*, 3 Ky. L. Rep. 755. **Me.**—*Emerson v. Lakin*, 23 Me. 384; *Little v. Thompson*, 2 Greenl. 228. **Md.**—*Riggs v. Turnbull*, 105 Md. 135, 66 Atl. 13, 8 L. R. A. (N. S.) 824; *Merrick v. Bank of Metropolis*, 8 Gill 59. **Mass.**—*Tulane University v. O'Connor*, 192 Mass. 428, 78 N. E. 494; *Worster v. Canal Bridge*, 16 Pick. 541; *Richardson v. Eastman*, 12 Mass. 505; *Avery v. Inhabitants of Tyringham*, 3 Mass. 160, 3 Am. Dec. 105. **Mich.**—*Smith v. Cowles*, 123 Mich. 4, 81 N. W. 916; *Kean v. Mitchell*, 13 Mich. 207. **Minn.**—*Hurd v. Simonton*, 10 Minn. 423. **Miss.**—*Mississippi Cent. R. Co. v. Hardy*, 88 Miss. 732, 41 So. 505; *Noble v. Terrell*, 64 Miss. 830, 2 So. 14; *Cole v. Harman*, 8 Smed. & M. 562. **Mo.**—*Brady v. Kansas City, St. L. & C. R. Co.*, 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195; *Palmer v. Hunter*, 8 Mo. 512; *Mullich v. Broecker*, 119 Mo. App. 332, 97 S. W. 549; *Wall v. Continental Casualty Co.*, 111 Mo. App. 504, 86 S. W. 491; *Munchow v. Munchow*, 96

and practice acts as well as at common law.⁴¹ This broad rule, however, is subject to the limitations and exceptions hereinafter discussed.

Necessity for Failure To Object. — The rule of *aider* by verdict or judgment has no application where timely objection has been made

Mo. App. 553, 70 S. W. 386; *Kain v. Kansas City, etc. R. Co.*, 29 Mo. App. 53. **Mont.**—*Daniels v. Andes Ins. Co.*, 2 Mont. 78. **Neb.**—*Agnew v. Pawnee City*, 79 Neb. 603, 113 N. W. 236; *Union Pac. R. Co. v. Connolly*, 77 Neb. 254, 109 N. W. 368; *Marvin v. Weider*, 31 Neb. 774, 48 N. W. 825. **N. H.** *Colebrook v. Merrill*, 46 N. H. 160; *New Hampshire Mut. Fire Ins. Co. v. Walker*, 30 N. H. 324; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171. **N. J.** *King v. Morris*, 74 N. J. L. 810, 68 Atl. 162, 14 L. R. A. (N. S.) 439. **N. M.**—*Western Union Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339. **N. Y.**—*Bartlett v. Crozier*, 17 Johns. 439, 8 Am. Dec. 428; *Brown v. Harmon*, 21 Barb. 508. **N. D.**—*Guild v. More*, 32 N. D. 432, 155 N. W. 44. **Ore.**—*Scott v. Christenson*, 49 Ore. 223, 89 Pac. 376, 124 Am. St. Rep. 1041; *Madden v. Welch*, 48 Ore. 199, 86 Pac. 2; *Hannan v. Greenfield*, 36 Ore. 97, 58 Pac. 888; *Fowler v. Phoenix Ins. Co.*, 35 Ore. 559, 57 Pac. 421. **Pa.** *Waltz v. Pennsylvania R. Co.*, 216 Pa. 165, 65 Atl. 401; *Mathias v. Sellers*, 86 Pa. 486, 27 Am. Rep. 723; *Miltenerberger v. Schlegel*, 7 Pa. 241; *Miles v. Oldfield*, 4 Yeates 423, 2 Am. Dec. 412; *Allwein v. Brown*, 29 Pa. Super. 331. **S. C.**—*Morgan v. Livingston*, 2 Rich. L. 573. **Tenn.**—*Cannon v. Phillips*, 2 Sneed 185. **Tex.**—*Schuster v. Frendenthal*, 74 Tex. 53, 11 S. W. 1051; *Texarkana, etc. R. Co. v. Toliver*, 37 Tex. Civ. App. 437, 84 S. W. 375. **Utah.**—*Harkness v. McClain*, 8 Utah 52, 29 Pac. 964. **Vt.**—*Pette's Admr. v. Old English State Quarry*, 90 Vt. 87, 96 Atl. 596; *Needham v. McAuley*, 13 Vt. 68; *Morey v. Homan*, 10 Vt. 565; *Haselton v. Weare*, 8 Vt. 480. **Va.**—*Chichester v. Vass*, 1 Call (5 Va.) 83, 1 Am. Dec. 509. **Wash.**—*Said v. Twin City L. & T. Co.*, 70 Wash. 585, 127 Pac. 191; *Inland Empire R. Co. v. McKinley*, 48 Wash. 675, 94 Pac. 644. **W. Va.**—*Grass v. Big Creek Dev. Co.*, 75 W. Va. 719, 84 S. E. 750, L. R. A. 1915E, 1057; *Kirchner v. Smith*, 61 W. Va. 434, 58 S. E. 614. **Wis.**—*Young v. Milwaukee Gas Light Co.*, 133 Wis. 9, 113 N. W. 59; *McKone v. Metro-*

politan Life Ins. Co., 131 Wis. 243, 110 N. W. 472; *Hall v. Kitson*, 3 Pin. 296, 4 Chand. 20. **Eng.**—*Stennel v. Hogg*, 1 Saund. 226, 85 Eng. Reprint 244, note 1.

[a] **The expression "aider by verdict,"** signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated, or omitted in the pleading was duly proved at the trial. *Stanley v. Whipple*, 2 McLean 35, 22 Fed. Cas. No. 13,286.

[b] **The cause need not be tried before a jury for this rule to operate,** it applies as well when the cause is tried before a judge and findings and judgment are had. **Fla.**—*Georgia, F. & A. Ry. Co. v. Andrews*, 61 Fla. 246, 54 So. 461; *North American Acc. Ins. Co. v. Moreland*, 60 Fla. 153, 53 So. 635. **Ind.**—*Charlestown School v. Hay*, 74 Ind. 127. **Ky.**—*Chesapeake & O. R. Co. v. Williams*, 156 Ky. 114, 160 S. W. 769, 49 L. R. A. (N. S.) 347. **Me.**—*Emerson v. Lakin*, 23 Me. 384. **Ore.**—*Ferguson v. Reiger*, 43 Ore. 505, 73 Pac. 1040.

[c] **Failure To File Petition.**—After having gone to trial upon theory that petition was duly filed, a defeated party cannot, after verdict against him, be heard to urge that there was no petition on file and no cause pending before the court. *Heater v. Penrod*, 2 Neb. (Unof.) 711, 89 N. W. 762.

[d] **Any defect in pleading which might have been taken advantage of by demurrer** (1) will not be noticed after verdict or judgment. *Ragsdale v. Caldwell*, 2 How. (Miss.) 930; *Whitaker v. Comfort*, Walk. (Miss.) 421; *Brydia v. Platt*, 2 Tyler (Vt.) 369. (2) Imperfection in a pleading which might have been remedied by demurrer or motion to make more definite, is cured by judgment. *Haygood v. McKoon*, 49 Mo. 77.

41. *Hoke v. Halverstadt*, 22 Neb. 421, 35 N. W. 204; *Brown v. Harmon*, 21 Barb. (N. Y.) 508. And see cases cited in preceding note.

to the defect or omission of the pleading,⁴² unless there is a waiver of the objection by pleading over and going to trial.⁴³

B. IRREGULARITIES AND FORMAL DEFECTS GENERALLY.⁴⁴—Generally irregularity or informality in pleadings is cured by verdict or judgment,⁴⁵ so all defects merely of form,⁴⁶ clerical errors or omis-

42. **U. S.**—Victor American Fuel Co. v. Edison, 237 Fed. 999, 150 C. C. A. 649. **Ark.**—Bloch Queensware Co. v. Metzger, 70 Ark. 232, 65 S. W. 929. **Conn.**—See Scott v. Scott, 83 Conn. 634, 78 Atl. 314. **Ill.**—Hertz v. Chicago, Indiana, etc. Ry. Co., 154 Ill. App. 80. **Ind.**—Pittsburgh, C., C. & St. L. Ry. Co. v. Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; Radebaugh v. Scanlan, 41 Ind. App. 109, 82 N. E. 544; Pape v. Kaough, 23 Ind. App. 525, 55 N. E. 775. **N. Y.**—Steuben v. Wood, 24 App. Div. 442, 48 N. Y. Supp. 471. **Ore.**—Society of Doukhobors v. Hecker, 83 Ore. 65, 162 Pac. 851. **Tenn.**—Cannon v. Phillips, 2 Sneed 185. **W. Va.**—Wright v. Ridgely, 67 W. Va. 319, 67 S. E. 787; McGlamery v. Jackson, 67 W. Va. 417, 68 S. E. 105. **Wyo.**—Hazard Powder Co. v. Volger, 3 Wyo. 189, 18 Pac. 636.

See Wilson v. Hunt's Admr., 6 B. Mon. (Ky.) 379, that when a demurrer to a declaration and pleas are filed together and demurrer overruled, and issues made and tried upon the pleas and found for plaintiff, if the issues made involve the fact omitted or defectively stated in the declaration, the error of the court in overruling the demurrer, will be cured by the verdict.

43. See *supra*, X, C.

44. Technical and formal defects in complaint, see *infra*, XII, D, 2.

45. **U. S.**—Mine & Smelter Supply Co. v. Parke & Lacy Co., 107 Fed. 881, 47 C. C. A. 34; Railway Officials' & Employes' Acc. Assn. v. Wilson, 100 Fed. 368, 40 C. C. A. 411; Keener v. Baker, 93 Fed. 377, 35 C. C. A. 350. **Ark.**—Randall v. Sanders, 71 Ark. 609, 77 S. W. 56. **D. C.**—Chandler & Taylor Co. v. Norwood, 14 App. Cas. 357. **Ga.**—Sanders v. Houston Guano Co., 107 Ga. 49, 32 S. E. 610; Vale Royal Mfg. Co. v. Bradley, 8 Ga. App. 483, 70 S. E. 36. **Ill.**—Drainage Commissioners v. Knox, 237 Ill. 148, 86 N. E. 636; Town of Mechanicsburg v. Meredith, 54 Ill. 84. **Ia.**—Wendall v. Os-

borne, 63 Iowa 99, 18 N. W. 709. **Ky.** Pacific Mut. Life Ins. Co. v. Taylor, 166 Ky. 323, 179 S. W. 199; Kilcoyn v. Chicago, St. L. & N. O. R. Co., 141 Ky. 237, 132 S. W. 438; Winstead v. Hicks, 135 Ky. 154, 121 S. W. 1018, 135 Am. St. Rep. 446; Rogers v. Felton, 98 Ky. 148, 32 S. W. 405 (if every fact necessary to maintain action may be fairly inferred); Hoeker v. Davis, 2 Mon. 118. **Me.**—Piper v. Goodwin, 23 Me. 251. **Mass.**—Avery v. Inhabitants of Tyngham, 3 Mass. 160, 3 Am. Dec. 105. **Miss.**—Noble v. Terrell, 64 Miss. 830, 2 So. 14. **Mo.** McWhirt v. Chicago & A. R. Co., 187 S. W. 830; Maughiman v. National Ben-Franklin Ins. Co., 196 Mo. App. 367, 194 S. W. 893. **Mont.**—Christiansen v. Aldrich, 30 Mont. 446, 76 Pac. 1007. **Neb.**—Darst v. Perfect, 42 Neb. 574, 60 N. W. 928. **N. H.**—Roberts v. Dame, 11 N. H. 226. **N. J.**—Associates of Jersey Co. v. Halsey, 5 N. J. L. 750. **N. Y.**—Bank of Utica v. Smedes, 3 Cow. 662; Brown v. Harmon, 21 Barb. 508; Switzerland General Ins. Co. v. New York Cent. & H. R. R. Co., 136 N. Y. Supp. 726. **Ohio.**—Hall v. Reed, 17 Ohio 498; Smyth v. Sprout, Wright 757. **Ore.** Childers v. Brown, 81 Ore. 1, 158 Pac. 166; Farrell v. Kirkwood, 69 Ore. 413, 139 Pac. 110; Aiken v. Coolidge, 12 Ore. 244, 6 Pac. 712. **Pa.**—Quick v. Miller, 103 Pa. 67; Barber v. Erie City Iron Wks., 2 Pa. Co. Ct. 162. **Tenn.**—Read v. Memphis Gayoso Gas Co., 9 Heisk. 545; Goodloe v. Potts, Cooke 399. **Vt.**—Durrill v. Lawrence, 10 Vt. 517. **Va.**—Davis' Admr. v. McMullen's Admr., 86 Va. 256, 9 S. E. 1095.

46. **Ala.**—Turner v. Brown, 9 Ala. 866; Garrard v. Zachariah, 2 Stew. 410. **Ill.**—Wallace v. Curtiss, 36 Ill. 156; Warren v. Harris, 7 Ill. 307. **Ind.**—Rittenhouse v. Knoop, 9 Ind. App. 126, 36 N. E. 384, formal defects that might have been cured by amendment remedied. **N. J.**—Associates of Jersey Co. v. Halsey, 5 N. J. L. 750. **N. Y.** Bank of Utica v. Smedes, 3 Cow. 662. **Vt.**—Vadakin v. Soper, 1 Aikens 287.

sions,⁴⁷ surplusage,⁴⁸ or argumentative pleading,⁴⁹ will be disregarded.

C. **WANT OR INFORMALITY OF ISSUE.**⁵⁰—The failure to add a similiter is cured by verdict or judgment,⁵¹ and a party permitting a cause to go to the jury cannot, after verdict, object that issue was not formally joined.⁵² So too, informality,⁵³ or misjoinder,⁵⁴ of issue is cured by verdict or judgment.

D. **DECLARATION OR COMPLAINT.**—1. **General Statement.**—Generally defects in a declaration or complaint which should be taken

And see cases cited under preceding note.

47. *Ala.*—*Jordan v. Bell*, 8 Port. 53. *Ohio.*—*Smyth v. Sprout*, Wright 757. *Ore.*—*Wyatt v. Wyatt*, 31 Ore. 531, 49 Pac. 855.

48. *Carroll v. Peake*, 1 Pet. (U.S.) 18, 7 L. ed. 34.

49. *Mills v. Larrance*, 111 Ill. App. 140; *People v. Warner*, 4 Barb. (N. Y.) 314.

50. Failure to file replication, reply, or rejoinder, see *infra*, XII, G, 1.

51. *Ala.*—*Ripley v. Coolidge*, Minor 11. *Ark.*—*Eason v. Fisher*, 1 Ark. 90. *Ill.*—*Walker v. Armour*, 22 Ill. 658; *Hellen v. Hellen*, 170 Ill. App. 464; *Strause v. Owen Electric Belt & Appliance Co.*, 64 Ill. App. 435. *Ind.*—*Jared v. Hill*, 1 Blackf. 155. See also *Van Glaricum v. Ward*, 1 Blackf. 485. *Miss.*—*Harmon v. James*, 7 Smed. & M. 111, 45 Am. Dec. 296. *Mo.*—*Hubble v. Patterson*, 1 Mo. 392. *Tenn.*—*Lowrey v. Brown*, 3 Sneed 17; *Trabue v. Higden*, 4 Coldw. 620. *Vt.*—*Stone v. Van Curler*, 2 Vt. 115. *W. Va.*—*Weekley v. Weekley*, 75 W. Va. 280, 83 S. E. 1005; *State v. Tinovits*, 72 W. Va. 531, 78 S. E. 664; *Baltimore & O. R. Co. v. Faulkner*, 4 W. Va. 180.

See 14 STANDARD PROC. 526.

52. *Ala.*—*Hall v. Dargan*, 4 Ala. 696; *Abercrombie v. Moseley*, 9 Port. (Ala.) 145, the court saying: "It is always within the power of the defendant or plaintiff, to require the pleadings to be in the regular form, and they can respectively claim judgments of *non pros.* or default, if the regular steps are omitted. With this right completely in their power on the circuit, it is unjust that parties should be permitted, after a trial, as if an issue was in fact made up, and submitted to the jury, to reverse the judgment for the want of a replication or rejoinder." See also *Channing v. Caskaden*, Minor 73, where new matter

in bar of the action was set up in a special plea to which there was no replication, the cause went to the jury and verdict given for plaintiff, it was held that until the issue had been formed by the pleadings there was nothing properly before the jury, and the verdict was set aside. *D. C.*—*Carver v. O'Neal*, 11 App. Cas. 353. *Ill.*—*Smith v. Bellrose*, 200 Ill. App. 368; *McConnell v. Chicago Railways Co.*, 199 Ill. App. 490; Supreme Court of Honor *v. Barker*, 96 Ill. App. 490; *West Chicago St. R. Co. v. Krueger*, 68 Ill. App. 450. *Ind.*—*Stingley v. Second National Bank*, 42 Ind. 580. *Ky.*—*Brooks v. City of Maysville*, 151 Ky. 707, 152 S. W. 788; *Bell v. Rowland's Admr.*, Hard. 301, 3 Am. Dec. 729. *Mass.*—*Whiting v. Cochran*, 9 Mass. 532. *Miss.*—*Chichester v. Daggett*, 2 How. 863. *Mo.*—*St. Joseph Fire & M. Ins. Co. v. Harlan*, 72 Mo. 202; *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399. *S. C.*—*Taylor v. Stockdale*, 3 McCord 302. *Tenn.*—*Brinson v. Smith*, Peck 194. *W. Va.*—*Douglass v. Central Land Co.*, 12 W. Va. 502; *Simmons v. Trumbo*, 9 W. Va. 358. But see *Norfolk & W. R. Co. v. Coffey*, 104 Va. 665, 51 S. E. 729.

[a] Want of joinder of issue on demurrer is cured by verdict. *Eason v. Fisher*, 1 Ark. 90.

53. *Ala.*—*Channing v. Caskaden*, Minor 73; *Malone v. Donnally*, Minor 12. *Ky.*—*Pringle v. Samuels' Admr.*, 4 Ky. 167; *Bell v. Rowland's Admr.*, Hard. 304, 3 Am. Dec. 729. *Mo.*—*Hubble v. Patterson*, 1 Mo. 392. *Tenn.*—*Brinson v. Smith*, Peck 194.

54. *Ala.*—*Channing v. Caskaden*, Minor 73. *Miss.*—*Chichester v. Daggett*, 2 How. 863. *N. J.*—*Associates of Jersey Co. v. Halsey*, 5 N. J. L. 750. *Va.*—*Moore v. Mauro*, 4 Rand. (25 Va.) 488, misjoinder of issue is not fatal after a verdict, and it being stated in record that issue was joined. *W. Va.*—*Huffman v. Alderson's Admr.*, 9 W. Va. 616.

advantage of by demurrer or motion will be cured by verdict or judgment,⁵⁵ subject to the limitation hereinafter stated that generally the failure to state a cause of action may not be so cured.⁵⁶

2. Technical and Formal Defects Generally.—Defects in form of the complaint or declaration will be cured by verdict or judgment.⁵⁷ Thus the failure to recite the nature of the action,⁵⁸ clerical errors,⁵⁹ lack of formal introduction or conclusion,⁶⁰ ambiguity and repugnancy,⁶¹ alleging facts inferentially and not by positive allegations,⁶² surplusage,⁶³ indefiniteness, uncertainty, or obscurity,⁶⁴ argumentative

55. Ind.—*Farneman v. Mt. Pleasant Cemetery Assn.*, 135 Ind. 344, 35 N. E. 271; *Vawter v. Ohio & M. R. Co.*, 14 Ind. 174. **Ia.**—*Crossen v. White*, 19 Iowa 109, 87 Am. Dec. 420; *Rivereau v. St. Ament*, 3 G. Gr. 118. **Md.**—*Gent v. Cole*, 38 Md. 110. **Mich.**—*Kean v. Mitchell*, 13 Mich. 207. **Neb.**—See *Darst v. Perfect*, 42 Neb. 574, 60 N. W. 928. **Pa.**—*Stone v. Furry*, Add. 114.

See cases cited *supra*, X, A; XII, A.

[a] Defects which may be reached by special demurrer cured by verdict. *Firemen's Ins. Co. v. Seitz*, 4 Watts & S. (Pa.) 273.

56. See infra, XII, D, 5, c.

57. U. S.—*Bank of Metropolis v. Gutschlick*, 14 Pet. 19, 10 L. ed. 335; *Mine & Smelter Supply Co. v. Parke & Lacy Co.*, 107 Fed. 881, 47 C. C. A. 34; *Railway Officials' & Employes' Acc. Assn. v. Wilson*, 100 Fed. 368, 40 C. C. A. 411; *Tryon v. White*, Pet. C. C. 96, 24 Fed. Cas. No. 14,208. **Ala.**—*Hill v. McNeil*, 6 Port. 29. **Cal.**—*Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024. **Ind.**—*Louisville, N. A. & C. Ry. Co. v. Peck*, 99 Ind. 68; *Monticello v. Kennard*, 7 Ind. App. 135, 34 N. E. 454. **Ia.**—*Shaw v. Gordon*, 2 G. Gr. 376. **Ky.**—*Hill v. Ragland*, 114 Ky. 209, 70 S. W. 634; *Louisville & N. R. Co. v. Simpson's Admr.*, 23 Ky. L. Rep. 1075, 64 S. W. 750. **Me.**—*Piper v. Goodwin*, 23 Me. 251. **Minn.**—*Marsh v. Webber*, 13 Minn. 109. **Mo.**—*Seckinger v. Philibert & Johanning Mfg. Co.*, 129 Mo. 590, 31 S. W. 957; *Salmon Falls Bank v. Lysser*, 116 Mo. 51, 22 S. W. 504. **Mont.**—*Christiansen v. Aldrich*, 30 Mont. 416, 76 Pac. 1007. **Neb.**—*American Fire Ins. Co. v. Landfare*, 56 Neb. 482, 76 N. W. 1068; *Hoke v. Halverstadt*, 22 Neb. 421, 35 N. W. 204. **N. H.**—*Roberts v. Dame*, 11 N. H. 226. **Ohio.**—*Nelson v. Ford*, 5 Ohio 473. **Ore.**—*Ferguson v. Reiger*, 43 Ore. 505, 73 Pac.

1040; *Currey v. Butcher*, 37 Ore. 380, 61 Pac. 631; *Wyatt v. Wyatt*, 31 Ore. 531, 49 Pac. 855. **Pa.**—*East Union v. Comrey*, 100 Pa. 362; *Robinson v. English*, 34 Pa. 324; *Leekey v. Blosser*, 24 Pa. 401; *Hamilton v. Frederick*, 4 Yeates 129. **Va.**—*Scott v. Dameron's Admr.*, 32 S. E. 415.

58. Tankersley v. Silburn, Minor (Ala.) 185.

59. Leekey v. Blosser, 24 Pa. 401. See *supra*, XII, B.

60. Ala.—*Malone v. Donnally*, Minor 12. **Ohio.**—*Nelson v. Ford*, 5 Ohio 473. **Va.**—*Carthrae v. Clarke*, 5 Leigh (32 Va.) 268; *Eppes' Admr. v. Smith*, 4 Munf. (18 Va.) 466.

61. Ill.—*La Salle v. Porterfield*, 138 Ill. 114, 27 N. E. 937. **Ind.**—*Dickerson v. Hays*, 4 Blackf. 44. **Ia.**—*Connors v. Sioux City & P. Ry. Co.*, 78 Iowa 410, 43 N. W. 267. **Miss.**—*Poin-dexter v. Turner*, Walk. 349. **N. J.**—*Farwell v. Smith*, 16 N. J. L. 133.

62. Evansville & T. H. R. Co. v. Willis, 80 Ind. 225.

63. Marshall v. White, Harp. (S. C.) 122.

64. U. S.—*United States v. Virgin*, 1 Pet. C. C. 7, 28 Fed. Cas. No. 16,625. **Ala.**—*Bradfield v. Patterson*, 106 Ala. 397, 17 So. 536; *Broughton v. Governor*, 7 Ala. 561. **Cal.**—*Cronise v. Carghill*, 4 Cal. 120. **Conn.**—*Brockett v. Fair Haven & W. R. Co.*, 73 Conn. 428, 47 Atl. 763; *Dickinson v. Harrison*, 1 Day 10. **Ga.**—*Dotterer v. Harden*, 88 Ga. 145, 13 S. E. 971. **Ill.**—*Shreffler v. Nadelhoffer*, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626. **Ind.**—*Garard v. Garard*, 135 Ind. 15, 34 N. E. 442, 809; *Smith v. Flack*, 95 Ind. 116; *Puett v. Beard*, 86 Ind. 104; *Huntington & Mendenhall*, 73 Ind. 460; *Tyrell v. Lockhart*, 3 Blackf. 136. **Ia.**—*Shuck v. Chicago, R. I. & P. Ry. Co.*, 73 Iowa 333, 35 N. W. 429. **Kan.**—*Mitchell v. Milhoan*, 11 Kan. 617. **Ky.**—*Dunekake v. Beyer*, 25 Ky. L. Rep.

allegations, failure to make profert,⁶⁶ legal conclusions,⁶⁷ the failure to file an exhibit,⁶⁸ or a mere specific bill of particulars,⁶⁹ failure to verify a pleading,⁷⁰ or to indorse thereon the time of filing,⁷¹ in the absence of timely objection, will be cured by verdict or judgment.

3. Form of Action. — Generally a mistake as to the form of action is cured by verdict or judgment.⁷² That an action on a judgment is in assumpsit instead of debt,⁷³ or that an action is styled trespass when it should be trespass on the case,⁷⁴ is immaterial after judgment.

4. Several Counts or Causes of Action. — a. *When Some Counts Bad.* — Where one or more of several counts are bad, but the declaration or complaint contains a good count, the defect is cured by a general verdict, there being no objection prior to verdict,⁷⁵ and a de-

2001, 79 S. W. 209; *Wilson v. Smith*, 18 Ky. L. Rep. 927, 38 S. W. 870; *Keubler v. Taylor*, 15 Ky. L. Rep. 334. **Md.**—*Giles v. Perryman*, 1 Har. & G. 164. **Mass.**—*Richardson v. Eastman*, 12 Mass. 505; *Livermore v. Boswell*, 4 Mass. 437. **Mich.**—*Shaw v. Chicago & G. T. Ry. Co.*, 123 Mich. 629, 82 N. W. 618, 81 Am. St. Rep. 230, 49 L. R. A. 308. **Minn.**—*Rich v. Rich*, 12 Minn. 468. **Mo.**—*Keaton v. Keaton*, 74 Mo. App. 174; *Alter v. Frick*, 62 Mo. App. 453. **Neb.**—*Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994; *American Fire Ins. Co. v. Landfare*, 56 Neb. 482, 76 N. W. 1068. **N. M.**—*Western Union Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339. **Pa.**—*Sauerman v. Weckerly*, 17 Serg. & R. 116. **S. C.**—*Blythe's Exrs. v. Marsh*, 1 McCord 360. **Va.**—*Hall v. Smith*, 3 Munf. 550.

[a] **Complaint containing blanks for sums of money or number of articles**, sufficient after verdict. **Pa.** *Sauerman v. Weckerly*, 17 Serg. & R. 116. **S. C.**—*Blythe's Exrs. v. Marsh*, 1 McCord 360. **Va.**—*Hall v. Smith*, 3 Munf. (17 Va.) 550.

65. *Mills v. Larrance*, 111 Ill. App. 140.

66. **Ala.**—*Dinsmore v. Austill*, Minor 89. **Ark.**—*Ex parte Jones*, 20 Ark. 35. **Ky.**—*Francis v. Hazlerig's Exrs.*, 1 A. K. Marsh. 93. **Ohio.**—*Howe v. Dawson*, Tapp. 201.

67. *Jenkins v. Rice*, 84 Ind. 342. But see 5 STANDARD PROC. 226.

68. *Owen School Twp. v. Hay*, 107 Ind. 351, 8 N. E. 220; *Galvin v. Woolen*, 66 Ind. 464; *Darnall v. Simpkins*, 10 Ind. App. 469, 38 N. E. 219. See also *Rairden v. Winstandley*, 99 Ind. 600; *Bank of Louisiana v. Ballard*, 7 How. (Miss.) 371.

69. *Davis v. Jenkins*, 14 Ind. 572;

Lewiston Steam Mill Co. v. Easter, 78 Me. 107, 2 Atl. 882.

70. **Ark.**—*Randall v. Sanders*, 71 Ark. 609, 77 S. W. 56. **Ind.**—*Decker v. Gilbert*, 80 Ind. 107. **Ind. Ter.** *Long-Bell Lumber Co. v. Thomas*, 1 Ind. Ter. 225, 40 S. W. 773. **Ky.** *Harris v. Ray*, 15 B. Mon. 628. **Neb.** *Hershiser v. Delone*, 24 Neb. 380, 38 N. W. 863; *Trumble v. Williams*, 18 Neb. 144, 24 N. W. 716. **Pa.**—*Carl v. Com.*, 9 Serg. & R. 63. **Tex.**—*Wedgworth v. Smith* (Tex. Civ. App.), 178 S. W. 641. **Va.**—*Hicks v. Goode*, 12 Leigh (39 Va.) 479, 37 Am. Dec. 677. 71. *Miller v. Foley*, 4 Bibb (Ky.) 200; *Fanning v. Fly*, 2 Coldw. (Tenn.) 486.

72. **U. S.**—*Carson v. Hood's Exrs.*, 4 Dall. 108, 1 L. ed. 762. **Ill.**—See *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414. **Ky.**—*McClelland v. Strong*, Hard. 522. See also *Wickliffe v. Sanders*, 6 Mon. 296. **Mich.**—*Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405; *Potter v. Brown*, 35 Mich. 274. **Minn.**—*Marsh v. Weber*, 13 Minn. 109. **Miss.**—*Noble v. Terrell*, 64 Miss. 830, 2 So. 14; *Breck v. Smith*, 44 Miss. 690; *Bone v. McGinley*, 7 How. 671. **Mo.**—See *Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1084, 135 Am. St. Rep. 537. **Va.** *Boyles' Admr. v. Overby*, 11 Gratt. (52 Va.) 202; *Cleek v. Haines*, 2 Rand. (23 Va.) 440.

73. *Bone v. McGinley*, 7 How. (Miss.) 671.

74. *Satterthwaite v. Morgan*, 3 N. J. L. 962.

75. **Ala.**—*Thirman v. Matthews*, 1 Stew. 384. **Ga.**—See *Bradshaw v. Perdue*, 12 Ga. 510. **Ill.**—*Gebbie v. Mooney*, 121 Ill. 255, 12 N. E. 472; *Barry v. Mackey*, 66 Ill. 164; *Chicago & E. I. R. Co. v. Snedaker*, 122 Ill. App.

fault judgment upon two counts for the same cause of action will not be disturbed because one of the counts is insufficient.⁷⁶

b. *Misjoinder of*.—In some jurisdictions the misjoinder of several counts or causes of action is cured by verdict or judgment,⁷⁷ but in other states it is not so cured.⁷⁸

5. **Averments as to Particular Matters.**—a. *Generally*.—In the application of the doctrine of *aider* by verdict to specific matters the general principles and rules already discussed⁷⁹ are followed, but not always with wholly harmonious results.⁸⁰

b. *Venue*.—The failure to properly lay the venue of an action is generally cured by verdict or judgment after trial in the proper place.⁸¹

c. *Statement of Title or Right of Action Generally*.—A defective statement of plaintiff's title or right will generally be cured by ver-

262. **Ind.**—*Tomlinson v. Hamilton*, 27 Ind. 139; *Findley v. Buchanan*, 1 Blackf. 12. **Ky.**—*Stockdon v. Bayless*, 2 Bibb 60. **Md.**—*Huffer v. Miller*, 74 Md. 454, 22 Atl. 205. **Mass.**—*Payson v. Whitecomb*, 15 Pick. 212. **Miss.**—*Scott v. Peebles*, 2 Smed. & M. 546. **N. J.**—See *Harrison v. Newkirk*, 20 N. J. L. 176.

[a] See, however, *Needham v. McAuley*, 13 Vt. 68, that where there is a general verdict and one count is insufficient, the judgment, on motion, must be arrested.

76. *Mullaly v. Holden*, 123 Mass. 583.

77. **Colo.**—*Possell v. Smith*, 39 Colo. 127, 88 Pac. 1064. **Mich.**—See *Schafer v. Boyce*, 41 Mich. 256, 2 N. W. 1. **Mo.**—*Yates v. Kimmel*, 5 Mo. 87 (while counts cannot be joined in one of which plaintiff sues as administratrix and the other sues in her individual capacity, this misjoinder is cured by verdict); *Tenzer v. Gilmore*, 114 Mo. App. 210, 89 S. W. 341; *Walters v. Hamilton*, 75 Mo. App. 237. **N. Y.**—*Lovett v. Pell*, 22 Wend. 369, misjoinder of counts by adding a count in *assumpsit* to one in *covenant*, will be cured by verdict. See, however, *Cooper v. Bissell*, 16 Johns. 146. **Ohio.**—*Nimocks v. Inks*, 17 Ohio 596; *Bratton v. Smith*, 2 Ohio Dec. 360.

[a] Joinder of counts *ex contractu* and *ex delicto* cured where all questions of contract were withdrawn and jury instructed to consider tort alone. *Barber v. Erie City Iron Wks.*, 2 Pa. Co. Ct. 162.

78. **Conn.**—*Phelps v. Hurd*, 31 Conn. 444, joinder of counts in book debt and *assumpsit* not cured by report of

auditor and its acceptance and defect may be reached by motion in arrest of judgment. See also *Whipple v. Fuller*, 11 Conn. 582, 29 Am. Dec. 330. **Ill.**—*Dalson v. Bradbury*, 50 Ill. 82 (joinder of count in case with one in trespass may be availed of by motion in arrest or on error); *Cruikshank v. Brown*, 10 Ill. 75, joinder of debt and *assumpsit* not cured by verdict. **Ky.**—*Louisville & Portland Canal Co. v. Rowan*, 4 Dana 606, misjoinder of contract and tort not cured by a verdict upon the whole declaration. **Mass.**—See *Heminway v. Saxton*, 3 Mass. 222.

[a] A misjoinder of counts upon which the same judgment cannot be rendered, may be assigned for error and is not cured by verdict. **Ill.**—*Selby v. Hutchinson*, 9 Ill. 319. **N. Y.**—*Cooper v. Bissell*, 16 Johns. 146. **Vt.**—See *Wilson Bros. Garage v. Larrow*, 90 Vt. 413, 98 Atl. 902.

[b] A statutory action for treble damages cannot be joined with common-law action for single damages, for the bringing of vexatious suits, and the defect is not cured by verdict. *Whipple v. Fuller*, 11 Conn. 582, 29 Am. Dec. 330.

79. See *supra*, this section.

80. See *infra*, this section, and 1 Chit. Pl. 712.

81. **U. S.**—*Crittenden v. Davis*, Hempst. 96, 6 Fed. Cas. No. 3,393b. **Fla.**—See *Edwards v. Union Bank*, 1 Fla. 136. **Ky.**—*Tarleton v. Briscoe*, 4 Bibb 73. **Mo.**—*Kronski v. Missouri Pac. Ry. Co.*, 77 Mo. 362; *Duncan v. Oliphant*, 59 Mo. App. 1. **Pa.**—*Nagle v. Nagle*, 3 Grant Cas. 155.

[a] In transitory actions, failure to properly lay venue is cured by ver-

dict or judgment,⁸² but a total failure to aver plaintiff's title or right in the premises will not be so cured,⁸³ and while a defective statement of a title will be cured, a statement of a defective title is not aided.⁸⁴ In other words, a complaint or declaration which by fair implication states a good cause of action though imperfectly or defectively, is good after verdict, in the absence of previous objection,⁸⁵ but generally the failure of a declaration, com-

dict. *Barlow v. Garrow*, Minor (Ala.) 1.

82. **U. S.**—*Gray v. James*, Pet. C. C. 476, 10 Fed. Cas. No. 5,719; *Dobson v. Campbell*, 1 Sumn. 319, 7 Fed. Cas. No. 3,945. **Ala.**—*Payne v. Martin*, 1 Stew. 407. **Cal.**—*Cortelyou v. Jones*, 132 Cal. 131, 64 Pac. 119; *Irish v. Sunderhaus*, 122 Cal. 308, 54 Pac. 1113. See also *Bane v. Peerman*, 125 Cal. 220, 57 Pac. 885. **Conn.** *Seery v. City of Waterbury*, 82 Conn. 567, 74 Atl. 908, 25 L. R. A. (N. S.) 681; *Treadway v. Andrews*, 20 Conn. 384; *Russell v. Slade*, 12 Conn. 455. **Ga.**—*Klassing v. Pavlovski*, 134 Ga. 815, 68 S. E. 614. **Ill.**—*Western Screw Co. v. Johnson*, 86 Ill. App. 89; *Libby, McNeil & Libby v. Scherman*, 50 Ill. App. 123. **Ind.**—*Phenix Ins. Co. v. Wilson*, 132 Ind. 449, 25 N. E. 592; *Hatfield v. Miller*, 123 Ind. 463, 24 N. E. 330; *Cleveland v. Vaien*, 76 Ind. 146. **Ky.**—*Henry Clay Fire Ins. Co. v. Barkley*, 160 Ky. 153, 169 S. W. 747; *United States Mail Line Co. v. Carrollton Furniture Mfg. Co.*, 101 Ky. 658, 42 S. W. 342; *Coleman v. Croysdale*, 3 J. J. Marsh. 541; *Hall v. Roberts*, 24 Ky. L. Rep. 2362, 74 S. W. 199; *Slusher v. Kinnaird*, 18 Ky. L. Rep. 744, 38 S. W. 134. **Me.**—*Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150. **Mo.**—*State v. Webster*, 53 Mo. 135; *Dougherty v. German-American Ins. Co.*, 67 Mo. App. 526. **N. Y.**—*Ridell v. New York Cent. & H. R. R. Co.*, 73 N. Y. 618; *Bayley v. Onondaga County Mut. Ins. Co.*, 6 Hill 476, 41 Am. Dec. 759. See also *People v. Fields*, 1 Lans. 222. **Ore.** *McKay v. Musgrove*, 15 Ore. 162, 13 Pac. 770. **Pa.**—*Good v. Harnish*, 13 Serg. & R. 99, that a declaration in trover for rye, stating that the plaintiff was lawfully possessed of the rye, which he lost, and which came to the hands of the defendant, by finding, and that the defendant, well knowing the said rye to be the property of the plaintiff, converted it, is a sufficient allegation that it was the property of

the plaintiff, after verdict. **S. C.** *Craven v. Rose*, 3 S. C. 72. **Tex.** *Loungeway v. Hale*, 73 Tex. 495, 11 S. W. 537; *Gulf, C. & S. F. Ry. Co. v. Reagan*, 34 S. W. 796. **Vt.**—*Curtis v. Burdick*, 48 Vt. 166. **Va.**—*Woodford's Heirs v. Pendleton*, 1 Hen. & M. (11 Va.) 303.

[a] "It may be laid down as a general rule, that a declaration ought always to show a title in the plaintiff, and that with convenient certainty. . . . If his title depends upon the performance of certain acts, he must affirm the performance of those acts. If enough is stated to show title in the plaintiff, and with sufficient certainty to enable the court to give judgment, but with less certainty than the case admitted of, and which for the purpose of notice to the adverse party, or otherwise, ought to have been stated, the defect is cured by verdict. The court will presume that all such omissions were supplied, and obscurities explained, at the trial, by the evidence given to the jury." *Gray v. James*, Pet. C. C. 476, 10 Fed. Cas. No. 5,719.

83. **Ark.**—*Sevier v. Holliday*, 2 Ark. 512. **Conn.**—*Russell v. Slade*, 12 Conn. 455. **Mass.**—*Carlisle v. Weston*, 1 Mete. 26, complaint in trespass de bonis asportatis is bad even after verdict if there is no averment that the goods were the property of the plaintiff, or that they had any possession, or right of possession, at the time of the taking. **Mo.**—*Melton v. McDonald*, 2 Mo. 45, 22 Am. Dec. 437; *Benefiet & Burnham Mfg. Co. v. Jones*, 60 Mo. App. 219.

84. *Western Screw Co. v. Johnson*, 86 Ill. App. 89; *Libby, McNeil & Libby v. Scherman*, 50 Ill. App. 123.

85. **U. S.**—*Palmer v. Arthur*, 131 U. S. 60, 9 Sup. Ct. 649, 33 L. ed. 87; *In re First Nat. Bank*, 152 Fed. 64, 81 C. C. A. 260; *World's Columbian Exposition Co. v. Republic of France*, 91 Fed. 64, 33 C. C. A. 333. **Ala.**—*Georgia Pac. Ry. Co. v. Propst*, 90 Ala. 1, 7 So. 635. **Ark.**

plaint or equivalent pleading to state a cause of action by express averment or reasonable inference or intendment, is not cured by

St. Louis, I. M. & S. R. Co. *v.* Wynne Hoop & Cooperage Co., 81 Ark. 373, 99 S. W. 375; Holleville *v.* Patrick, 14 Ark. 208. **Cal.**—Christensen *v.* Cram, 156 Cal. 633, 105 Pac. 950; Schmidt *v.* Market St. & W. G. R. Co., 90 Cal. 37, 27 Pac. 61; People *v.* Rains, 23 Cal. 127. See also Dillon *v.* Cross, 5 Cal. App. 766, 91 Pac. 439. **Colo.**—Wilcox *v.* Jamieson, 20 Colo. 158, 36 Pac. 902. **Conn.**—Whitlock *v.* Uhle, 75 Conn. 423, 53 Atl. 891; Russell *v.* Slade, 12 Conn. 455; Bulkley *v.* Storer, 2 Day 531. **D. C.**—Washington & Georgetown R. Co. *v.* Hickey, 5 App. Cas. 436. **Ga.**—Reid *v.* Hearn, 127 Ga. 117, 56 S. E. 129; Moss *v.* Fortson, 99 Ga. 496, 27 S. E. 745; Royal *v.* McPhail, 97 Ga. 457, 25 S. E. 512. **Idaho.**—The Mode, Ltd. *v.* Myers, 164 Pac. 91. **Ill.**—Illinois Cent. R. Co. *v.* Treat, 179 Ill. 576, 54 N. E. 290; Marquette Third Vein Coal Co. *v.* Dielle, 110 Ill. App. 684; Knisely *v.* Brown, 95 Ill. App. 516; Cleveland, C. & St. L. R. Co. *v.* Chinsky, 92 Ill. App. 50. **Ind.**—Burkett *v.* Holman, 104 Ind. 6, 3 N. E. 406; Murphy *v.* Murphy, 95 Ind. 430; Jenkins *v.* Rice, 84 Ind. 342; Evansville & T. H. R. Co. *v.* Willis, 80 Ind. 225; McAninch *v.* Hamilton, 1 Ind. App. 429, 27 N. E. 719. **Ind. Ter.**—Long-Bell Lumber Co. *v.* Thomas, 1 Ind. Ter. 225, 40 S. W. 773. **Ky.**—Western Assurance Co. *v.* Ray, 105 Ky. 523, 49 S. W. 326; Hall *v.* Roberts, 24 Ky. L. Rep. 2362, 74 S. W. 199; Banks *v.* Collins, 19 Ky. L. Rep. 46, 39 S. W. 519; Slusher *v.* Kinnaird, 18 Ky. L. Rep. 744, 38 S. W. 134. **La.**—See Morris *v.* St. Bernard Cypress Co., 140 La. 511, 73 So. 345. **Me.**—Emerson *v.* Lakin, 23 Me. 384. **Md.**—Gent *v.* Cole, 38 Md. 110. **Mass.**—Crocker *v.* Gilbert, 9 Cush. 131. ***Mich.**—Hunn *v.* Michigan Cent. R. Co., 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500; Delashman *v.* Berry, 21 Mich. 516. **Minn.**—McElrath *v.* McElrath, 120 Minn. 380, 139 N. W. 708, 44 L. R. A. (N. S.) 505; Hurd *v.* Simonton, 10 Minn. 423. **Miss.**—See Hamer *v.* Rigby, 65 Miss. 41, 3 So. 137; Poindexter *v.* Turner, Walk. 349. **Mo.**—Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504; State *v.* Williams, 77 Mo. 463; Moellman *v.* Gieze-Henselmeier Lumber Co., 134 Mo. App. 485, 114 S. W. 1023; Murphy *v.* North British & Merc. Ins. Co., 70 Mo. App. 78; Clark *v.* Fairley, 24 Mo. App. 429. **Mont.**—See Moss *v.* Goodhart, 47 Mont. 257, 131 Pac. 1071. **Neb.**—Brown *v.* Helsley, 2 Neb. (Unof.) 69, 96 N. W. 187. **N. J.**—See Farwell *v.* Smith, 16 N. J. L. 133. **N. M.**—State Bank of Commerce *v.* Western Union Tel. Co., 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120. **N. D.**—Wyldes *v.* Patterson, 24 N. D. 218, 139 N. W. 577. **Ohio.**—Erwin *v.* Shaffer, 9 Ohio St. 43, 72 Am. Dec. 613. **Ore.**—Brown *v.* Lewis, 50 Ore. 358, 92 Pac. 1058; Hannan *v.* Greenfield, 36 Ore. 97, 58 Pac. 888; David *v.* Waters, 11 Ore. 448, 5 Pac. 748. See also Turner *v.* Corbett, 9 Ore. 79. **Pa.**—Schlosser *v.* Brown, 17 Serg. & R. 250. **R. I.**—Barber *v.* James, 21 R. I. 279, 43 Atl. 101. **S. C.**—Simpson *v.* Vaughan, 2 Strob. 32. **Tex.**—De Witt *v.* Miller's Admr., 9 Tex. 239; Western Union Tel. Co. *v.* McHenry, 3 Wills. Civ. Cas., §9. **Utah.**—Mangum *v.* Bullion, Beck & Champion Min. Co., 15 Utah 534, 50 Pac. 834. **Vt.**—Lawson *v.* Crane & Hall, 83 Vt. 115, 74 Atl. 641. **Va.**—City of Richmond *v.* McCormack, 120 Va. 552, 91 S. E. 767; Scott *v.* Dameron's Admr., 32 S. E. 415. **Wash.**—Johnson *v.* Ryan, 62 Wash. 60, 112 Pac. 1114. **W. Va.**—Holliday's Exrs. *v.* Myers, 11 W. Va. 276. **Wis.**—Blaikie *v.* Griswold, 10 Wis. 293. See also Richards *v.* Land & River Imp. Co., 99 Wis. 625, 75 N. W. 401. **Wyo.**—Hudson Coal Co. *v.* Hauf, 18 Wyo. 425, 109 Pac. 21.

[a] **Illustrations of defects cured.**

(1) Declaration that defendant was indebted to plaintiff for money had and received without stating "to plaintiff's use," good after verdict. Judson *v.* Eslava, Minor (Ala.) 2.

(2) Omission to allege delivery in a suit on a bond. Garcia *v.* Satrustegui, 4 Cal. 244. (3) In assumpsit against a town for the maintenance of one of its paupers, omission to aver the giving of notice of plaintiff's demand to the defendant. Spencer *v.* Overton, 1 Day (Conn.) 183. (4) A declaration in an action of debt, for goods sold and delivered is good, after verdict, although the words "at his special instance and request" are omitted. Durrill *v.* Lawrence, 10 Vt. 517.

verdict or judgment.⁸⁶ However, if the issue joined be such as necessarily required proof of the facts imperfectly stated or omitted,

86. U. S.—City of Pontiac *v. Talbot Pav. Co.*, 94 Fed. 65, 36 C. C. A. 88, 48 L. R. A. 326; World's Columbian Exposition Co. *v. Republic of France*, 91 Fed. 64, 33 C. C. A. 333. **Ark.**—De Loach Mill Mfg. Co. *v. Bonner*, 64 Ark. 510, 43 S. W. 504; Knight *v. Sharp*, 24 Ark. 602. **Cal.**—Bell *v. Thompson*, 147 Cal. 689, 82 Pac. 327; Buckman *v. Hatch*, 139 Cal. 53, 72 Pac. 445; Richards *v. Travelers' Ins. Co.*, 80 Cal. 505, 22 Pac. 939; Barron *v. Frink*, 30 Cal. 486. **Colo.**—Nix *v. Miller*, 36 Colo. 203, 57 Pac. 1084; Rhodes *v. Hutchins*, 10 Colo. 258, 15 Pac. 329. See also Park County Comrs. *v. Locke*, 2 Colo. App. 508, 31 Pac. 351. **Conn.**—Daly *v. New Haven*, 69 Conn. 644, 38 Atl. 397; McCune *v. Norwich City Gas Co.*, 30 Conn. 521, 79 Am. Dec. 278; Ives *v. Goshen*, 63 Conn. 79, 26 Atl. 845; Russell *v. Slade*, 12 Conn. 455. **D. C.**—Washington & Georgetown R. Co. *v. Hickey*, 5 App. Cas. 436. **Fla.**—Florida Cent. & P. R. Co. *v. Ashmore*, 43 Fla. 272, 32 So. 832. **Ill.**—Sargent Co. *v. Baublis*, 215 Ill. 428, 74 N. E. 455; Illinois Steel Co. *v. Stonevick*, 199 Ill. 122, 64 N. E. 1014; McLean County Coal Co. *v. Long*, 91 Ill. 617; Funk *v. Piper*, 50 Ill. App. 163. **Ind.**—Home Ins. Co. *v. Duke*, 75 Ind. 535; Indianapolis & C. R. Co. *v. Davis*, 10 Ind. 398; Dickerson *v. Hays*, 4 Blackf. 44; Harter *v. Parsons*, 14 Ind. App. 331, 42 N. E. 1025; McAninch *v. Hamilton*, 1 Ind. App. 429, 27 N. E. 719. **Ky.**—Hall *v. Huffman*, 159 Ky. 72, 166 S. W. 770. See also Davis, Moody & Co. *v. Wiley*, 11 Ky. Op. 580. **Mass.**—Williams *v. Hingham & Q. Bridge, etc Corp.*, 4 Pick. 341; Worster *v. Proprietors of Canal Bridge*, 16 Pick. 541. **Mich.**—Delashman *v. Berry*, 21 Mich. 516. **Minn.**—Catheart *v. Peck*, 11 Minn. 45; Lee *v. Emery*, 10 Minn. 187. **Miss.**—Poindexter *v. Turner*, Walk. 349. **Mo.**—Seckinger *v. Philibert & Johanning Mfg. Co.*, 129 Mo. 590, 31 S. W. 957; Hyatt *v. Loyal Protective Assn.*, 106 Mo. App. 610, 81 S. W. 470; Clark *v. Whittaker Iron Co.*, 9 Mo. App. 446. See also Frost *v. Pryor*, 7 Mo. 314. **Mont.**—Thornton *v. Kaufman*, 35 Mont. 181, 88 Pac. 796. **N. J.**—Farwell *v. Smith*, 16 N. J. L. 133. **N. M.**—La Mesa Community Ditch *v. Appelzoeller*, 19 N. M. 75, 140 Pac. 1051. **N. Y.**—Allerton *v. Rhineland Machine Works Co.*, 165 App. Div. 557, 150 N. Y. Supp. 265; Samuelson *v. Mayer*, 65 Misc. 518, 120 N. Y. Supp. 75. **N. C.**—Pearce *v. Mason*, 78 N. C. 37. **Ore.**—Farrell *v. Kirkwood*, 69 Ore. 413, 139 Pac. 110; Robinson *v. Holmes*, 57 Ore. 5, 109 Pac. 754; Hannan *v. Greenfield*, 36 Ore. 97, 58 Pac. 888. **Pa.**—Dewart *v. Masser*, 40 Pa. 302. **Tex.**—Shaw *v. Lobitz* (Tex. Civ. App.), 35 S. W. 877; Texas & P. Ry. Co. *v. McCoy*, 3 Tex. Civ. App. 276, 22 S. W. 926. **Utah.**—Mangum *v. Bullion, Beek & Champion Min. Co.*, 15 Utah 534, 50 Pac. 834. **Vt.**—Needham *v. McAuley*, 13 Vt. 68; Harding *v. Cragie*, 8 Vt. 501. **Va.**—Ross *v. Milne*, 12 Leigh (39 Va.) 204, 37 Am. Dec. 646; Chichester *v. Vass*, 1 Call (5 Va.) 83, 1 Am. Dec. 509. **W. Va.**—See Wright *v. Ridgely*, 67 W. Va. 319, 67 S. E. 787. **Wis.**—Harris *v. Harris*, 10 Wis. 467, the presumption being that nothing is proved on trial except what is alleged or necessarily implied from what is alleged. **Wyo.**—Hudson Coal Co. *v. Hauf*, 18 Wyo. 425, 109 Pac. 21; Pardee *v. Kuster*, 15 Wyo. 368, 91 Pac. 836.

[a] **Most liberal construction in favor of complaint** is made where it is objected after judgment that it does not state a cause of action. Holmes *v. Campbell*, 12 Minn. 221.

[b] **Illustrations of material omissions not cured.** (1) Declaration in an action upon an award, containing no allegation that the award was published, or made known to the defendant except by bringing the action. Kingsley *v. Bill*, 9 Mass. 198. (2) Declaration against a sheriff for the default of his deputy, not alleging that he is sheriff. Low *v. Tilton*, 19 N. H. 271. (3) Complaint for death of plaintiff's minor son while in the employ of defendant which fails to allege knowledge on the part of defendant of the minority of the deceased son, this being an essential element of the parent's cause of action. Gulf, C. & S. F. Ry. Co. *v. Vieno*, 7 Tex. Civ. App. 347, 26 S. W. 230. (4) Declaration in debt against one obligor only, describing the bond as joint but not alleging that the other obligor is dead. Newman *v. Graham*, 3 Munf. (17 Va.) 187.

and without which the verdict could not properly have been given, the defect or omission is cured by the verdict even though it would have been fatal on demurrer,⁸⁷ and this latter would seem to be the rule also where the failure to object to evidence of an essential fact not alleged, waives the deficiency in pleading.⁸⁸

d. *Performance of Conditions Precedent*.—A defective averment of performance,⁸⁹ as, for instance, a mere general averment where that is insufficient,⁹⁰ is cured by verdict;⁹¹ and the failure to aver the performance of a condition precedent has been held to be cured by verdict or judgment.⁹²

e. *Promise or Consideration*.—The failure to allege the consideration for a promise is not cured by verdict,⁹³ though a defective allegation of consideration will be aided by verdict.⁹⁴ According to

87. **Ky.**—*Vaughn's Exr. v. Gardner*, 7 T. Mon. 326. See *Mutual Life Ins. Co. v. Gividen*, 13 Ky. L. Rep. 970. **Pa.**—*Corson v. Hunt*, 14 Pa. 510. See *McMicken v. Com.*, 58 Pa. 213. **Wyo.** *Grover Irrigation & L. Co. v. Lovella Ditch R. & I. Co.*, 21 Wyo. 204, 131 Pac. 43, Ann. Cas. 1915D, 1207, L. R. A. 1916C, 1275.

See 1 Chit. Pl. 712; Step. Pl. 149; Gould Pl., ch. X, §12.

88. See *supra*, X, E.

89. *Keys v. Powell*, 2 A. K. Marsh. (Ky.) 253; *O'Connor v. Standard Theatre Co.*, 17 Mo. App. 675.

90. *Carroll v. Peake*, 1 Pet. (U. S.) 18, 7 L. ed. 34 (general averments of readiness and request are sufficient after verdict unless in very peculiar cases); *Thompson v. Gray*, 2 Stew. & P. (Ala.) 60, where there is a general averment of performance on the part of the plaintiff, and the defendant pleads that the plaintiff had not performed the covenant on his part. on which plea, issue is joined, and a verdict had in favor of the plaintiff, want of a special averment of performance by the plaintiff will be cured.

91. *Sufficiency of general averment of performance*, see 11 STANDARD PROC. 998, 1062.

92. **Cal.**—*Happe v. Stout*, 2 Cal. 460. **Me.**—*Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150. **N. Y.**—*Fullerton v. Dalton*, 58 Barb. 236, failure to allege demand for the property before suit in action to recover possession of personal property. **Pa.**—*McMicken v. Com.*, 58 Pa. 213 (failure to allege demand); *Weigley's Admrs. v. Weir*, 7 Serg. & R. 309. "The omission of the averment of

notice, when necessary, . . . may be aided by a verdict, unless in an action against the drawer of a bill, where the omission of the averment of notice of non-payment by the acceptor is fatal, even after verdict." **Tenn.**—*Rogers v. Love*, 2 Humph. 417, failure to aver special demand when necessary from nature of agreement, is cured by verdict. **Va.**—*Bailey v. Clay*, 4 Rand. (25 Va.) 346.

[a] Where party agrees to sell and deliver goods at a particular place failure to allege readiness and willingness to accept them at that place in action for failure to deliver, is cured by verdict. See *Clark v. Dales*, 20 Barb. (N. Y.) 42.

93. **Conn.**—*Lyon v. Alvord*, 18 Conn. 66 (omission to state any sufficient consideration not cured); *Hitchcock v. Page*, 1 Root 293. **Ind.**—*Taylor v. Lesson*, 35 Ind. App. 620, 74 N. E. 907. **Ky.**—*Bruner v. Stout*, Hard. 225. **Mass.**—See *Hemmenway v. Hickes*, 4 Pick. 497. **Pa.**—*Whitall v. Morse*, 5 Serg. & R. 358.

94. **Conn.**—*Hendrick v. Seely*, 6 Conn. 176. **Ill.**—*Demesmey v. Gravelin*, 56 Ill. 93. **Ky.**—*Ward v. Coffey*, 11 Ky. L. Rep. 339, 12 S. W. 145. **Me.** *Stimpson v. Gilchrist*, 1 Me. 202, after a verdict every promise in the declaration is to be taken as an express promise. **Mich.**—*Kean v. Mitchell*, 13 Mich. 207, declaration alleged a sale, and an agreement by the defendant to deliver goods "for a good and valuable consideration, paid by the plaintiff to the defendant," this was sufficient after judgment though demurrable. **Pa.**—*Miltnerberger v. Schlegel*, 7 Pa. 241. **Tenn.**—*Brown v. Parks*, 8 Humph. 294, a declaration stating

some authorities the failure to allege a promise in an action of assumpsit is not cured by verdict,⁹⁵ while in other jurisdictions a contrary rule is recognized.⁹⁶

f. *Non-Payment and Breach of Contract.*—A defective averment of a breach of the obligation sued on will be cured by verdict,⁹⁷ as will the averment of a breach generally that defendant has not performed his agreement,⁹⁸ or the omission to assign a breach to one of several counts.⁹⁹ A declaration, however, which assigns no breach within either the words or the import and effect of the contract sued on, is fatally defective and is not cured by verdict,¹ and the same is true of a declaration assigning several breaches of a bond all of which are bad in substance.²

Nonpayment.—The failure to allege that the note, policy, or other instrument sued on is unpaid,³ or wholly unpaid,⁴ or an otherwise defective allegation of non-payment,⁵ is cured by verdict.

that the parties had accounted together, and upon the adjustment of their accounts, it was settled, that in consideration thereof the defendant was indebted to the plaintiff in the sum of \$400, contains sufficient averment of consideration after verdict.

See 11 STANDARD PROC. 988.

95. *Ky.*—*Bruner v. Stout*, Hard. 225. *Mass.*—See *Kingsley v. Bill*, 9 Mass. 198. *Mo.*—*McNulty v. Collins*, 7 Mo. 69. *Pa.*—See *McKee v. Bartley*, 9 Pa. 189, averment that plaintiff agreed to make and deliver to defendants a wagon, for a sum mentioned, and agreed between them, is sufficient after verdict.

[a] The word "promised" is not necessary, any other intelligible word of the same import, as "agreed," is sufficient. *Avery v. Inhabitants of Tyrringham*, 3 Mass. 160, 3 Am. Dec. 105.

[b] In an action upon an award, failure to aver promise to perform the award is cured by verdict for the law implies a promise to abide by the award, and hence the omission is a defect of form. *Kingsley v. Bill*, 9 Mass. 198.

[c] Failure to aver promise was made to plaintiff in action of assumpsit. *McCredy v. James*, 6 Whart. (Pa.) 547.

96. *Cal.*—*Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64. *Mich.*—*Hoard v. Little*, 7 Mich. 468. *N. H.*—*Haynes v. Brown*, 36 N. H. 545. *W. Va.*—*Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098.

97. *Mo.*—*Pinkston v. Stone*, 3 Mo. 119. *N. Y.*—*Thomas v. Roosa*, 7 Johns.

461. *Pa.*—*Weigley's Admrs. v. Weir*, 7 Serg. & R. 309. *Va.*—*Horrel v. McAlexander*, 3 Rand. (24 Va.) 94.

[a] If one of several breaches is well assigned in a suit on an administration bond, it is sufficient after verdict. *Carl v. Com.*, 9 Serg. & R. (Pa.) 63.

98. *U. S.*—*Minor v. Mechanics' Bank*, 1 Pet. 46, 68, 7 L. ed. 47. *Ga.*—*Murphy v. Lawrence*, 2 Ga. 257. *Pa.*—*Weigley's Admrs. v. Weir*, 7 Serg. & R. 309.

99. *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194.

1. *Curtis v. Mutual Benefit Life Co.*, 48 Conn. 98.

2. *Abrahams v. Jones*, 20 Ill. App. 83.

3. *Ind.*—*Howorth v. Scarce*, 29 Ind. 278; *McAfee v. Bending*, 36 Ind. App. 628, 76 N. E. 412. *N. Y.*—*Packard v. Automobile Club of America*, 90 Misc. 642, 153 N. Y. Supp. 942, where non-payment is proved before the close of plaintiff's case, the defect in failing to plead non-payment may be regarded as waived. *Pa.*—*American Ins. Co. v. Francia*, 9 Pa. 390, failure to aver refusal to pay insurance policy cured by verdict. But see *Hurley v. Ryan*, 119 Cal. 71, 51 Pac. 20.

4. *Regensberger v. Quinn*, 106 Cal. xviii, 39 Pac. 788 (failure to aver "or any part thereof" after an allegation of non-payment is immaterial after judgment); *Hammitt v. Bullett's Exrs.*, 1 Call (5 Va.) 567.

5. *Crocker v. Gilbert*, 9 Cush. (Mass.) 131; *Clarke v. Gregory*, 5 How. (Miss.) 363, where the action was debt brought by the assignee of the

g. *Time*.⁶—The failure to aver the date of an act,⁷ the leaving of a date blank,⁸ an error in misstating a date,⁹ or an ambiguous or uncertain allegation as to a date,¹⁰ will be cured by verdict or judgment.

h. *Description of Property*.—Generally a defective description in a complaint will be cured by verdict or judgment.¹¹ Thus a defective

payee of a bill single, and the breach did not aver that the money had not been paid to the original payee, the court held that after judgment upon nil dict, the defect was cured.

6. *Averments as to time*, see 4 STANDARD PROC. 841.

7. *Ala.*—*Russell v. Russell*, 62 Ala. 48; *Hubbert v. Collier*, 6 Ala. 269. *Cal.*—*Rutan v. Wolters*, 116 Cal. 403, 48 Pac. 385. *Conn.*—*Hall v. Crandall*, Kirby 402. *Ga.*—*Bond v. Central Bank*, 2 Ga. 92, suit on note payable to bearer, failure to allege date of transfer of note cured. *Ind.*—*Overton v. Rogers*, 99 Ind. 595. *Miss.*—*Shrock v. Bowden*, 5 Miss. 426; *Delahuff v. Reed*, Walk. 74. *N. H.*—*Rowell v. Bruce*, 5 N. H. 381, failure to allege day of demand in action in assumpsit. *Ore.*—*Nicolai v. Krimbel*, 29 Ore. 76, 43 Pac. 865, failure to allege date of sale in complaint for goods sold and delivered. *Tenn.*—See *Nashville Life Ins. Co. v. Mathews*, 8 Lea 499. *Va.*—*Milstead v. Redman*, 3 Munf. (17 Va.) 219, action for breach of promise to marry, failure to allege date when marriage was solemnized is cured by verdict.

[a] In an action against an indorser of a promissory note the failure to allege the time of notice of non-payment is not cured by verdict. *Halsey v. Salmon*, 3 N. J. L. 916.

[b] Alleging the month but not the particular day of a trespass, is cured by verdict. *Hubbert v. Collier*, 6 Ala. 269.

8. *Sauerman v. Weckerly*, 17 Serg. & R. (Pa.) 116; *Blythe's Exrs. v. Marsh*, 1 McCord (S. C.) 360.

9. *U. S.*—*Scull v. Higgins*, Hempst. 90, 21 Fed. Cas. No. 12,570. *Ala.*—*Crawford v. Camfield*, 6 Ala. 153. *Cal.*—*Coryell v. Cain*, 16 Cal. 567, where ouster was alleged to have taken place June 15, 1856, while the claim of title is alleged to have been acquired May 12, 1859, it is a defect which is cured by verdict. *Ill.*—*Otto v. Jackson*, 35 Ill. 349. *Miss.*—*Wells v. Woodley*, 5 How. 484. *Mo.*—*Block v. O'Hara's*

Admr., 1 Mo. 145. *N. Y.*—*Allaire v. Ouland*, 2 Johns. Cas. 52. *Pa.*—*Loose v. Loose*, 36 Pa. 538.

[a] Stating an impossible date such as 1892 in an action pending in 1811 will not vitiate after judgment, the court will intend the true date was shown. *Morgan's Exrx. v. Morgan*, 2 Bibb (Ky.) 388.

[b] Alleging cause of action to have accrued subsequent to commencement of the action, is cured by verdict. *Kraft v. Gilchrist*, 31 Pa. 470. But the contrary was held in *Cheetham v. Lewis*, 3 Johns. (N. Y.) 42. See also *Allaire v. Ouland*, 2 Johns. Cas. (N. Y.) 52, where a promise, in one of the counts, by reference to the day in the preceding count, was laid after the breach assigned, the mistake was held to be cured by the verdict. And *Bemis v. Faxon*, 4 Mass. 263, that a declaration in assumpsit laying the promise on a day before the teste of the writ, is well enough after verdict, though it would have been bad on special demurrer.

10. *John v. Clayton*, 1 Blackf. (Ind.) 54; *Block v. O'Hara's Admr.*, 1 Mo. 145.

[a] Alleging a promise to have been made "sometime about" a certain date, in an action of assumpsit, will be good after verdict. *John v. Clayton*, 1 Blackf. (Ind.) 54.

11. *Cal.*—*Whitney & Woods v. Buckman*, 19 Cal. 300, where a complaint in ejectment describing the land as "All that certain tract or parcel of land situated in Napa county, consisting of a pre-emption claim of one hundred and sixty acres of land, and commonly known as the Soda Springs, and embracing said improvements thereto belonging, and being about five miles from Napa in a northerly direction," was held sufficient after verdict though the statute required the premises to be set out by metes and bounds in the complaint. *Ind.*—*Alford v. Baker*, 53 Ind. 279. *N. C.*—*Redmond v. Stepp*, 100 N. C. 212, 6 S. E. 727. *Pa.*—*Fisher v. Larick*, 7 Serg. & R. 99, in eject-

description of the goods in an action of replevin,¹² or trover,¹³ is generally cured.

i. *Damages and Value of Property.*—The failure of the declaration or complaint to set forth the amount of damages sustained will be cured by verdict.¹⁴ So leaving a blank as to the damages claimed or the sum due, is cured.¹⁵ A declaration in trespass for taking and

ment a description of the land claimed, as two houses, one barn, eighty acres of arable land, twenty acres of woodland, with the appurtenances in P. township, N. county, being part of a tract of land surveyed in pursuance of a warrant granted to W. G., is sufficient after verdict. **S. C.**—Lahiffe v. Hunter, Harp. 184, trespass to try title, describing property as a plantation called Green Grove "lying on the northeast side of the road to Ashley ferry," but giving no metes or bounds, is sufficient after verdict. **Vt.**—Wetherby v. Foster, 5 Vt. 136. **Va.**—Paul v. Smiley, 4 Munf. (13 Va.) 468; Lovell v. Arnold, 2 Munf. (16 Va.) 167, a count on a writ of right describing the land demanded as a certain number of acres part of a larger tract, and setting forth the boundaries of such larger tract is sufficiently certain after verdict.

See *Mundell v. Perry*, 2 Gill & J. (Md.) 193, where a complaint for trespass q. c. f. charging that the defendant the close of the plaintiff "called ———, situate in the county aforesaid, broke and entered," etc., is not sufficient after judgment. And *Unversaw v. Myers*, 37 Ind. 487, that describing land as "six ——— of lot number five," in the complaint is not cured by judgment and findings though the finding is "six acres of lot number five," etc.

12. *State v. Welch*, 88 Ind. 308; *Malone v. Stickney*, 88 Ind. 594; *Stevens v. Osman*, 1 Mich. 92, 48 Am. Dec. 696.

13. *State v. Berning*, 74 Mo. 87; *Colebrook v. Merrill*, 46 N. H. 160.

14. **Ala.**—See *Irvin v. Nichols*, 5 Stew. & P. 189, action upon a note payable in cotton, failure to set out value of the cotton is cured by verdict. **Colo.**—*School District v. Ross*, 4 Colo. App. 493, 36 Pac. 560, here there was no averment of the damages sustained. **Ill.**—*Koehler v. King*, 119 Ill. App. 6. See also *Lake Erie & W. R. Co. v. Wills*, 140 Ill. 614,

31 N. E. 122; *Burst v. Wayne*, 13 Ill. 599. **Ind.**—*Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061. **Ia.**—*Humphreys v. Daggs*, 1 G. Gr. 435. **Me.**—See *Warren v. Litchfield*, 7 Me. 63. **Miss.**—*Kehler Flour Mills Co. v. Reeves Grocery Co.*, 113 Miss. 30, 73 So. 866; *Delahuff v. Reed*, Walk. 74. **Va.**—*Stephens v. White*, 2 Wash. (2 Va.) 203.

[a] *Failure to aver special damage in action for public nuisance* is not cured by verdict, the special injury being the gist of the action, and unless alleged and proved no cause of action exists. *Platte & Denver D. Co. v. Anderson*, 8 Colo. 131, 6 Pac. 515. But see *Hall v. Kitson*, 3 Pin. (Wis.) 296, where the court says: "Special damages being the gist of the action, it is contended that the declaration should have set out some damage peculiar to the plaintiff, and not that merely, which he sustains in common with others. There is no doubt of the correctness of the position, that it was incumbent on the plaintiff to state in his declaration . . . that he had sustained special injury by means of the erection of the dam. It would not have been sufficient to state merely that he was deterred from attempting to navigate the river with his boats and rafts by means of the obstruction. In order to enable the plaintiff to recover, it must appear that he was obstructed in fact . . . The declaration states that the 'plaintiff was and still is obstructed, hindered, and prevented from navigating said river with his boats' . . . This, we think, is an imperfect and defective statement that the plaintiff was obstructed in fact . . . and a defective statement of a good cause of action is cured by a verdict."

[b] *Declaration for foreign money without allegation of its value* is cured by verdict. *Brown v. Barry*, 3 Dall. (U. S.) 365, 1 L. ed. 638.

15. **Ill.**—*Burst v. Wayne*, 13 Ill. 599. **Ind.**—*Peltier v. Britton*, 4 Blackf. 502. **Ky.**—*Walker v. Kendall*, Hard.

carrying away goods,¹⁶ detainee,¹⁷ for goods sold,¹⁸ or trover,¹⁹ which fails to state the value of the articles involved is cured by verdict, as is the failure to allege the value of the property destroyed in an action on a fire insurance policy.²⁰

E. PLEA OR ANSWER.—Generally pleas or answers bad in form and demurrable but sufficient in substance to put in issue material allegations of the declaration or present a defense to the cause of action set forth, will in the absence of objection, be cured by verdict.²¹ So an error in the form of the plea used,²² or indefiniteness and un-

404. **Tenn.**—*Williams v. Bank of Tennessee*, 1 Coldw. 43.

16. *Baker v. Baker*, 13 Mete. (Mass.) 125, 46 Am. Dec. 725.

17. *Jordan v. Thomas*, 31 Miss. 557, that the failure to state separate value of several articles, the aggregate value being stated, cured by verdict. To same effect, *Holladay v. Littlepage*, 2 Munf. (16 Va.) 539.

18. *Nicolai v. Krimbel*, 29 Ore. 76, 43 Pac. 865.

19. **Ark.**—*Jefferson v. Hale*, 31 Ark. 286, failure to state value at time of conversion cured. **Mo.**—*Case v. Fogg*, 46 Mo. 44, here complaint referred to an exhibit attached thereto as setting forth the values. **Ore.**—*Berry v. King*, 15 Ore. 165, 13 Pac. 772.

20. **Ind.**—*German-American Ins. Co. v. Paul*, 2 Ind. Ter. 625, 53 S. W. 442. **Mo.**—See *v. St. Paul Fire & M. Ins. Co.*, 60 Mo. App. 518. **Wash.**—*Waldron v. Home Mut. Ins. Co.*, 9 Wash. 534, 33 Pac. 136.

[a] See also *Jones v. St. Joseph Fire & M. Ins. Co.*, 55 Mo. 342, that a declaration alleging the insurance of certain described property to the amount of \$1200.00 and that property was totally destroyed by fire, is sufficient averment of value after verdict.

21. **U. S.**—*Garland v. Davis*, 4 How. 131, 11 L. ed. 907. **Ala.**—*Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354. **Ariz.**—*Hall v. Southern Pacific Co.*, 6 Ariz. 378, 57 Pac. 617. **Ark.**—*Hughes v. Sloan*, 8 Ark. 146. **Colo.**—*McCraw v. Welch*, 2 Colo. 284. **Conn.**—*Curtice v. Beardsly*, 1 Root 441. **Ga.**—*De Loach Mill Mfg. Co. v. Standard Sawmill Co.*, 125 Ga. 377, 54 S. E. 157. **Ill.**—*People v. Comrs. of Wild-Cat Special Drainage Dist.*, 181 Ill. 177, 54 N. E. 923; *Sullivan v. Dollins*, 13 Ill. 85. **Kan.**—*Castle v. Houston*, 19 Kan. 417, 27 Am. Rep. 127. **Ky.**—*Rogers v. Felton*, 98 Ky. 148, 32 S. W. 405. **Miss.**

Tucker v. Zollicoffer, 12 Smed. & M. 591. **Mo.**—*Hay v. Short*, 49 Mo. 139. See also *St. Louis Nat. Bank v. Ross*, 9 Mo. App. 399. **N. Y.**—See *House v. Howell*, 53 Hun 638, 6 N. Y. Supp. 799, 25 N. Y. St. 277, 3 Silv. 455. **Ohio.**—*Stull v. Wilcox*, 2 Ohio St. 569. **Ore.**—*Hemenway v. Francis*, 20 Ore. 455, 26 Pac. 301. **Va.**—*Pence v. Huston's Exrs.*, 6 Gratt. (47 Va.) 304; *Vaiden v. Bell*, 3 Rand. 448; *Woodford's Heirs v. Pendleton*, 1 Hen. & M. 303. **W. Va.**—*State v. Seabright*, 15 W. Va. 590; *Jarrett v. Nickell*, 4 W. Va. 276.

22. **Ky.**—*Com. v. Richardson*, 8 B. Mon. 81. **Pa.**—*Millard v. Morse*, 32 Pa. 506 (plea of non-assumpsit instead of nil debet, in action on debt, cured); *Cavene v. McMichael*, 8 Serg. & R. 441. **Va.**—*Hunnicutt v. Carsley*, 1 Hen. & M. 153 (plea of "not guilty" to an action of covenant cured by verdict); *King v. M'Daniel*, 4 Call 451, if to a declaration charging a tort with an assumpsit upon it, the defendant pleads not guilty, it will be good after verdict, notwithstanding the double aspect of the declaration, and the irrelevancy of the issue to the assumpsit. **W. Va.**—*Bannister v. Victoria Coal & Coke Co.*, 63 W. Va. 502, 61 S. E. 338 (in action of assumpsit a plea of "not guilty" presents a substantial issue, and such misleading will be cured by verdict); *Smith v. Townsend*, 21 W. Va. 486, plea of nil debet in action of indebitatus assumpsit, instead of plea of non-assumpsit, cured by verdict.

[a] See, however, *Garland v. Davis*, 4 How. (U. S.) 131, 11 L. ed. 907, that when a declaration sounds in tort and the plea is "non assumpsit," such a plea would be bad on demurrer. If not demurred to, and the case goes to trial (the issue and verdict following the plea), the defect is so material that it is not cured by verdict,

certainty in the plea or answer,²³ will be cured by verdict. However, a plea which does not set up a good defense,²⁴ or the failure to file a plea,²⁵ is not so cured.

F. SET-OFF, COUNTERCLAIM, OR CROSS-COMPLAINT.²⁶ — Defective allegations in a cross-complaint or counter-claim will be cured by verdict,²⁷ and it is too late after verdict to object to the filing of a plea of set-off.²⁸

G. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS. — 1. **Replication or Reply.** — The irregular filing of a replication,²⁹ and formal

under the statute of jeofails. Bad pleas, which are cured by verdict, are those which, although they would be bad on demurrer because wrong in form, yet still contain enough of substance to put in issue all the material parts of the declaration.

[b] Defendant cannot take advantage of the informality of his own plea after verdict against him. *Malone v. Donnally*, Minor (Ala.) 12.

23. **Mo.**—*Hay v. Short*, 49 Mo. 139. **Mont.**—*Raymond v. Wimsette*, 12 Mont. 551, 31 Pac. 537, 33 Am. St. Rep. 604. **Ore.**—*Hemenway v. Francis*, 20 Ore. 455, 26 Pac. 301, in action of ejectment, a specification in defendant's answer of the part for which he defends, which describes it as "about 120 acres of said land—the farming land on the north side of the county road,—with the buildings thereon," is very indefinite but will be cured by verdict.

24. **Ark.**—*Hughes v. Sloan*, 8 Ark. 146. **Ky.**—*Minor v. Kelly*, 5 Mon. 272, where defendant's pleas can be admitted as true, and yet the plaintiff be entitled to judgment, verdict for defendant cannot avail him. See also *Lowry v. Drake's Heirs*, 1 Dana 46. **Pa.**—*Tams v. Lewis*, 42 Pa. 402, pleas which are bad are not aided by the fact that immaterial issues have been formed upon them and found for the defendant.

25. *Rowans v. Givens*, 10 Gratt. (51 Va.) 250; *Taylor v. Huston*, 2 Hen. & M. (12 Va.) 161. See, however, *Pinkerton v. Sydnor*, 87 Ill. App. 76; *West Chicago St. Ry. Co. v. Krueger*, 68 Ill. App. 450.

[a] Verdict for Defendant Will Not Cure Failure To Plead Contributory Negligence.—*Louisville & N. R. Co. v. Schuster*, 10 Ky. L. Rep. 65, 7 S. W. 874.

26. See generally the titles "Cross-

Complaint;" "Set-Off, Counterclaim and Recoupment."

27. **U. S.**—*Monarch Cycle Mfg. Co. v. Royer Wheel Co.*, 105 Fed. 324, 44 C. C. A. 523. **Ind.**—*Coppes v. Union Nat. Sav. & Loan Assn.*, 33 Ind. App. 367, 69 N. E. 702; *McCloy v. Cox*, 12 Ind. App. 27, 39 N. E. 901. **Ky.** *Boughner v. Black's Admr.*, 83 Ky. 521, 4 Am. St. Rep. 174, too late after verdict to object the allegation of counterclaim should have been more specific.

28. *Brantley v. Dempsey*, 24 Ga. 341 (it is too late to object that a set-off cannot be pleaded in a suit for unliquidated damages after there has been a trial and verdict on such plea); *Henry v. Hoover*, 6 Smed. & M. (Miss.) 417, the court saying: "In this case, the plea of set-off having been a nullity, the response to the plea was likewise a nullity, and there was therefore, in contemplation of law, no issue joined. If we are to consider that no plea was filed, then it was irregular to proceed before a jury as on an issue. . . . But what is the result of having gone to trial on an issue to a plea of set-off? The defendant below cannot complain, because it was his plea; the plaintiff cannot complain because he took issue. We are inclined to regard the plea as that kind of misleading which is cured by the verdict."

[a] But see *Bloss v. Kittridge*, 5 Vt. 28, that when one of several pleas in offset is defective in substance, and there is a general verdict for the defendant by reason of damages allowed on such pleas in offset, the judgment must be arrested.

29. *Keator Lumber Co. v. Thompson*, 144 U. S. 434, 12 Sup. Ct. 669, 36 L. ed. 495 (objection that replications were filed after the commencement of the trial without leave of court comes too late after judgment);

or technical errors in a replication or reply,³⁰ will generally be cured by verdict or judgment. Thus the objection that new matter contained in a reply constitutes a departure is cured by verdict.³¹ But where the matters set up in the replication are insufficient and only raise immaterial issues, it is not cured by verdict.³² The failure to file a replication or reply to a plea is cured by verdict³³ in many juris-

Magehan v. Orme, 7 Mo. 4, where replications are not filed within time prescribed by statute and no objection is made, after verdict for plaintiff it is too late to object.

30. **Ala.**—Marr v. Foster, 1 Stew. 57. **Conn.**—Chesnut Hill Reservoir Co. v. Chase, 14 Conn. 123. **Ill.**—Price v. Art Printing Co., 112 Ill. App. 1. **Ind.**—Hays v. M'Kee, 2 Blackf. 11; George v. Robinson, 36 Ind. App. 310, 75 N. E. 697. **Ky.**—Louisville & N. R. Co. v. Lawes, 21 Ky. L. Rep. 1793, 56 S. W. 426; Newby v. Million, 15 Ky. L. Rep. 63. **Md.**—Cappeau's Bail v. Middleton, 1 Har. & G. 154. **Mass.**—Harding v. Brooks, 5 Pick. 244. **Minn.**—Trustees of Macalester College v. Nesbitt, 65 Minn. 17, 67 N. W. 652. **Miss.**—Barrow v. Wade, 7 Smed. & M. 49; Halsey v. Pinchard, 6 How. 278; Pickett's Exrs. v. Ford, 4 How. 246. **Mo.**—Davis v. Cooper, 6 Mo. 148. **Neb.**—Western Mattress Co. v. Potter, 1 Neb. (Unof.) 627, 95 N. W. 841. **N. J.**—Franklin Fire Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271, erroneous use of the general replication *de injuria* is cured by verdict. **Ohio.**—Hall v. Reed, 17 Ohio 498; Richmond v. Patterson, 3 Ohio 368, double replications to a plea no ground of error after verdict finding both true. **Ore.**—Patterson v. Patterson, 40 Ore. 560, 67 Pac. 664; Miller v. Hirschberg, 27 Ore. 522, 40 Pac. 506. **Va.**—Carthrae v. Clarke, 5 Leigh (32 Va.) 268; Snapp v. Spengler, 2 Leigh (29 Va.) 1 (blanks, informalities and bad grammar in replication immaterial after verdict); McMichen v. Amos, 4 Rand. (25 Va.) 134. **Wash.**—Moran Bros. Co. v. Northern Pac. R. Co., 19 Wash. 266, 53 Pac. 49, 1101.

[a] A general replication to a special plea is sufficient after verdict. Ellett v. Vaughan, 6 Call (10 Va.) 77.

31. **Ind.**—Beard v. Hand, 88 Ind. 183. See also Midland Steel Co. v. Citizens' Nat. Bank, 26 Ind. App. 71, 59 N. E. 211. **Mass.**—Keay v. Goodwin, 16 Mass. 1. **Mo.**—Mortland v.

Holton, 44 Mo. 58. **R. I.**—Burdick v. Kenyon, 20 R. I. 498, 40 Atl. 99.

32. **Ark.**—Denton v. Brownlee, Homer & Co., 24 Ark. 556. **Ill.**—Young v. Paris, 69 Ill. App. 449. **Mo.**—See St. Joseph Fire & M. Ins. Co. v. Harlan, 72 Mo. 202, where the court says: "It is insisted, . . . that as the replication of plaintiff does not deny one of the defenses set up in the answer alleging facts sufficient to defeat a recovery, the judgment should, for that reason be reversed. Supposing it to be true, as claimed, that the replication does not fully traverse the allegations of the answer, yet as the record shows the parties went to trial without defendants' excepting to the sufficiency of the replication, without making any motion to non pros. the plaintiff, and without asking that the allegations of the answer, which were undenied, should be taken as confessed, it is too late after verdict and judgment to make the objection."

33. **Ill.**—Illinois Life Association v. Wells, 200 Ill. 445, 65 N. E. 1072; Tompkins v. Gerry, 52 Ill. App. 570, "Both parties appeared and went to trial without objection, as though replications were in, and appellants cannot now urge such omission as sufficient to require a reversal of the judgment." **Ind.**—Jones v. Hathaway, 77 Ind. 14. **Mo.**—Howell v. Reynolds, 51 Mo. 154; National Stamping, etc. Works v. Wicks, 144 Mo. App. 249, 128 S. W. 775. **Neb.**—*In re Cheney's Estate*, 78 Neb. 274, 110 N. W. 731. See also Mosslander v. Armstrong, 90 Neb. 774, 134 N. W. 922. **N. Y.**—Coan v. Whitmore, 12 Johns. 353. **N. D.**—Power v. Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328, reply is waived by conduct of parties in going to trial without it. **Pa.**—Thompson v. Cross, 16 Serg. & R. 350. See also Union Ins. Co. v. Murphy, 1 Sad. 570, 4 Atl. 352.

[a] Parties presumed to have gone to trial on issues formed by general replications, traversing the special

dictions, but in some states the want of such a pleading is not cured.³⁴

2. Pleadings Subsequent to Replication.—The failure to file a joinder to the replication is held cured by verdict in some jurisdictions,³⁵ while in other states such failure is not so cured.³⁶

H. WHERE JUDGMENT IS BY DEFAULT.—The rule of aider by verdict is held not to apply where judgment is taken by default;³⁷ however, mere formal defects will not vitiate, after judgment by default, if the pleading be good in substance.³⁸

pleas. *Coutch v. Barton*, *Morris* (Iowa) 354.

34. Ark.—*Reagan v. Irvin*, 25 Ark. 86. **Fla.**—*Bridger v. Thrasher*, 22 Fla. 383; *Livingston v. L'Engle*, 22 Fla. 427. **Miss.**—*Hogue v. Lewellen*, 42 Miss. 302, entire omissions to plead are not cured by verdict. See also *Halsey v. Pinchard*, 6 How. 278. **Tenn.** *Furman & Co. v. Fisher*, 4 Coldw. 626, 94 Am. Dec. 210. **Va.**—See *Turberville v. Long*, 3 Hen. & M. 309, that if the record of proceedings on a writ of right state that the demandant "replied" generally, the court will intend, after verdict, that a general replication was filed in writing.

Compare XII, C.

35. Ill.—*Supreme Court v. Barker*, 96 Ill. App. 490. **Ia.**—*Hendrie v. Rippey*, 9 Iowa 351, "If the plaintiff proceeded with his trial and treated the replication as denied, it was too late for him to claim, after verdict, that it should have been taken as true. To permit such a practice would be in the teeth of the spirit of the code, and make courts of justice engines of fraud and injustice." **Md.**—*Tyson v. Rickard*, 3 Har. & J. 109, 5 Am. Dec. 424. **Miss.**—*Grubbs v. Collins*, 54 Miss. 485. **Okla.**—*Holt v. Holt*, 23 Okla. 639, 102 Pac. 187. **Va.**—See *South Side R. Co. v. Daniel*, 20 Gratt. (61 Va.) 344; *Moore v. Mauro*, 4 Rand. (25 Va.) 488, not fatal after verdict, it being stated in the record that issue was joined.

36. Miller v. Hoc, 1 Fla. 189; *Minor v. Kelly*, 5 Mon. (Ky.) 272, verdict for defendant, where he fails to rejoin to an affirmative replication, avails not. See, however, *Morrison's Exr. v. Hart*, *Hard*. 150.

37. U. S.—*Loewe v. Union Savings Bank*, 226 Fed. 294. **Cal.**—*Hentsch v. Porter*, 10 Cal. 555; *Watson v. Zim-*

merman, 6 Cal. 46. **Ill.**—*Warren v. Harris*, 7 Ill. 307. **Ind.**—*Erhardt v. Pfeiffer*, 29 Ind. App. 570, 64 N. E. 885 (judgment by default will not cure defect in complaint on a promissory note of failure to set out a copy of the note, and objection may be urged on appeal); *Cleveland, C., C. & St. L. R. Co. v. Tyler*, 9 Ind. App. 689, 35 N. E. 523. **Mass.**—See *Hemenway v. Hiekes*, 4 Pick. 497. **R. I.** *Dunn v. Sullivan*, 23 R. I. 605, 51 Atl. 203. **Tenn.**—*Williams v. President and Directors, etc.*, 1 Coldw. 43, that in action of debt, where writ states the amount of damages, but damages are left blank in the declaration, the defect is cured by final judgment by default.

[a] *Contra*, see *Ragsdale v. Caldwell*, 2 How. (Miss.) 930, that all defects in pleadings, whether in form or substance, which would have been ground for demurrer, are cured by judgment by default.

[b] **The reason**, why the rule does not apply to cases of judgment by default, is, that in such cases the introduction of proof is not required; and the judgment would not therefore show that the plaintiff had made out a case, on which he was entitled to recover. *Emerson v. Lakin*, 23 Me. 384.

38. Ill.—*Buck v. Citizens' Coal Mining Co.*, 254 Ill. 198, 98 N. E. 228; *Lawver v. Leaghans*, 85 Ill. 138. **Ky.** *Bryant v. Cheek, Webb & Co.*, 19 Ky. L. Rep. 749, 41 S. W. 776. **Mich.**—See *Elliott v. Farwell*, 44 Mich. 186, 6 N. W. 234. **Tex.**—*Belcher v. Ross*, 33 Tex. 12.

[a] **Omission of profert** cannot be availed of after judgment by default. *Dinsmore v. Austill*, *Minor* (Ala.) 89; *Ex parte Jones*, 20 Ark. 35; *Shields v. Barden*, 6 Ark. 459; *Tucker v. Real Estate Bank*, 4 Ark. 429.

PLEADING IN EQUITY.—See **Bills and Answers; Equity Jurisdiction and Procedure; Pleading; Pleas in Equity.**

PLEADINGS. — See **Pleading; Pleas; Service of Process and Papers; Striking Out and Withdrawal.**

PLEADING UNDER THE CODES. — See **Answers; Declaration and Complaint; Denials; Replication and Reply; Set-Off, Counterclaim and Recoupment.**

PLEAS

By the Editorial Staff.

I. SCOPE AND GENERAL STATEMENT, 435

II. DEFINITIONS, NATURE AND CLASSIFICATION, 435

III. ORDER IN WHICH TO PLEAD, 436

IV. FORM, 437

V. SUBSTANCE AND SUFFICIENCY, 438

A. *General Statement*, 438

B. *Duplicity*, 439

C. *Joint and Several Pleas*, 440

D. *Special Pleas Amounting to General Issue*, 440

VI. OBJECTIONS AND EXCEPTIONS, 440

CROSS-REFERENCES: .

Abatement, Pleas of;

Aliens;

Another Action Pending;

Answers;

Arraignment and Plea;

Confession and Avoidance;

Denials;

Infants;

Insane Persons;

Jeopardy;

Jurisdiction;

Nul Tiel Record;

Payment;

Plea in Equity;

Puis Darrein Continuance,

Pleas of;

Tender.

In criminal cases, see "Arraignment and Plea," and titles dealing with particular kinds of pleas.

Pleas in particular actions or proceedings, see the specific titles, and the following: Coverture, plea of, 11 STANDARD PROC. 783; misnomer of party, plea of generally, 1 STANDARD PROC. 33; indictment and information, 12 STANDARD PROC. 627; non-assumpsit, 3 STANDARD PROC. 187, et seq.; nil debet, plea of generally, 7 STANDARD PROC. 63; in debt on simple contract, 11 STANDARD PROC. 1013; non cepet, plea of in replevin, see the title "Replevin;" non detinet, plea of in detinue, 7

STANDARD PROC. 64; non est factum, 6 STANDARD PROC. 158, et seq.; not guilty, plea of, in criminal prosecution, 2 STANDARD PROC. 907, et seq.; in civil actions, 7 STANDARD PROC. 62; nul tiel corporation, plea of, 5 STANDARD PROC. 647, 7 STANDARD PROC. 76.

For forms, see 9 STANDARD PROC. 982, et seq., and the notes to this article.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. SCOPE AND GENERAL STATEMENT.—Formerly all defensive pleadings interposing matters of fact were, in legal actions, grouped under the one generic term "pleas," and the same was true in equity, with the exception of certain dilatory matters, under the head "answers."¹ With the advent of reformed, or code procedure the significance of these terms was lost and, adopting the equity term, all defensive pleadings of fact were classified as "answers."² It is only with "pleas," strictly as such, in actions at law that this article deals, pleas³ and answers⁴ in equity, and answers under reformed procedure,⁵ being fully treated elsewhere in this work. In some jurisdictions, too, special pleas in bar have been supplanted by a notice or statement of special defenses under the general issue, which subject is also fully treated in another part of this work.⁶

II. DEFINITION, NATURE AND CLASSIFICATION.—A plea, in common law practice, is the first pleading by which the defendant presents matters of fact as a defense to the plaintiff's case.⁷ Pleas are of two general kinds, dilatory pleas and pleas in bar.⁸ A dilatory plea is one which merely seeks to delay the suit by setting up some matter which attacks the plaintiff's remedy rather than his right of action,⁹ while a plea in bar goes to the merits of the cause of action

1. 1 STANDARD PROC. 3.

2. 1 STANDARD PROC. 3, et seq.

3. See the title "Pleas in Equity."

4. 4 STANDARD PROC. 151, et seq.

5. See 1 STANDARD PROC. 1, et seq., and the title "Denials."

6. 7 STANDARD PROC. 78, et seq.

7. Shinn, Pl. & Pr., §700; Brower v. Nellis, 6 Ind. App. 323, 33 N. E. 672; Bates v. Colvin, 21 R. I. 57, 41 Atl. 1004.

Pleas in equity defined, see the title "Pleas in Equity."

[a] **Distinguished From Demurrer.** It is in this sense that a plea is distinguishable from a demurrer, *i. e.*, the former presents matter of fact while the latter interposes matter of law. Bates v. Colvin, 21 R. I. 57, 41 Atl. 1004.

8. Shinn, Pl. & Pr., §700.

[a] **Synonymous Terms.**—Pleas "to the action . . . are usually called pleas in bar, though sometimes, and especially in the older books of the law, they are denominated *perpetual* or *peremptory* pleas, or pleas in chief." Hamilton's Gould on Pl., p. 40.

[b] **Misnomer.**—"All dilatory pleas are sometimes called pleas in *abatement* as contradistinguished from pleas to the action. This, however, is a vague use of the term, and never proper when strict accuracy is required." Hamilton's Gould on Pl., p. 42.

9. Mahoney v. New South Building & Loan Assn., 70 Fed. 513; Parks v. McClellan, 44 N. J. L. 552.

[a] **The use and purpose of dila-**

and tends to defeat it altogether.¹⁰ Dilatory pleas are classified as pleas (1) to the jurisdiction, (2) to the disability of the plaintiff to sue and (3) in abatement.¹¹ Pleas to the jurisdiction are defined and fully treated elsewhere in this work,¹² as are also pleas in abatement,¹³ and pleas to the disability of plaintiff to sue.¹⁴ Pleas in bar are usually classified as (1) pleas of the general issue and (2) special pleas.¹⁵ Pleas of the general issue are such as deny all the allegations of the declaration,¹⁶ while a special plea is one advancing new matter as a defense to the plaintiff's cause of action.¹⁷ Some authorities, also, create another class of plea in bar which does not strictly fall under either of the foregoing subdivisions and which is called a plea of special issue, being termed "special" to distinguish it from the "general" issue and differing from a "special plea" in this, that it does not, as does a special plea, advance new matter, and does not, as does the "general" issue, deny all the allegations of the declaration, but instead it denies some particular material averment of the declaration and thus, in effect, denies the entire right of action.¹⁸

III. ORDER IN WHICH TO PLEAD.¹⁹—Under the common law the order in which the different pleas should be interposed is as follows: (1) To the jurisdiction of the court; (2) to the disability of the plaintiff or defendant; (3) To the process and (4) lastly, pleas in bar.²⁰ This is the natural order of pleading,²¹ because by filing any one of these pleas the defendant is precluded from afterwards availing himself of any of the pleas which precede it,²² excepting only a

tory pleas has been somewhat modified. "For, though pleas of this kind were formerly often used for the mere purpose of delay without any foundation in truth, and though the interlocutory questions raised by such a plea may still incidentally have the mere effect of *delaying* the termination of the suit, yet the proper and direct effect of a plea of this kind, when it prevails, is in general, and with a very few exceptions, to *defeat* forever the particular suit in which it is used, though it leaves the *merits*, or right of action, undetermined, so that the plaintiff is still at liberty to seek his remedy by a new suit. The peculiar office of a dilatory plea is therefore, in general, to *defeat* the individual suit in which it is pleaded, without affecting the *right of action*." Hamilton's Gould on Pl., p. 40.

10. Ill.—Pitts Sons' Mfg. Co. v. Commercial Nat. Bank, 121 Ill. 582, 13 N. E. 156. Me.—Rawson v. Knight, 71 Me. 99, 102. Mo.—Wilson v. Knox, 132 Mo. 387, 34 S. W. 45. N. J.—Parks v. McClellan, 44 N. J. L. 552; Lord v. Brookfield, 37 N. J. L. 552. Ore. Norton v. Winter, 1 Ore. 47, 62 Am. Dec. 297. Va.—Mason v. Farmers'

Bank, 12 Leigh (39 Va.) 84.

11. Shinn, Pl. & Pr., §700.

12. See the title "Jurisdiction."

13. See 1 STANDARD PROC. 28, et seq., and particular titles.

14. See the titles "Husband and Wife;" "Infants;" "Insane Persons."

15. Hamilton's Gould on Pl., p. 43.

A full treatment of pleas of the general issue and special traverses and denials appears in 7 STANDARD PROC. 62, et seq., and 100, et seq.

16. Van Dusen v. Pomeroy, 24 Ill. 289; Osborn v. Lovell, 36 Mich. 246, 250; Kinnie v. Owen, 1 Mich. 249. See 7 STANDARD PROC. 62, et seq.

17. Hamilton's Gould on Pl., p. 43, and the following cases: Ga.—Dougherty v. Bethune, 7 Ga. 90. Ill.—Curtiss v. Martin, 20 Ill. 557. Ky.—Berry v. Kenney, 5 B. Mon. 120.

Special traverses and denials fully treated in 7 STANDARD PROC. 100, et seq.

18. Hamilton's Gould on Pl., p. 43.

19. Pleas in abatement, see 1 STANDARD PROC. 52.

20. Shinn, Pl. & Pr., §701.

21. Shinn, Pl. & Pr., §701.

22. Shinn, Pl. & Pr., §701.

plea to the jurisdiction of the court over the subject matter, which is not waived by pleading in any of the classes subsequent thereto.²³ By pleading in bar of the action it is admitted that there is no occasion for a dilatory plea and one may not thereafter be pleaded,²⁴ except when based upon new matter arising subsequent to the filing of the former plea.²⁵ Furthermore, when a plea has been filed and the defendant thereafter files another plea which is, in this order of pleading, subsequent to the one first filed, the first plea and all defenses peculiar to it is thereby waived.²⁶ On the other hand, when a dilatory plea has been overruled the defendant may still plead, within the proper time, any other plea which is, in the order above given, subsequent to the one overruled.²⁷

An amended declaration, filed after the defendant has thus lost his right to file a dilatory plea to the original, stands in the same position in this respect as the original and to it the defendant may not plead in abatement.²⁸

IV. FORM.²⁹—Whether a plea is one in abatement or in bar is to be determined by its opening and conclusion.³⁰ The title being no

In answers under reformed or code procedure these rules as to the order of pleading must yet be observed to a limited extent. See 2 STANDARD PROC. 60, et seq.

23. *Thompson v. Michigan Mut. Ben. Assn.*, 52 Mich. 522, 18 N. W. 247; *Rowland v. Superintendents of Poor*, 49 Mich. 553, 14 N. W. 494. See the title "Jurisdiction," and 1 STANDARD PROC. 52, note 33.

24. **U. S.**—*Wittmore v. Malcomson*, 28 Fed. 605; *Gause v. Clarksville*, 1 Fed. 353, 1 McCrary 78. **Ala.**—*Cleveland v. Chandler*, 3 Stew. 489; *Robertson v. Lea*, 1 Stew. 141. **Ark.**—*Foreman v. Gibson*, 15 Ark. 206. **Fla.**—*Stewart v. Bennett*, 1 Fla. 437. **Ill.**—*Union Nat. Bank v. First Nat. Bank*, 90 Ill. 56; *Ricker v. Scofield*, 28 Ill. App. 32. **Ind.**—*Estep v. Larsh*, 21 Ind. 190; *Sowle v. Holdridge*, 17 Ind. 236. **Me.**—*Powers v. Mitchell*, 75 Me. 364. **Mass.**—*Chamberlayne v. Nazro*, 188 Mass. 454, 74 N. E. 674; *Seagrave v. Erickson*, 11 Cush. 89; *Martin v. Com.*, 1 Mass. 347, 358. **Mich.**—*Webb v. Mann*, 3 Mich. 139. **Mo.**—*Fugate v. Glasscock*, 7 Mo. 577. **Neb.**—*Baker v. Union Stock Yds. Nat. Bank*, 63 Neb. 801, 89 N. W. 269, 93 Am. St. Rep. 484. **N. J.**—*Wittmore v. Malcomson*, 9 N. J. L. J. 338. **N. Y.**—*Palmer v. Evertson*, 2 Cow. 417; *Palmer v. Green*, 1 Johns. Cas. 101. **N. C.**—*Morgan v. Charlotte First Nat. Bank*, 93 N. C. 352. **Ore.**—*Winter v. Norton*, 1 Ore. 42. **Pa.**—*Potter v. McCoy*, 26 Pa.

458; *Good Intent Co. v. Hartzell*, 22 Pa. 277; *Wilson v. Hamilton*, 4 Serg. & R. 238; *Hoopes v. Pusey*, 2 Chest. Co. Rep. 306. **R. I.**—*Potter v. Smith*, 7 R. I. 55; *Gardner v. James*, 5 R. I. 235. **Tex.**—*Taylor v. Hall*, 20 Tex. 211; *Hamilton v. James A. Cushman Mfg. Co.*, 15 Tex. Civ. App. 338, 39 S. W. 641; *Meyer v. Smith*, 3 Tex. Civ. App. 37, 21 S. W. 995. **Vt.**—*Lyman v. Central Vermont R. Co.*, 59 Vt. 167, 10 Atl. 346. **Va.**—*Howard v. Rawson*, 2 Leigh (29 Va.) 733.

See 1 STANDARD PROC. 53.

25. **Ark.**—*Johnson v. Killian*, 6 Ark. 172. **Ill.**—*Ricker v. Scofield*, 28 Ill. App. 32. **Tenn.**—*Yancey v. Marriott, Frisby & Co.*, 1 Sneed 28.

See 1 STANDARD PROC. 61.

Supplemental answers, see generally the title "Supplemental Pleading."

26. *Potter v. McCoy*, 26 Pa. 458.

27. *Hamilton's Gould on Pl.*, p. 226.

28. *Chapman v. Davis*, 4 Gill (Md.) 166.

29. **Forms for pleas**, see 9 STANDARD PROC. 982, et seq.

Confession and avoidance, commencement and conclusion of plea of, see 5 STANDARD PROC. 230.

Covenant, conclusion of plea in, action of, see 6 STANDARD PROC. 161.

30. *Mudge v. Rinkle*, 45 Ill. App. 604. See 1 STANDARD PROC. 45.

[a] **If it commence in bar and conclude in abatement** it will, it has been held, be considered as a plea in bar. *Lowe v. Blair*, 6 Blackf. (Ind.) 282;

part of the plea, a mistake therein is usually considered harmless,³¹ but the plea must be entitled in the proper court; otherwise it is useless.³² Whenever new matter is introduced the plea should conclude with a verification,³³ and a dilatory plea should conclude with a verification and a prayer for a proper judgment.³⁴ When no new matter is introduced in a plea in bar, however, the conclusion should be to the country.³⁵

V. SUBSTANCE AND SUFFICIENCY.—A. GENERAL STATEMENT.—Pleas in bar must traverse or confess and avoid the allegations of the declaration,³⁶ or present matter of estoppel thereto.³⁷ If the plea purports to go to the entire declaration it is bad if it does not present an answer in law to the entire gravamen or cause of action.³⁸ It is not necessary, however, that the whole declaration be answered by any one plea, for a plea may be interposed to a separate part of the declaration, but the entire matter pleaded must cover the entire cause of action.³⁹ Every special plea must contain issuable matter,⁴⁰ and be responsive to the declaration.⁴¹ The plea must deny all such allegations in the declaration as it is not desired to admit, for the general rule is that a plea will be taken to confess such traversable matter of fact as it does not deny.⁴² The plea must be certain⁴³ to such an extent as to render it readily understandable.⁴⁴ Less certainty is, however, re-

Hargis v. Ayres, 8 Yerg. (Tenn.) 467.

31. Columbia Bank v. Ott, 2 Cranch C. C. 529, 2 Fed. Cas. No. 878. But see 1 STANDARD PROC. 42.

32. Mattingly v. Cline, 7 Mo. 499.

33. Conn.—Baily v. Smith, 1 Root 243. N. Y.—McClure v. Erwin, 3 Cow. 313, 321. Pa.—Wallace v. Taylor, 1 Phila. 74, 7 Leg. Int. 114. Vt.—Sherwin v. Bliss, 4 Vt. 96.

34. See 1 STANDARD PROC. 45.

[a] The usual form, as given in Shinn's Pl. & Pr., §719, is "And this the defendant is ready to verify. Wherefore he prays judgment of the said writ (or declaration) and that the same may be quashed, etc."

35. Conn.—Baily v. Smith, 1 Root 243. Mass.—Sampson v. Henry, 11 Pick. 379. N. J.—Everett v. Bartlett, 20 N. J. L. 117. Vt.—Sherwin v. Bliss, 4 Vt. 96.

36. Mercer v. Dowson, 5 Barn. & C. 479, 11 E. C. L. 549, 8 D. & R. 264, 4 L. J. K. B. O. S. 211, 108 Eng. Reprint 179. See the titles "Confession and Avoidance;" "Denials."

37. Shinn's Pl. & Pr., §732.

Plea in estoppel, distinguished from plea in confession and avoidance, see 5 STANDARD PROC. 230.

38. Ala.—McDougald's Admr. v. Dawson's Exr., 30 Ala. 553. Ill.—Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Hinton v. Husbands,

4 Ill. 187. N. J.—Lord v. Brookfield, 37 N. J. L. 552. Tenn.—McGhee v. Smith, 6 Heisk. 315. Vt.—Alexander v. School Dist. No. Six, 62 Vt. 273, 19 Atl. 995.

39. Sterry v. Schuyler, 23 Wend. (N. Y.) 487.

40. Marsh v. Smith, 49 Ill. 396.

[a] An Illustration.—To a declaration for false imprisonment the defendant pleaded that he arrested the plaintiff "by lawful authority." This matter was not issuable for it put in issue matters of law which were, under the form of the allegation, inseparably confused with matters of fact; matter of law is not issuable. The defendant should have specially pleaded what his authority was. Marsh v. Smith, 49 Ill. 396.

41. Gradle v. Hoffman, 105 Ill. 147.

42. Ill.—Coppinger v. Armstrong, 8 Ill. App. 210. Mass.—Dwight v. Holbrook, 1 Allen 560. N. H.—Tappan v. Tappan, 36 N. H. 98, 109. N. J.—Phillips v. Crosby, 70 N. J. L. 785, 59 Atl. 142.

43. Cooper v. Monke, Willes 52, 125 Eng. Reprint 1051. See generally the title "Certainty in Pleading."

44. Ala.—Roland v. Logan, 18 Ala. 307, 313. Ill.—Morehouse v. Fowler, 69 Ill. App. 50. Mass.—Oystead v. Shed, 12 Mass. 506. N. J.—Hudson v. Winslow, 35 N. J. L. 437. N. Y.

quired of statements of facts which are peculiarly within the knowledge of the plaintiff.⁴⁵ It must set up facts rather than conclusions,⁴⁶ and must be direct and positive,⁴⁷ not discursive or argumentative.⁴⁸ If a plea is bad in part it cannot stand.⁴⁹

B. **DUPPLICITY.**⁵⁰—The plea must, in general, be single, and, if it contain two matters, either of which would bar the action it is bad for duplicity.⁵¹ In accordance with the general rule, however,⁵² a defendant is not precluded from setting forth several matters of fact which are all constituent parts of the same entire defense, forming one connected proposition and requiring but one answer,⁵³ nor from setting forth matters of inducement,⁵⁴ nor from pleading several defenses to separate parts of the declaration.⁵⁵ Surplusage will not render a plea duplicitous.⁵⁶

The court may permit a defendant to plead double where to do so will further the ends of justice and expedite the trial of the cause,⁵⁷ but will usually withhold its permission where the proposed pleas are inconsistent,⁵⁸ or are substantially the same.⁵⁹ Permission will not be given, moreover, to file two pleas creating issues which must be tried

Spencer v. Southwick, 9 Johns. 314.

45. Andrews v. Whitehead, 13 East 102, 112, 104 Eng. Reprint 306; Gale v. Reed, 8 East 80, 85, 103 Eng. Reprint 274.

46. **Ill.**—Clay Fire & Marine Ins. Co. v. Wusterhausen, 75 Ill. 285. **Ind.** Stonsel v. Abrams, 7 Blackf. 516. **N. J.**—Hudson v. Winslow, 35 N. J. L. 437. **Tenn.**—Columbia v. Beasley, 1 Humph. 232, 34 Am. Dec. 646.

See the title "**Conclusions of Law.**"

47. Liverpool Waterworks Co. v. Atkinson, 6 East 507, 102 Eng. Reprint 1382.

48. **Ill.**—Spahr v. Tartt, 23 Ill. App. 420. **N. H.**—Quimby v. Melvin, 28 N. H. 250. **Vt.**—Alexander v. School Dist. No. Six, 62 Vt. 273, 19 Atl. 995. **Eng.** Isherwood v. Whitmore, 12 L. J. N. S. Exch. 93.

49. Clarkson v. Lawson, 6 Bing. 266, 274, 19 E. C. L. 127, 3 Moo. & P. 605, 8 L. J. C. P. (O. S.) 36, 130 Eng. Reprint 1283; Macdonnell v. Macdonnell, 3 Bos. & P. 174, 127 Eng. Reprint 96; Duffield v. Scott, 3 T. R. 374, 100 Eng. Reprint 628.

50. See generally 7 STANDARD PROC. 391.

In plea in criminal cases, see 2 STANDARD PROC. 883, 893; 4 STANDARD PROC. 511.

Confession and avoidance, joinder of plea of with denial, see 5 STANDARD PROC. 543, et seq.

Plea in abatement, see 1 STANDARD PROC. 50.

51. Eyre v. Shelley, 6 M. & W. (Eng.) 269, 274; Wright v. Watts, 3 Q. B. 89, 114 Eng. Reprint 441, even though imperfectly pleaded.

[a] **Provided they are both relied upon**—for it may happen that the facts alleged disclose two defenses, but if so alleged as to show that but one is relied upon the plea will not be double. Robinson v. St. Johnsbury & L. C. R. Co., 80 Vt. 129, 66 Atl. 814. 52. 7 STANDARD PROC. 941, et seq.

53. Robinson v. St. Johnsbury & L. C. R. Co., 80 Vt. 129, 66 Atl. 814; Robinson v. Raley, 1 Burr. 316, 97 Eng. Reprint 330.

54. Robinson v. St. Johnsbury & L. C. R. Co., 80 Vt. 129, 66 Atl. 814, 9 L. R. A. (N. S.) 1249, where the court say: "When the fact relied on as the gist of the defense is but the consequence of another fact, or when one of them is a necessary or a proper inducement to the other, both may be pleaded without making the plea double." See also 7 STANDARD PROC. 943.

55. 1 Tidd's Pr. (4th Am. ed.) 654.

56. Jacobs v. Pierce, 132 Ill. App. 547. See generally 7 STANDARD PROC. 944, and the title "**Surplusage and Scandal.**"

57. Parks v. McClellan, 44 N. J. L. 552.

58. Granite State Bank v. Otis, 53 Me. 133.

59. Martin v. Woods, 6 Mass. 6; Chapman v. Sloan, 2 N. H. 464.

in different tribunals,⁶⁰ although it is no objection that they create different issues if they may all be tried by the same court.⁶¹

C. **JOINT AND SEVERAL PLEAS.**—Where there are several defendants they may all join in one plea,⁶² but a joint plea filed by several defendants, which is bad as to one is bad as to all.⁶³ Some authorities limit the operation of this rule to pleas of justification in which the facts charged are necessarily confessed, holding that it is inapplicable to pleas of the general issue.⁶⁴

D. **SPECIAL PLEA AMOUNTING TO GENERAL ISSUE.**—This matter is treated elsewhere in this work.⁶⁵

VI. OBJECTIONS AND EXCEPTIONS.⁶⁶—It is a general rule that defects of form, as distinguished from defects of substance, can be taken advantage of only by a special demurrer,⁶⁷ which must point out precisely wherein the plea is defective;⁶⁸ a general demurrer will only test its substance without reference to its form.⁶⁹ Thus, a special demurrer is the proper means of taking advantage of such defects in the plea as duplicity.⁷⁰ But if the plea be wholly unauthorized,⁷¹ as, for instance, where it is filed out of time,⁷² or entirely without merit in its substance, as where it is frivolous,⁷³ a motion to strike is the proper remedy.

60. *Chapman v. Sloan*, 2 N. H. 464; *Riley v. Riley*, 20 N. J. L. 114.

61. *Shafer v. Stonebraker*, 4 Gill & J. (Md.) 345; *Chapman v. Sloan*, 2 N. H. 464.

62. *Crump v. Bennett*, 2 Litt. (Ky.) 209; *Tappan v. Tappan*, 36 N. H. 98, 109.

63. *Ala.*—*McCreary v. Jones*, 96 Ala. 592, 11 So. 600; *Overdeer v. Wiley, Banks & Co.*, 30 Ala. 709. *Ill.* *Beesley v. Hamilton*, 50 Ill. 88; *Frazier v. Resor*, 23 Ill. 88. *Ind.*—*Ward v. Bennett*, 20 Ind. 440; *Supreme Council of C. B. L. v. Boyle* (Ind. App.), 42 N. E. 827; *Poult v. Slocum*, 3 Blackf. 421. *Mass.*—*Moors v. Parker*, 3 Mass. 310. *N. H.*—*Marsh v. Smith*, 18 N. H. 366. *N. Y.*—*Shannon v. Comstock*, 21 Wend. 457, 34 Am. Dec. 262. *Vt.*—*Clark v. Lathrop*, 33 Vt. 140.

64. *Hayden v. Nott*, 9 Conn. 367; *Downer v. Flint*, 28 Vt. 527.

65. See 7 STANDARD PROC. 104.

66. Confession and avoidance, ob-

jections to form of conclusion, see 5 STANDARD PROC. 231.

67. *Ill.*—*Orne v. Cook*, 31 Ill. 238. *N. J.*—*Shotwell's Exrs. v. Dennis*, 14 N. J. L. 501. *Tenn.*—*Mynatt v. Mynatt*, 6 Heisk. 311.

See generally the title "Demurrer."

68. *Griffiths v. Eyles*, 1 Bos. & P. 413, 126 Eng. Reprint 983.

69. *Pendleton v. Amy*, 13 Wall. (U. S.) 297, 20 L. ed. 579.

70. *Smith v. Clench*, 2 Q. B. 835, 114 Eng. Reprint 324.

71. *Ala.*—*Cunyus v. Guenther*, 96 Ala. 564, 11 So. 649. *Ind.*—*Merkle v. Bolles*, 6 Blackf. 288. *N. J.*—*Shotwell's Exrs. v. Dennis*, 14 N. J. L. 501.

72. *Pool v. Hill*, 44 Miss. 306, 311; *Morgan v. Dyer*, 10 Johns. (N. Y.) 161.

73. *Pool v. Hill*, 44 Miss. 306, 310; *Shotwell's Exrs. v. Dennis*, 14 N. J. L. 501; *Westervelt v. Marinus*, 3 N. J. L. 266. See generally the title "Frivolous and Sham Pleadings."

PLEAS IN CRIMINAL CASES.—See Abatement, Pleas of; Arraignment and Plea; Insane Persons; Jeopardy; Pardon.

PLEAS IN EQUITY

By the Editorial Staff.

I. DEFINITION AND CLASSIFICATION, 442

II. PURPOSE AND DISTINCTIONS, 442

III. PROPRIETY AND GENERAL UTILITY, 443

IV. SUPPORTING ANSWERS, 444

V. TIME FOR FILING, 444

VI. FORM AND SUFFICIENCY, 445

- A. *General Statement*, 445
- B. *Negative or Anomalous Pleas*, 446
- C. *Upon Information and Belief*, 447
- D. *Duplicity and Several Pleas*, 447
- E. *Commencement*, 449
- F. *Conclusion*, 449
 - 1. *General Statement*, 449
 - 2. *Verification*, 449

VII. AMENDMENTS, 450

VIII. WITHDRAWAL, 450

IX. PROCEEDING UPON PLEA, 450

- A. *General Statement*, 450
- B. *Setting Plea Down for Argument*, 451
- C. *Taking Issue on the Plea*, 452
- D. *Reference to Master*, 453
- E. *Allowed To Stand for Answer*, 454
- F. *Overruled by Answer*, 454

CROSS-REFERENCES:

Bills and Answers;	Pleas;
Equity Jurisdiction and	Time To Plead.
Procedure;	

Particular pleas, see the specific titles.

For forms, see 9 STANDARD PROC. 972, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION AND CLASSIFICATION.—A plea in equity is a special answer to the bill.¹ Considered with reference to their form, pleas in equity are generally divided into pure, or affirmative pleas, which rely for a defense upon matter dehors the record,² and pleas which, by way of contradistinction, are called pleas not pure, or anomalous or negative pleas, which rely wholly upon denials and negations of matter appearing in the record.³ In addition to this classification, pleas are sometimes divided into pleas in bar and pleas in abatement.⁴

II. PURPOSE AND DISTINCTIONS.—The purpose of a plea is to obviate the necessity of an examination of the witnesses at large,⁵ by not putting in issue, as does an answer, all the allegations in the bill,⁶ but by demanding, instead, the judgment of the court in the first instance whether the special matter set up by it does not preclude the plaintiff from his right to an answer or the relief prayed for.⁷ A plea is further distinguishable from an answer in that an answer under oath is evidence in favor of the defendant because made in obedience to the demand of the bill for a discovery,⁸ but a plea, which avoids the discovery prayed for, is no evidence in the defendant's favor, even when it is made under oath and negatives a material averment in the bill.⁹ A plea, also, serves a different purpose than a demurrer; it does not, as does a demurrer, simply question the equity¹⁰

1. Story's Eq. Pl. (10th ed.), §649, and the following: **U. S.**—*Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684. **Md.**—*Rouskulp v. Kershner*, 49 Md. 516. **N. J.**—*Gilson v. Appleby*, 78 N. J. Eq. 96, 78 Atl. 668. **Tenn.**—*Seifried v. People's Bank*, 2 Tenn. Ch. 17.

2. Story's Eq. Pl. (10th ed.), §§651, 667, and the following cases: **U. S.**—*United States v. California & O. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458, 37 L. ed. 354; *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684; *Vacuum Oil Co. v. Eagle Oil Co.*, 154 Fed. 867; *McCloskey v. Barr*, 38 Fed. 165. **Del.**—*Gilder v. Gilder*, 1 Del. Ch. 331. **Fla.**—*Da Costa v. Dibble*, 40 Fla. 418, 24 So. 911. **Ill.**—*Stephens v. St. Louis Union Trust Co.*, 260 Ill. 364, 103 N. E. 190; *Palmer v. Wood*, 48 Ill. App. 630; *Spangler v. Spangler*, 19 Ill. App. 28. **Tenn.**—*Whitthorne v. St. Louis Mut. Life Ins. Co.*, 3 Tenn. Ch. 147; *Benson v. Jones*, 1 Tenn. Ch. 498.

3. Story's Eq. Pl. (10th ed.), §§651, 667; *Stephens v. St. Louis Union Trust Co.*, 260 Ill. 364, 103 N. E. 190; *Whitthorne v. St. Louis Mut. Life Ins. Co.*, 3 Tenn. Ch. 147; *Benson v. Jones*, 1 Tenn. Ch. 498.

[a] But see *Glucose Sugar Ref. Co.*

v. Douglass & Co., 145 Fed. 949, where it is said that pleas are to be classified with reference to their form, as (1) affirmative, (2) negative and (3) anomalous.

4. See *Dan. Ch. Pr.* (6th Am. ed.) 626, and **U. S.**—*Chicago, B. & Q. R. Co. v. Weil*, 183 Fed. 956, 106 C. C. A. 296. **N. J.**—*Ewald v. Ortynsky*, 77 N. J. Eq. 76, 75 Atl. 577. **W. Va.**—*Foley v. Ruley*, 43 W. Va. 513, 27 S. E. 268.

5. Story's Eq. Pl. (10th ed.), §652; *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684; *Anderson v. Audenreid*, 8 Phila. (Pa.) 96.

6. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684; *Groel v. United Elect. Co.*, 70 N. J. Eq. 616, 61 Atl. 1061.

7. Story's Eq. Pl. (10th ed.), §649; *Rouskulp v. Kershner*, 49 Md. 516; *Hagthorp v. Hook's Admrs.*, 1 Gill & J. (Md.) 270, 283; *Donnell v. King's Heirs*, 7 Leigh (34 Va.) 393, 398.

8. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684. See also 4 STANDARD PROC. 151, and the ENCY. OF EV., title "Answers."

9. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684.

10. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684, where the court say: "The distinction be-

of the bill, or the formal sufficiency thereof,¹¹ but, instead it brings forward some distinct fact which, of itself creates a bar to the suit or the part to which the plea applies and thus to avoid the necessity of making the discovery asked for and the expense of going into the evidence at large.¹² Moreover, a plea is employed to reach defects in the plaintiff's case which do not appear on the face of the bill, while a demurrer is used when the defect inheres in the bill.¹³ A plea only resembles a demurrer in that it admits the facts not necessarily embraced in and denied by the plea.¹⁴

III. PROPRIETY AND GENERAL UTILITY.—Under the old chancery practice, when not disclosed by the bill, such defenses as a lack of jurisdiction over the person of the defendant,¹⁵ the pendency of another suit involving the same cause,¹⁶ the incapacity of the plaintiff to sue,¹⁷ and matters in abatement generally,¹⁸ could only be inter-

tween a demurrer and a plea dates as far back as the time of Lord Bacon, by the 58th of whose Ordinances for the Administration of Justice in Chancery, 'a demurrer is properly upon matter defective contained in the bill itself, and no foreign matter; but a plea is of foreign matter to discharge or stay the suit' . . . Lord Redesdale, in his Treatise on Pleadings, says: 'A plea must aver facts to which the plaintiff may reply, and not, in the nature of a demurrer, rest on facts in the bill.' Mitf. Pl. 297. And Mr. Jeremy, in a note to this passage, . . . observes, 'The prominent distinction between a plea and a demurrer, here noticed, is strictly true, even of that description of plea which is termed negative, for it is the affirmative of the proposition which is stated in the bill;' in other words, a plea which avers that a certain fact is not as the bill affirms it to be sets up matter not contained in the bill. That an objection to the equity of the plaintiff's claim, as stated in the bill, must be taken by demurrer and not by plea is so well established that it has been constantly assumed, and therefore seldom stated in judicial opinions.'

11. *McCloskey v. Barr*, 38 Fed. 165, where it is held that a plea which raises a question, such as multifariousness of the bill, which should be presented by demurrer, will be overruled.

12. **U. S.**—*Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684; *Central National Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. ed. 693. **Ga.**—*Union Branch R. Co. v. East Tennessee & G. R. Co.*, 14 Ga. 327. **Md.**—*Bush v. Linthicum*, 59 Md.

344; *Salmon v. Claggett*, 3 Bland 125.

13. **Fla.**—*City of West Palm Beach v. Ryder*, 74 So. 603. **Ga.**—*Black v. Black*, 15 Ga. 445. **N. J.**—*Kelly v. Masonis*, 79 N. J. Eq. 644, 82 Atl. 329.

See also 8 STANDARD PROC. 849, 850.

14. *Bush v. Linthicum*, 59 Md. 344; 8 STANDARD PROC. 849.

15. **U. S.**—*Pond v. Vermont Val. R. Co.*, 12 Blatchf. 280, 19 Fed. Cas. No. 11,265. **Ala.**—*Campbell v. Crawford*, 63 Ala. 392. **Ill.**—*Emerson v. Western Union R. Co.*, 75 Ill. 176; *Kimball v. Walker*, 30 Ill. 482. **N. J.**—*Wilson v. American Palace Car Co.*, 65 N. J. Eq. 730, 55 Atl. 997. **Vt.**—*Bank of Bel- lows Falls v. Rutland & B. R. Co.*, 28 Vt. 470.

16. **U. S.**—*Pierce v. Feagans*, 39 Fed. 587. **Md.**—*Baltimore Trust Co. v. George's Creek C. & I. Co.*, 119 Md. 21, 85 Atl. 949. **Vt.**—*Battell v. Matot*, 58 Vt. 271, 5 Atl. 479.

[a] *Compare Moore v. Grubbs*, 3 B. Mon. (Ky.) 77, where the court say that when there are two suits pending in the same court for the same cause an election may be required as well "as when one of the suits is in a court of equity and the other in a court of law—and, in the latter class of cases, the only appropriate course is to require an election. . . . And we have no doubt that the court may require an election without plea."

17. *Burger v. Potter*, 32 Ill. 66; *City of Chicago v. Cameron*, 22 Ill. App. 91; *Hoyt v. Hoyt*, 58 Vt. 538, 3 Atl. 316.

18. **U. S.**—*Chapman v. School Dist.*, Deady 108, 5 Fed. Cas. No. 2,607. **Ala.**—*Bank of St. Mary's v. St. John, Powers & Co.*, 25 Ala. 566. **Vt.**—*Hoyt v. Hoyt*, 58 Vt. 538, 3 Atl. 316.

posed by a plea, and this, stated in general terms, was the proper manner of presenting any matter of defense, not appearing on the face of the bill,¹⁹ which would, without going into the full merits,²⁰ reduce the cause, or some part thereof, to a single issue,²¹ and create a bar or obstruction to the entire suit, or to the part to which the plea was addressed.²²

In modern practice, however, pleas are an infrequent mode of defense,²³ these matters being now generally presented by an answer.²⁴ In a number of states the old rules of chancery pleading have been wholly superseded by Practice Acts or Codes of Procedure,²⁵ and in the United States courts pleas in equity have been abolished, along with demurrers, and all questions formerly presented in this manner must now be raised by motion to dismiss or answer.²⁶

IV. SUPPORTING ANSWERS.—The necessity, formal requisites, and sufficiency of an answer in support of a plea is fully treated elsewhere in this work.²⁷

V. TIME FOR FILING.²⁸—The general rule is that a defendant is allowed the same time for pleading as for answering,²⁹ and it has

19. Story's Eq. Pl. (10th ed.), §660, and the following: **U. S.**—Garrett v. New York Transit & Terminal Co., 29 Fed. 129; Noyes v. Willard, 1 Woods 187, 18 Fed. Cas. No. 10,374. **Fla.** Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448. **N. J.**—Kelly v. Masionis, 79 N. J. Eq. 644, 82 Atl. 329; Davis v. Davis, 57 N. J. Eq. 252, 41 Atl. 353. **Vt.**—Ainger v. Webster, 85 Vt. 446, 82 Atl. 666. **Va.**—Northwestern Bank v. Nelson, 1 Gratt. (42 Va.) 108.

[a] **Defenses appearing on the face of the bill** (1) must be taken advantage of by demurrer. Davis v. Davis, 57 N. J. Eq. 252, 41 Atl. 353. Thus, (2) for example, multifariousness (McCloskey v. Barr, 38 Fed. 165), (3) the existence of an adequate remedy at law, etc. (Gifford v. Thorn, 7 N. J. Eq. 90) must be raised by demurrer. As to the distinctions between a demurrer and a plea, see *supra*, II.

[b] **If additional facts are stated** the plea is good though it states, and partly relies upon, facts appearing in the bill. Missouri Pac. Ry. Co. v. Texas & P. R. Co., 50 Fed. 151; Ainger v. Webster, 85 Vt. 446, 82 Atl. 666.

20. Dugan v. Howard, 130 Md. 114, 99 Atl. 966.

21. **Ill.**—Spangler v. Spangler, 19 Ill. App. 28. **Mich.**—Mains v. Homer Steel-Fence Co., 116 Mich. 526, 74 N. W. 735, 5 Det. Leg. N. 30; Albany City Bank v. Dorr, Walk. Ch. 317. **N. J.**—Gilson v. Appleby, 78 N. J. Eq. 96, 73 Atl. 668. **N. Y.**—Loud v. Ser-

geant, 1 Edw. Ch. 164. **Eng.**—Morison v. Turnour, 18 Ves. Jr. 175, 34 Eng. Reprint 284.

22. Story's Eq. Pl. (10th ed.), §652, and the following: **U. S.**—Farley v. Kittson, 120 U. S. 303, 314, 7 Sup. Ct. 534, 30 L. ed. 684; Rhode Island v. Massachusetts, 14 Pet. 210, 10 L. ed. 423; Western Elect. Co. v. North Elect. Co., 135 Fed. 79, 67 C. C. A. 553; Computing Scale Co. v. Moore, 139 Fed. 197; United States v. American Bell Tel. Co., 30 Fed. 523. **Ga.** Union Branch R. Co. v. East Tennessee & G. R. Co., 14 Ga. 327. **N. Y.**—Goodrich v. Pendleton, 3 Johns. Ch. 384. **Va.**—Donnell v. King's Heirs, 7 Leigh (35 Va.) 398. **Wis.**—Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co., 5 Wis. 173. **Eng.** Morison v. Turnour, 18 Ves. Jr. 175, 34 Eng. Reprint 284.

23. Dugan v. Howard, 130 Md. 114, 99 Atl. 966; Rouskulp v. Kershner, 49 Md. 516.

24. Withers v. Denmead, 22 Md. 135.

25. See generally the statutes and the following: Cordier v. Schloss, 12 Cal. 143; Wa Ching v. Constantine, 1 Idaho 266.

26. Fed. Eq. Rule, No. 29; Montgomery's Manual of Fed. Proc., §950.

27. 4 STANDARD PROC. 151, et seq.

28. See generally the title "**Time To Plead.**"

29. Dan. Ch. Pl. & Pr. (6th Am. ed.), p. 690.

been held that a plea may be filed at any time before the bill is taken as confessed.³⁰ Any extension of time to plead must be applied for in the same manner as in the case of answers.³¹ A plea is generally considered as within the purview of an order extending the time to "answer,"³² unless the order clearly indicates,³³ or expressly declares³⁴ an intention to limit the defendant to an answer. But where, by stipulation, time to answer is extended in consideration of defendant's answering to the merits, a plea is improper and will be stricken out.³⁵

VI. FORM AND SUFFICIENCY.³⁶—A. GENERAL STATEMENT. The same strictness and exactness is required in pleas in equity as in pleas at law,³⁷ if not in matters of form, at least in matters of substance.³⁸ In the application and enforcement of these rules, however, courts of equity have always exercised a wide discretion.³⁹ As to the general sufficiency of a plea, it is a well established rule that it must either allege or deny some material fact, or matters of fact which are constituent elements of an ultimate general fact, which presents a single issue,⁴⁰ and which is a defense to the whole bill or so much thereof as it purports to answer.⁴¹ The plea must also be responsive to the

30. *Oliver v. Decatur*, 4 Cranch C. C. 453, 18 Fed. Cas. No. 10,494.

[a] When required to plead by a day certain, a plea may yet be filed after the expiration of that time if done before default is asked. *Lambert v. Hyers*, 27 Ill. App. 400.

31. *Dan. Ch. Pl. & Pr.* (6th Am. ed.), p. 690.

32. *Ill.*—*Kilgour v. Crawford*, 51 Ill. 249; *Bracken v. Kennedy*, 4 Ill. 558. *N. Y.*—*Heartt v. Corning*, 3 Paige 566. *Eng.*—*De Minckwitz v. Udney*, 16 Ves. Jr. 355, 33 Eng. Reprint 1018; *Roberts v. Hartley*, 1 Bro. C. C. 56, 2 Dick. 554, 28 Eng. Reprint 981.

[a] Compare *Allen v. Baugus*, 1 Swan (Tenn.) 404, where it was held that when a judgment pro confesso has been taken against a defendant for failure to plead to a bill filed against him, if that judgment be set aside and leave be given him to answer, he may neither plead nor demur without special leave of court.

33. *Brooks v. Purton*, 1 Y. & C. C. 271, 278, 62 Eng. Reprint 885.

34. *Hunter v. Nockolds*, 12 Jur. (Eng.) 149.

35. *Morgan v. Corlies*, 81 Ill. 72.

36. Forms of pleas in equity, generally and in particular cases, see 9 STANDARD PROC. 972 to 979.

37. *U. S.*—*Mutual Life Ins. Co. v. Brune's Assignee*, 96 U. S. 588, 24 L. ed. 737; *Piatt v. Oliver*, 1 McLean 295, 19 Fed. Cas. No. 11,114. *Ill.*

Gage v. Smith, 142 Ill. 191, 31 N. E. 430; *Cheney v. Patton*, 134 Ill. 422, 25 N. E. 792. *Md.*—*Danels v. Taggart*, 1 Gill & J. 311. *Mass.*—*Burditt v. Grew*, 8 Pick. 108. *Vt.*—*Dietrich v. Hutchinson*, 81 Vt. 160, 69 Atl. 661. *Eng.*—*Foster v. Vassall*, 3 Atk. 587, 26 Eng. Reprint 1138.

38. *Ill.*—*Gage v. Smith*, 142 Ill. 191, 31 N. E. 430; *Cheney v. Patton*, 134 Ill. 422, 25 N. E. 792. *Md.*—*Danels v. Taggart's Admr.*, 1 Gill & J. 311. *Mass.*—*Burditt v. Grew*, 8 Pick. 108.

39. *U. S.*—*Mutual Life Ins. Co. v. Brune's Assignee*, 96 U. S. 588, 24 L. ed. 737. *Vt.*—*Dietrich v. Hutchinson*, 81 Vt. 160, 69 Atl. 661. *Eng.*—*Foster v. Vassall*, 3 Atk. 587, 26 Eng. Reprint 1138.

40. See *infra*, VI, D.

41. Story's Eq. Pl. (10th ed.), §652, and the following cases: *U. S.*—*Mutual Life Ins. Co. v. Brune's Assignee*, 96 U. S. 588, 24 L. ed. 737; *McCloskey v. Barr*, 38 Fed. 165. *Ala.*—*Lyon v. Dees*, 84 Ala. 595, 4 So. 407. *Fla.*—*Da Costa v. Dibble*, 40 Fla. 418, 24 So. 911. *Ill.*—*Gage v. Smith*, 142 Ill. 191, 31 N. E. 430. *Me.*—*Quint v. Little*, 4 Greenl. 495. *Md.*—*Danels v. Taggart's Admr.*, 1 Gill & J. 311, 322. *Mich.*—*Clark v. Saginaw City Bank*, Harr. 240. *N. H.*—*Bell v. Woodward*, 42 N. H. 181. *N. J.*—*Gilson v. Appleby*, 78 N. J. Eq. 96, 78 Atl. 668; *Mount v. Manhattan Co.*, 41 N. J. Eq. 211, 3 Atl. 726. *N. Y.*—*Bogardus v. Trinity Church*, 4 Paige 178. *Wis.*

bill.⁴² Its averments must be concise,⁴³ direct and positive,⁴⁴ not argumentative,⁴⁵ and must be averments of facts,⁴⁶ and not inferences or conclusions.⁴⁷ It must not be uncertain;⁴⁸ thus, if it does not meet the entire bill it must indicate to what part of the bill it is addressed,⁴⁹ and what allegations in the bill it purposes to admit or deny.⁵⁰ Necessary facts must not be left to be supplied by inference,⁵¹ indeed, the language of the plea must exclude every intendment which would render the plea inoperative, otherwise it is insufficient.⁵² A plea need not extend to the entire bill; it may be interposed to a part thereof,⁵³ but, whether addressed to the whole or only a portion of the bill, it must be an answer to so much of the plaintiff's case as it assumes to meet.⁵⁴

B. NEGATIVE OR ANOMALOUS PLEAS.—Any doubt that may have formerly existed as to the propriety and sufficiency of a negative plea in equity has been dissipated and it is now well settled that such a plea

Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co., 5 Wis. 173. **Eng.**—Hardman v. Ellames, 5 Sim. 640, 58 Eng. Reprint 480; Robertson v. Lubbock, 4 Sim. 161, 58 Eng. Reprint 61.

42. Story's Eq. Pl. (10th ed.), §659; Computing Scale Co. v. Moore, 139 Fed. 197; Wilson v. Wilson, 25 R. I. 446, 56 Atl. 773.

43. Scharfenberg v. New Decatur, 155 Ala. 651, 47 So. 95.

44. **U. S.**—McCloskey v. Barr, 38 Fed. 165. **Ark.**—Moss v. Ashbrooks, 12 Ark. 369. **Cal.**—Bruck v. Tucker, 42 Cal. 346. **Fla.**—Harvey v. Morgan, 58 Fla. 427, 51 So. 140. **N. H.**—Bassett v. Salisbury Mfg. Co., 43 N. H. 249.

[a] Same as in Pleading at Law. "In this respect the rules of pleading in equity are analogous to the rules at law." Story's Eq. Pl. (10th ed.), §661.

45. **U. S.**—McDonald v. Salem Capital Flour Mills Co., 31 Fed. 577, 12 Sawy. 492. **Fla.**—Harvey v. Morgan, 58 Fla. 427, 51 So. 140. **N. H.**—Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574; Bassett v. Salisbury Mfg. Co., 43 N. H. 249.

46. **U. S.**—Central National Bank v. Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. ed. 693. **Fla.**—Harvey v. Morgan, 58 Fla. 427, 51 So. 140. **Tenn.**—Whitthorne v. St. Louis Mut. Life Ins. Co., 3 Tenn. Ch. 147.

47. Central National Bank v. Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. ed. 693; McCloskey v. Barr, 38 Fed. 165; Parmelee v. Tennessee

& S. V. R. Co., 13 Lea (Tenn.) 600; Whitthorne v. St. Louis M. Life Ins. Co., 3 Tenn. Ch. 147. See the title "Conclusions of Law."

48. **U. S.**—Computing Scale Co. v. Moore, 139 Fed. 197. **Ala.**—Scharfenberg v. New Decatur, 155 Ala. 651, 47 So. 95. **Ark.**—Moss v. Ashbrooks, 12 Ark. 369.

49. Story's Eq. Pl. (10th ed.), §659; Snow v. Counselman, 136 Ill. 191, 26 N. E. 590; Jarvis v. Palmer, 11 Paige (N. Y.) 650; Van Hook v. Whitlock, 3 Paige (N. Y.) 409; Davison v. Schermerhorn, 1 Barb. (N. Y.) 480.

50. Carmichael v. Hunter, 4 How. (Miss.) 308, 35 Am. Dec. 401.

51. Harvey v. Morgan, 58 Fla. 427, 51 So. 140, Da Costa v. Dibble, 40 Fla. 418, 24 So. 911; Meeker v. Marsh, 1 N. J. Eq. 198.

52. Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471; Whitlock v. Fiske, 3 Edw. Ch. (N. Y.) 131.

53. **U. S.**—Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684. **Ala.**—Cartwright v. West, 173 Ala. 198, 55 So. 917. **Me.**—Graves v. Blondell, 70 Me. 190.

54. Francis v. White, 160 Ala. 523, 49 So. 334; Scharfenberg v. New Decatur, 155 Ala. 651, 47 So. 95; Supreme Lodge, K. & L. of H. v. Wing, 131 Ala. 395, 31 So. 3.

[a] Where a bill is framed upon two theories, a plea which is interposed to the entire bill and only meets the same as to one of such theories is bad. Supreme Lodge Knights & Ladies of Honor v. Wing, 131 Ala. 395, 31 So. 3.

is good,⁵⁵ at least in those instances where the title of the complainant or his right to maintain the suit is denied.⁵⁶ But a mere denial of a substantive fact alleged in the bill as grounds for relief, is not proper as a plea.⁵⁷ When such a plea is accompanied by an answer it should cover only so much of the bill as does not relate to a discovery of those facts as to which the plaintiff may require an answer.⁵⁸

C. UPON INFORMATION AND BELIEF. — A plea may not be upon information and belief when the facts stated are such as must necessarily be within the knowledge of the defendant; but, when it relates exclusively to the acts of third persons it may be.⁵⁹

D. DUPLICITY AND SEVERAL PLEAS.⁶⁰ — A plea may not, without leave of court, present more than one defense to the entire bill, or any part thereof,⁶¹ nor may the defendant, without leave, present several

55. Story's Eq. Pl. (10th ed.), §668; *Rhino v. Emery*, 79 Fed. 483; *Stephens v. St. Louis Union Trust Co.*, 260 Ill. 364, 103 N. E. 190.

56. *Glucose Sugar Ref. Co. v. Douglass & Co.*, 145 Fed. 949; *Champlin v. Champlin*, 2 Edw. Ch. (N. Y.) 362.

57. *U. S.*—*Glucose Sugar Ref. Co. v. Douglass & Co.*, 145 Fed. 949. *N. Y.* *Bailey v. LeRoy*, 2 Edw. Ch. 514. *Tenn.*—*Benson v. Jones*, 1 Tenn. Ch. 498.

58. *Portarlington v. Soulbey*, 6 Sim. 356, 58 Eng. Reprint 628.

59. *Parker v. Parker*, Walk. Ch. (Mich.) 457. See generally 12 STANDARD PROC. 902, *et seq.* See also 4 STANDARD PROC. 172.

60. Duplicity generally, see 7 STANDARD PROC. 931, *et seq.* See also the title "Multifariousness."

61. *U. S.*—*Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. ed. 423; *Bunker Hill & S. M. & C. Co. v. Shoshone Min. Co.*, 109 Fed. 504, 47 C. C. A. 200; *Sims v. United Wireless Tel. Co.*, 179 Fed. 540; *Jahn v. Champagne Lumb. Co.*, 152 Fed. 669; *McCloskey v. Barr*, 38 Fed. 165. *Ala.* *New Decatur v. Scharfenberg*, 147 Ala. 367, 41 So. 1025, 119 Am. St. Rep. 81. *Fla.*—*Pinellas Packing Co. v. Clearwater Citrus, etc. Assn.*, 65 Fla. 340, 61 So. 625; *Mitchell v. Mason*, 61 Fla. 692, 55 So. 387. *Ind.*—*Driver v. Driver*, 6 Ind. 286. *Mich.*—*Mains v. Homer Steel-Fence Co.*, 116 Mich. 526, 74 N. W. 735, 5 Det. Leg. N. 30; *Albany City Bank v. Dorr*, Walk. Ch. 317; *Carroll v. Potter*, Walk. Ch. 355. *N. Y.*—*Didier v. Davison*, 10 Paige 515; *Loud v. Sergeant*, 1 Edw. Ch. 164. *Pa.*—*Underwood v. Warner*, 3 Phila. 414; *New York, S. & W. Coal Co. v. Spencer*, 3 Pa. Dist. 694. *Eng.*—*Wat-*

kins v. Stone, 2 Sim. 49, 57 Eng. Reprint 709; *Ritchie v. Aylwin*, 15 Ves. Jr. 79, 33 Eng. Reprint 685.

[a] **The Reason.**—(1) "If two matters of defense may be thus offered, the same reason will justify the making of any number of defenses in the same way; by which the ends intended by a plea would not be obtained; and the court would be compelled . . . to give instant judgment upon a variety of defenses with all their circumstances, as alleged by the plea, before they are made out in proof; and, consequently, would decide upon a complicated case, which might not exist." Story's Eq. Pl. (10th ed.), §653; and *Benson v. Jones*, 1 Tenn. Ch. 498. (2) Furthermore, "if the defense requires more than one plea, it is easier made by answer, and is less likely to produce delay. The only object of allowing a plea at all is because it narrows the defense, and if this end cannot be attained, that mode of defense is useless." *Benson & Co. v. Jones*, 1 Tenn. Ch. 498.

[b] **One plea in bar to the whole bill and several pleas to distinct parts of the same bill is a violation of this rule.** *Van Hook v. Whitlock*, 3 Paige (N. Y.) 409.

[c] **Two facts which are inconsistent with each other render the plea bad for duplicity.** *Emmott v. Mitchell*, 14 Sim. 432, 60 Eng. Reprint 426.

[d] **Statutes authorizing the defendant in an "action" to plead several defenses has been held not to apply to pleadings in equity.** *Didier v. Davison*, 10 Paige (N. Y.) 515, where the court adds: "But when the word 'suit' is used in reference to legal proceedings, by the revisers, the statute may apply to a proceed-

distinct and separate pleas to the same bill.⁶² It is only the issue, however, that is thus required to be single, and so the plea may, without being thereby rendered duplicitous, set up a number of facts which all tend to a single conclusion and give as their result one clear ground upon which the equity of the whole bill may be disposed of,⁶³ and, if matter which would otherwise render a plea duplicitous is immaterial to the defense and may be rejected as surplusage, the plea will yet be sustained.⁶⁴ Likewise, a plea is not bad because its denials are detailed and particular.⁶⁵ To different parts of the bill, moreover, different and separate defenses may be pleaded,⁶⁶ and the court may,⁶⁷ on a special application,⁶⁸ made upon notice,⁶⁹ permit the defendant to file two or more pleas, when great inconvenience would otherwise result.⁷⁰ Where leave to plead double is given, each defense must be set up by a separate plea.⁷¹

ing either at law or in equity, unless there is something in the context to confine the operation of the statutory provision to suits in a particular court."

[e] **Proper practice** where more than one defense is relied upon is to set them up by answer. *Reissner v. Anneßs*, 20 Fed. Cas. No. 11,686.

62. **U. S.**—*United States v. California & O. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458, 37 L. ed. 354; *McCloskey v. Barr*, 38 Fed. 165. **N. J.** *Mount v. Manhattan Bank*, 44 N. J. Eq. 297, 18 Atl. 80; *Mount v. Manhattan Co.*, 43 N. J. Eq. 25, 9 Atl. 114. **N. Y.**—*Didier v. Davison*, 10 Paige 515. **Tenn.**—*Benson v. Jones*, 1 Tenn. Ch. 498.

63. **U. S.**—*Sims v. United Wireless Tel. Co.*, 179 Fed. 540; *Underwood Typewriter Co. v. Manning*, 165 Fed. 451; *Vacuum Oil Co. v. Eagle Oil Co.*, 122 Fed. 105; *Hazard v. Durant*, 25 Fed. 26. **N. J.**—*Gilson v. Appleby*, 78 N. J. Eq. 96, 78 Atl. 668; *Sohege v. Singer Mfg. Co.*, 73 N. J. Eq. 567, 68 Atl. 64; *Harrison v. Farrington*, 38 N. J. Eq. 358, 362. **N. Y.**—*Didier v. Davison*, 2 Sandf. Ch. 61; *Bogardus v. Trinity Church*, 4 Paige 177, 195. **Eng.**—*Watkins v. Stone*, 2 Sim. 49, 57 Eng. Reprint 709; *Ritchie v. Aylwin*, 15 Ves. Jr. 79, 33 Eng. Reprint 685.

64. *Bell v. Woodward*, 42 N. H. 181. See generally the title "**Surplusage and Scandal.**"

65. *Harrison v. Farrington*, 38 N. J. Eq. 358.

66. *New York, S. & W. Coal Co. v. Spencer*, 3 Pa. Dist. 694.

67. **N. J.**—*Mount v. Manhattan Co.*, 41 N. J. Eq. 211, 3 Atl. 726. **N. Y.**

Didier v. Davison, 10 Paige 515; *Van Hook v. Whitlock*, 3 Paige 409. **Pa.** *Underwood v. Warner*, 3 Phila. 414.

68. **N. J.**—*Mount v. Manhattan Bank*, 44 N. J. Eq. 297, 18 Atl. 80; *Mount v. Manhattan Co.*, 43 N. J. Eq. 25, 9 Atl. 114. **N. Y.**—*Didier v. Davison*, 10 Paige 515; *Van Hook v. Whitlock*, 3 Paige 409. **Pa.**—*Underwood v. Warner*, 3 Phila. 414.

69. *Mount v. Manhattan Bank*, 44 N. J. Eq. 297, 18 Atl. 80; *Mount v. Manhattan Co.*, 43 N. J. Eq. 25, 9 Atl. 114; *Underwood v. Warner*, 3 Phila. (Pa.) 414.

70. **U. S.**—*Sims v. United Wireless Tel. Co.*, 179 Fed. 540. **Md.**—*Moreton v. Harrison*, 1 Bland 491. **Mich.**—*Andrews v. Osborn*, 159 Mich. 77, 123 N. W. 599. **N. J.**—*Mount v. Manhattan Bank*, 44 N. J. Eq. 297, 18 Atl. 80; *Mount v. Manhattan Co.*, 41 N. J. Eq. 211, 3 Atl. 726. **N. Y.**—*Didier v. Davison*, 10 Paige 515. **Pa.**—*Underwood v. Warner*, 3 Phila. 414. **R. I.**—*Providence Sav. Inst. v. Barr*, 17 R. I. 131, 20 Atl. 245. **Eng.**—*Hardman v. El-lames*, 5 Sim. 640, 645, 58 Eng. Reprint 480; *Saunders v. Druce*, 3 Drew. 140, 24 L. J. Ch. 593, 3 Wkly. Rep. 301, 61 Eng. Reprint 856.

[a] **Such leave granted only in clear cases of serious inconvenience.** *Mount v. Manhattan Co.*, 41 N. J. Eq. 726. **N. Y.**—*Didier v. Davison*, 10 Paige (N. Y.) 515.

[b] **That the defendant has several defenses of which he might avail himself by plea if permitted to do so is not enough to induce the court to give leave so to do.** *Didier v. Davison*, 10 Paige (N. Y.) 515.

71. **Fla.**—*Pinellas Packing Co. v.*

E. COMMENCEMENT.⁷² — It is proper to assert, in the commencement, that the defendant does not confess or acknowledge any or all of the allegations of the bill,⁷³ but this is not essential to a good plea.⁷⁴ When a plea is accompanied by an answer it should be headed "The plea and answer" or "The joint plea and answer" or "The joint and several plea and answer" as the case may be.⁷⁵

F. CONCLUSION. — **1. General Statement.** — It does not appear that any particular form of conclusion is necessary in pleas in equity.⁷⁶ With slight variations as to form, however, the conclusion commonly employed is a prayer for the judgment of the court as to whether or not the defendant shall be compelled to answer further to the bill.⁷⁷ When a disability in the plaintiff is pleaded in abatement the proper conclusion is a prayer "that the bill remain without day until the disability be removed" and not for a dismissal of the bill.⁷⁸

It is generally required that the plea be signed by counsel.⁷⁹

2. Verification. — It is a general rule that when the defendant pleads matters of fact dehors the record he must make oath to the truth thereof,⁸⁰ and that it is not interposed merely to delay the cause.⁸¹ This rule is altered by statutes in some jurisdictions which only require that the defendant make oath that the plea is interposed in good faith and not for the purpose of delay.⁸² Where such a statute prescribes the form of the verification no other or further verification is necessary,⁸³ and, if the statute does not require it, the oath need not be

Clearwater Citrus, etc. Assn., 65 Fla. 340, 61 So. 625. **N. J.**—Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726. **N. Y.**—Didier v. Davison, 10 Paige 515.

72. Form for commencement of plea in equity, see 9 STANDARD PROC. 972.

73. Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471.

74. Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471.

75. Beach, Mod. Eq. Pr., §317.

76. Dan. Ch. Pr. (6th Am. ed.), p. 685.

[a] **No distinction between pleas in bar and pleas in abatement;** in either case the conclusion is the same. Evans v. Monot, 57 N. C. 227.

77. Dan. Ch. Pr. (6th Am. ed.), p. 686.

78. Beck v. Beck, 36 Miss. 72.

79. Dan. Ch. Pr. (6th Am. ed.), p. 685.

80. U. S.—Central Nat. Bank v. Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. ed. 693. **Md.**—Carroll v. Waring, 3 Gill & J. 491. **Miss.** Beck v. Beck, 36 Miss. 72. **N. H.** Bassett v. Salisbury Mfg. Co., 43 N. H. 249. **N. Y.**—Heartt v. Corning, 3 Paige 566. **Tenn.** Graham's Heirs v.

Nelson's Heirs, 5 Humph. 605; Anderson v. Bedtord, 4 Coldw. 464.

[a] **Compare** New Decatur v. Scharfenberg, 147 Ala. 367, 41 So. 1025, 119 Am. St. Rep. 81, where the court says: "Unless there be some rule or statute requiring it, pleas need not be verified by affidavit."

[b] **But a plea which sets up a public record of the same court in which the action is pending need not be verified.** Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471.

81. Painter v. Harding, 3 Phila. (Pa.) 214.

82. See generally the statutes, and Harrison v. Farrington, 38 N. J. Eq. 358.

83. Harrison v. Farrington, 38 N. J. Eq. 358, where the court says: "The old rule on the subject was that to a plea of matter in pais in bar the defendant must make oath that it is true. And it has been held that such oath is requisite, even though the bill pray an answer without oath. Heartt v. Corning, 3 Paige 566. But where the statute directs what the verification of the plea shall be, it must be assumed that no further or other verification is necessary."

that the matter set up in the plea is true.⁸⁴ The affidavit may, in a proper case, be amended.⁸⁵

VII. AMENDMENTS.—Where the justice of the case requires it the court may allow an amendment of the plea.⁸⁶ Thus, where the substance of a plea is apparently good, the court may allow an amendment to correct formal inaccuracies⁸⁷ such as an imperfect verification.⁸⁸

VIII. WITHDRAWAL.⁸⁹—The defendant filing a plea may withdraw it,⁹⁰ and may, with the court's permission, plead *de novo*.⁹¹

IX. PROCEEDING UPON PLEA.—A. GENERAL STATEMENT. The proceedings upon a plea are very similar to those taken upon demurrer to the bill.⁹² Either the plaintiff or the defendant⁹³ may set the plea down for argument and thus test its legal sufficiency,⁹⁴ or the plaintiff may file a replication to it and test its truth.⁹⁵ A motion to strike from the files is the proper remedy when several pleas have been filed without leave of court,⁹⁶ and the usual mode of taking advantage of an insufficient verification is by a motion, on notice,⁹⁷ to take the plea from the files,⁹⁸ and objection on this ground may not be made upon the argument of the plea,⁹⁹ nor upon the hearing.¹ It has been held, however, that in case of an insufficient verification the plea may be simply disregarded.² In some proper manner the plea must be disposed of before either party may take any further step in the cause,³ and where a plea is directed against a part of the bill only and is accompanied by an answer, the plaintiff may not, until the plea has

84. *Harrison v. Farrington*, 38 N. J. Eq. 358.

85. See *infra*, VII.

86. *Greene v. Harris*, 11 R. I. 5.

87. *Mich.—Freeman v. Michigan State Bank*, Harr. 311. **N. H.**—*Bell v. Woodward*, 42 N. H. 181. **N. J.** *Driggs v. Garretson*, 25 N. J. Eq. 178. **R. I.**—*Greene v. Harris*, 11 R. I. 5. **Eng.**—*Dobson v. Leadbeater*, 13 Ves. Jr. 230, 33 Eng. Reprint 280; *Merrewether v. Mellish*, 13 Ves. Jr. 435, 33 Eng. Reprint 357.

88. *Cheatham v. Pearce*, 89 Tenn. 668, 15 S. W. 1080; *Trabue v. Higden*, 4 Coldw. (Tenn.) 620, 624.

89. **Withdrawal of pleadings generally**, see the title "**Striking Out and Withdrawal**."

90. *Foley v. Ruley*, 43 W. Va. 513, 27 S. E. 268, where it is said that another defendant may not thereafter rely upon the plea, nor will he be heard to complain of its withdrawal.

91. *Greene v. Harris*, 11 R. I. 5; *Nobkissen v. Hastings*, 2 Ves. Jr. 85, 30 Eng. Reprint 535.

92. *Rouskulp v. Kershner*, 49 Md. 516.

Hearing on demurrer, see 6 STANDARD PROC. 978.

93. **D. C.**—*Wagenhurst v. Wineland*, 22 App. Cas. 356. **N. J.**—*Flagg v. Bonnel*, 10 N. J. Eq. 82. **Tenn.**—*Montgomery v. Olwell*, 1 Tenn. Ch. 183.

94. See *infra*, IX, B.

95. See *infra*, IX, C.

96. *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 249; *Benson v. Jones*, 1 Tenn. Ch. 498, where it is said that perhaps the court might do this of its own motion.

97. *Harrison v. Farrington*, 38 N. J. Eq. 358.

98. **Ill.**—*Dunn v. Keegin*, 4 Ill. 292. **N. H.**—*Bassett v. Salisbury Mfg. Co.*, 43 N. H. 249. **N. J.**—*Harrison v. Farrington*, 38 N. J. Eq. 358. **N. Y.** *Heartt v. Corning*, 3 Paige 566.

99. *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 249; *Heartt v. Corning*, 3 Paige (N. Y.) 566.

1. *Cook v. Sterling Elect. Co.*, 118 Fed. 45; *Harrison v. Farrington*, 38 N. J. Eq. 358.

2. *Central National Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. ed. 693.

3. *Beach*, Mod. Eq. Pr., §324.

been argued, except to the answer,⁴ without admitting the truth of the plea.⁵

B. SETTING PLEA DOWN FOR ARGUMENT.—The proper manner of testing the sufficiency of the plea is by setting it down for argument,⁶ except where the matters alleged in the plea are not proper to be so brought forward; in which case the plea may be stricken out on motion,⁷ or set down as an answer to the bill.⁸ The effect of setting a plea down for argument is to admit the truth of all the facts therein stated,⁹ and, in subsequently determining its sufficiency, every fact stated in the bill and not denied by the plea is also taken as true,¹⁰ leaving as the only issue to be determined upon the argument the legal sufficiency

4. Beach, Mod. Eq. Pr., §324.

5. Brownell v. Curtis, 10 Paige (N. Y.) 210.

6. **U. S.**—Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684; Glucose Sugar Ref. Co. v. Douglass & Co., 145 Fed. 949. **Ala.**—Brunson v. Rosenheim, 149 Ala. 112, 43 So. 31. **Ark.**—Peay v. Duncan, 20 Ark. 85. **D. C.**—Wagenhurst v. Wineland, 22 App. Cas. 356. **Fla.**—Pinellas Packing Co. v. Clearwater Citrus, etc. Assn., 65 Fla. 340, 61 So. 625; Spaulding v. Ellsworth, 39 Fla. 76, 21 So. 812. **Ill.**—Perry v. United States School Furniture Co., 232 Ill. 101, 83 N. E. 444; Lester v. Stevens, 29 Ill. 155; Cochran v. McDowell, 15 Ill. 10. **Md.**—Rouskulp v. Kershner, 49 Md. 516. **Miss.**—Winters v. Claitor, 54 Miss. 341; Smith v. Cozart, 45 Miss. 698. **N. J.**—Moore v. Moore, 74 N. J. Eq. 733, 70 Atl. 684; Schoettle v. Hengen (N. J. Eq.), 66 Atl. 922; Corlies v. Corlies' Exrs., 23 N. J. Eq. 197; Davison's Exrs. v. Johnson, 16 N. J. Eq. 112. **Tenn.**—Hannum v. McInturf, 6 Baxt. 225; Klepper v. Powell, 6 Heisk. 503; Graham's Heirs v. Nelson's Heirs, 5 Humph. 605. **Wis.**—Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314.

[a] **A motion to strike** is not proper practice, but the court may, in its discretion, consider such a motion as though the plea had been set down for argument. Corlies v. Corlies' Exrs., 23 N. J. Eq. 197; Brevard v. Summar, 2 Heisk. (Tenn.) 97.

[b] **A demurrer** to the plea is likewise improper but may also, if no substantial rights are thereby prejudiced, be treated as a setting down for argument. Zimmerman v. So Relle, 80 Fed. 417, 25 C. C. A. 518; Perry v. United States School Furniture Co., 232 Ill. 101, 83 N. E. 444. See also

Klepper v. Powell, 6 Heisk. (Tenn.) 503.

7. Glucose Sugar Ref. Co. v. Douglass & Co., 145 Fed. 949.

8. Glucose Sugar Ref. Co. v. Douglass & Co., 145 Fed. 949.

9. **U. S.**—Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684; Schnauffer v. Aste, 148 Fed. 867; General Elect. Co. v. Bullbek Elect. Mfg. Co., 138 Fed. 412. **Ala.**—New Decatur v. Scharfenberg, 147 Ala. 367, 41 So. 1025, 119 Am. St. Rep. 81; McKee v. West, 141 Ala. 531, 37 So. 740, 109 Am. St. Rep. 54. **Fla.**—Wilson v. Mitchell, 43 Fla. 107, 30 So. 703; Spaulding v. Ellsworth, 39 Fla. 76, 21 So. 812; Brown v. Solary, 37 Fla. 102, 19 So. 161. **Ill.**—Perry v. United States Furniture Co., 232 Ill. 101, 83 N. E. 444; Gouwens v. Gouwens, 222 Ill. 223, 78 N. E. 597. **Me.**—York Mfg. Co. v. Cutts, 18 Me. 204. **Mass.**—Dorsey v. Corkery, 227 Mass. 498, 116 N. E. 870. **N. J.**—Mackey v. Mackey, 71 N. J. Eq. 686, 63 Atl. 984; Groel v. United Elec. Co., 70 N. J. Eq. 616, 61 Atl. 1061. **Wis.**—Rowley v. Williams, 5 Wis. 151.

[a] **A Qualified Admission.**—The admission of the truth of the allegations of the plea is made only for the purpose of testing its legal sufficiency. Wilson v. Mitchell, 43 Fla. 107, 30 So. 703.

10. **U. S.**—McCloskey v. Barr, 38 Fed. 165; Goldsmith v. Gilliland, 24 Fed. 154, 10 Sawy. 606. **Fla.**—Spaulding v. Ellsworth, 39 Fla. 76, 21 So. 812; Brown v. Solary, 37 Fla. 102, 19 So. 161. **Ill.**—Gage v. Smith, 142 Ill. 191, 195, 31 N. E. 430. **Me.**—Graves v. Blondell, 70 Me. 190. **Mich.**—Davis v. McCamman, 168 Mich. 587, 134 N. W. 1028. **N. J.**—Miller v. United States Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509.

of the facts alleged in the plea to defeat the plaintiff's case.¹¹

The manner of setting the plea down for argument is governed by local rules of practice.¹² It has been held, however, that no formal order in writing upon the minutes is necessary,¹³ although that would be the better practice.¹⁴ When the plea is ready to be argued, the parties appear informally in court and proceed with the matter, no attention being paid to a formal entry setting the hearing on the minutes, order book or docket.¹⁵

If the plea is allowed it is thereby determined that the plea, if subsequently proved to be true, is a complete bar to so much of the bill as it covers;¹⁶ if the plea is overruled the cause proceeds as if no such plea had been filed,¹⁷ and the defendant may then answer on the merits.¹⁸

C. TAKING ISSUE ON THE PLEA.—If the plea is allowed, or the plaintiff is willing to concede the sufficiency thereof and it is only desired to test the truth of its allegations, issue is taken thereon by filing a replication.¹⁹ By so doing the legal sufficiency²⁰ of the plea

11. **U. S.**—United States *v.* California & O. Land Co., 148 U. S. 31, 13 Sup. Ct. 458, 37 L. ed. 354; Farley *v.* Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684. **Fla.**—Brown *v.* Solary, 37 Fla. 102, 19 So. 161. **Ill.**—Perry *v.* United States School Furniture Co., 232 Ill. 101, 83 N. E. 444; Snow *v.* Counselman, 136 Ill. 191, 26 N. E. 590. **Wis.**—Rowley *v.* Williams, 5 Wis. 151.

[a] Operates as a demurrer to this extent. Korn *v.* Wiebusch, 33 Fed. 50; Davison's Exrs. *v.* Johnson, 16 N. J. Eq. 112.

12. Beach, Mod. Eq. Pr., §325.

13. Electrolibration Co. *v.* Jackson, 52 Fed. 773.

14. Electrolibration Co. *v.* Jackson, 52 Fed. 773.

15. Electrolibration Co. *v.* Jackson, 52 Fed. 773.

16. **U. S.**—United States *v.* Dalles Military Road Co., 140 U. S. 599, 11 Sup. Ct. 988, 35 L. ed. 560. **Mich.**—Detroit, L. & N. R. Co. *v.* McCammon, 108 Mich. 368, 66 N. W. 471. **N. H.**—Bassett *v.* Salisbury Mfg. Co., 43 N. H. 249. **N. J.**—Flagg *v.* Bonnel, 10 N. J. Eq. 82. **Tenn.**—Hannum *v.* McInturf, 6 Baxt. 225.

17. Dorsey *v.* Corkery, 227 Mass. 498, 116 N. E. 870.

18. **U. S.**—Wooster *v.* Blake, 7 Fed. 816. **S. C.**—Bush *v.* Bush, 1 Strobb. Eq. 377. **Tenn.**—Kendrick *v.* Davis, 3 Coldw. 524.

For additional authorities, see 4

STANDARD PROC. 151, note 93.

19. **U. S.**—United States *v.* Dalles Military Road Co., 140 U. S. 599, 11 Sup. Ct. 988, 35 L. ed. 560; Farley *v.* Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684; Rhode Island *v.* Massachusetts, 14 Pet. 210, 10 L. ed. 423. **Ark.**—Peay *v.* Duncan, 20 Ark. 85. **Fla.**—Austin *v.* Hoxsie, 44 Fla. 199, 32 So. 878. **Md.**—Rousculp *v.* Kershner, 49 Md. 516. **Mass.**—Dorsey *v.* Corkery, 227 Mass. 498, 116 N. E. 870. **Miss.**—Smith *v.* Cozart, 45 Miss. 698. **N. H.**—Bassett *v.* Salisbury Mfg. Co., 43 N. H. 249. **N. J.**—Moore *v.* Moore, 74 N. J. Eq. 733, 70 Atl. 684; Davison's Exr. *v.* Johnson, 16 N. J. Eq. 112; McEwen *v.* Broadhead, 11 N. J. Eq. 129. **Tenn.**—Hannum *v.* McInturf, 6 Baxt. 225.

Replications in equity, see the title "Replication and Reply."

[a] In Tennessee a statute expressly provides for such practice. Cheatham *v.* Pearce, 89 Tenn. 668, 15 S. W. 1080, decided under what is now §6203, Shannon's Code of Tennessee (1917 ed.).

20. **U. S.**—Farley *v.* Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684; Kennedy *v.* Creswell, 101 U. S. 641, 25 L. ed. 1075; McAleer *v.* Lewis, 75 Fed. 734. **Ala.**—Brunson *v.* Rosenheim, 149 Ala. 112, 43 So. 31; Holloway *v.* Southern Bldg. & Loan Assn., 136 Ala. 160, 33 So. 887; Tyson *v.* Decatur Land Co., 121 Ala. 414, 26 So. 507. **Ark.**—Miller *v.* Fraley, 21 Ark. 22. **Ill.**—Perry *v.* United States School

is admitted, but the truth of the facts therein alleged is denied.²¹

The hearing proceeds the same as upon a replication to an answer.²² No fact is in issue but the truth of the matter pleaded,²³ and, if the plea be subsequently found to be true in fact the bill must, to the extent to which it is covered by the plea, be dismissed,²⁴ as to the defendant who filed the plea,²⁵ even though the plea may be defective²⁶ in form²⁷ or in substance.²⁸ The weight of authority is that if issue be taken on a plea in bar of the whole bill and the plea be proved untrue the plaintiff is entitled to a decree as though the bill had been confessed.²⁹ Some cases hold, however, that after a plea has been found untrue the defendant may yet answer to the merits.³⁰ But it is clear, in any event that the same matter may not be set up by answer.³¹

D. REFERENCE TO MASTER.³²—Where a plea alleges a judgment in bar of the bill,³³ or the pendency of another suit,³⁴ the court may,

Furniture Co., 232 Ill. 101, 83 N. E. 444. **Md.**—Rouskulp v. Kershner, 49 Md. 516. **N. J.**—Hunt v. West Jersey Tract. Co., 62 N. J. Eq. 225, 49 Atl. 434. **Tenn.**—Moore v. Holt, 3 Tenn. Ch. 141.

21. Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684; Perry v. United States School Furniture Co., 232 Ill. 101, 83 N. E. 444.

Effect of replication in equity, see the title "Replication and Reply."

22. Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684; Bean v. Clark, 30 Fed. 225; Wilson v. Mitchell, 43 Fla. 107, 30 So. 703.

23. **U. S.**—Vacuum Oil Co. v. Eagle Oil Co., 154 Fed. 867. **Fla.**—Sheppard v. Livingston, 74 So. 815. **Ind.**—Sampson v. Hendricks, 8 Blackf. 288.

24. **U. S.**—Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684; Glucose Sugar Ref. Co. v. Douglass & Co., 145 Fed. 949; Bean v. Clark, 30 Fed. 225. **Ala.**—Holloway v. Southern Bldg. & Loan Assn., 136 Ala. 160, 33 So. 887; Tyson v. Decatur Land Co., 121 Ala. 414, 26 So. 507. **Ark.**—Miller v. Fraley, 21 Ark. 22; Peay v. Duncan, 20 Ark. 85. **Colo.**—Denver v. Lobenstein, 3 Colo. 216. **Ind.**—Sampson v. Hendricks, 8 Blackf. 288. **Mich.**—Hurlbut v. Britain, 2 Doug. 191. **Mo.**—Bell v. Simonds, 14 Mo. 100. **N. J.**—Hunt v. West Jersey Tract. Co., 62 N. J. Eq. 225, 49 Atl. 434. **N. Y.**—Dows v. McMichael, 6 Paige 139. **Wis.**—Ely v. Wilcox, 20 Wis. 523, 91 Am. Dec. 436.

25. Hunt v. West Jersey Tract. Co., 62 N. J. Eq. 225, 49 Atl. 434.

26. Miller v. Fraley, 21 Ark. 22; Sampson v. Hendricks, 8 Blackf. (Ind.) 288.

27. Miller v. Fraley, 21 Ark. 22; Peay v. Duncan, 20 Ark. 85.

28. **Ala.**—Holloway v. South Bldg. & Loan Assn., 136 Ala. 160, 33 So. 887. **Ark.**—Peay v. Duncan, 20 Ark. 85. **N. J.**—Hunt v. West Jersey Tract. Co., 62 N. J. Eq. 225, 49 Atl. 434.

29. **D. C.**—Adriaans v. Lyon, 8 App. Cas. 532. **Ill.**—Ferry v. Moore, 18 Ill. App. 135. **Mich.**—Hurlbut v. Britain, 2 Doug. 191. **N. J.**—Hunt v. West Jersey Tract. Co., 62 N. J. Eq. 225, 49 Atl. 434. **N. Y.**—Dows v. McMichael, 2 Paige 345.

[a] If the allegations in the bill do not entitle plaintiff to any relief, the bill will be dismissed. Hurlbut v. Britain, 2 Doug. (Mich.) 191.

30. Sheppard v. Livingston (Fla.), 74 So. 815 (where it is said that "a defendant has a right to answer after an issue of fact, joined on a plea, has been determined against him"); Battelle & Co. v. Youngstown Rolling Mill Co., 16 Lea (Tenn.) 355, where the court holds that the decision on the plea concludes all that was put in issue, but matter not in any way put in issue, investigated or determined, shall be open for subsequent investigation under such pleadings as the parties may present.

31. Townsend v. Townsend, 2 Paige (N. Y.) 413; Battelle & Co. v. Youngstown R. M. Co., 16 Lea (Tenn.) 355.

32. See generally the title "References."

33. Emma Silver Min. Co. v. Emma Silver Min. Co., 1 Fed. 39, 17 Blatchf. 389.

34. **N. J.**—McEwen v. Broadhead, 11 N. J. Eq. 129. **Tenn.**—Green v.

on motion,³⁵ refer the plea to a master to determine whether or not the judgment or former suit is for the same cause. This is the usual practice,³⁶ but the plaintiff may, if he chooses, take issue on the plea and set it down for a hearing.³⁷

E. ALLOWED TO STAND FOR ANSWER.—The court may, in its discretion,³⁸ where a plea appears to be good in substance although bad in form, allow such plea to stand as an answer.³⁹ But, conversely, if bad in substance as failing to present a defense to that part of the bill which it professes to answer, it should be overruled absolutely, and should not be permitted to stand as an answer.⁴⁰

F. OVERRULED BY ANSWER.—The general rule is that when the defendant at the same time sets up the same defense both by answer and plea, the former overrules the latter.⁴¹ So, when a supporting answer covers any part of the matter embraced by the plea, the latter will be thereby overruled,⁴² and, in the same manner, where a defendant pleads and thereafter files an answer the plea is waived.⁴³

Neal, 2 Heisk. 217. **Wis.**—Rowley v. Williams, 5 Wis. 151.

35. *Emma Silver Min. Co. v. Emma Silver Min. Co.*, 1 Fed. 39, 17 Blatchf. 389.

36. *Rowley v. Williams*, 5 Wis. 151.

37. *McEwen v. Broadhead*, 11 N. J. Eq. 129.

38. *Dietrich v. Hutchinson*, 81 Vt. 160, 69 Atl. 661.

39. **N. H.**—*Bell v. Woodward*, 42 N. H. 181. **N. Y.**—*Jarvis v. Palmer*, 11 Paige 650; *Oreutt v. Orms*, 3 Paige 459. **Tenn.**—*Brien v. Marsh*, 1 Tenn. Ch. 625. **Vt.**—*Dietrich v. Hutchinson*, 81 Vt. 160, 69 Atl. 661; *Tarbell v. Tarbell*, 57 Vt. 492. **Eng.**—*Wood v. Strickland*, 2 Ves. & B. 150, 35 Eng. Reprint 276; *Kinsey v. Kinsey*, 2 Ves. Sen. 577, 28 Eng. Reprint 368; *Hankey v. Simpson*, 3 Atk. 303, 26 Eng. Reprint 976.

[a] If it is allowed to stand as an answer it will be understood that the court allows it as a sufficient answer, and it may not be thereafter excepted to without permission of the court. *Brien v. Marsh*, 1 Tenn. Ch. (Tenn.) 625.

40. *Oreutt v. Orms*, 3 Paige (N. Y.) 459.

41. **U. S.**—*Ferguson v. O'Harra*, Pet. C. C. 493, 8 Fed. Cas. No. 4,740. **Ark.**—*Keatts v. Rector*, 1 Ark. 391. **Ill.**—*Miller v. Doran*, 151 Ill. App. 527. **Md.**—*Bank of Maryland v. Dugan*, 2 Bland 254. **Mich.**—*Clark v. Saginaw*

City Bank, Harr. 240. **N. J.**—*Harrison v. Farrington*, 38 N. J. Eq. 358. **N. Y.**—*Bangs v. Strong*, 7 Hill 250, 42 Am. Dec. 64; *Bolton v. Gardner*, 3 Paige 273. **Pa.**—*New York S. & W. Coal Co. v. Spencer*, 3 Pa. Dist. 694. **S. C.**—*Joyce v. Gunnels*, 2 Rich. Eq. 259; *Episcopal Church of Macon v. Wiley*, 2 Hill Eq. 584, *Riley Eq.* 156, 30 Am. Dec. 386. **Tenn.**—*Pigue v. Young*, 85 Tenn. 263, 1 S. W. 889; *Witt v. Ellis*, 2 Coldw. 38.

[a] "The reason is, that by interposing the plea he claims that he ought not to be required to answer, and yet at the same time, does answer." *Harrison v. Farrington*, 38 N. J. Eq. 358.

That supporting answers must not overlap the plea, see 4 STANDARD PROC. 153.

42. **U. S.**—*Grant v. Phoenix Mut. Life Ins. Co.*, 121 U. S. 105, 7 Sup. Ct. 841, 30 L. ed. 905. **Fla.**—*Ocala Foundry & Mach. Wks. v. Lester*, 49 Fla. 347, 38 So. 56. **N. Y.**—*Bangs v. Strong*, 7 Hill 250, 42 Am. Dec. 64; *Bolton v. Gardner*, 3 Paige 273.

[a] An answer addressed to the whole bill, which answers only a part thereof, nevertheless will overrule a plea to a part of the bill, even when that part is, in fact, unanswered. *Leacraft v. Demprey*, 4 Paige (N. Y.) 124.

43. *Miller v. Perks*, 63 Ill. App. 140; *Wilson v. Scruggs*, 7 Lea (Tenn.) 635.

PLEDGES

By the Editorial Staff.

I. REMEDIES OF PLEDGEE, 456

- A. *In General*, 456
- B. *Action on the Debt*, 456
 - 1. *Generally*, 456
 - 2. *Parties*, 456
 - 3. *Pleading*, 457
 - 4. *Return of Pledged Property Upon Payment of Judgment*, 457
- C. *Enforcement of the Security*, 457
 - 1. *Choses in Action*, 457
 - a. *Generally*, 457
 - b. *Parties*, 458
 - c. *Pleading*, 458
 - 2. *Foreclosure of the Lien*, 458
 - a. *Generally*, 458
 - b. *Parties*, 459
 - c. *Pleading*, 459
 - d. *Decree and Sale Thereunder*, 460

II. REMEDIES OF PLEDGOR, 460

- A. *To Recover Property or Its Value*, 460
 - 1. *In General*, 460
 - 2. *Prerequisites*, 461
 - 3. *Pleading*, 461
 - 4. *Judgment*, 461
- B. *Suit To Redeem*, 461
 - 1. *Generally*, 461
 - 2. *Tender*, 462
 - 3. *Judgment or Decree*, 462
- C. *Action To Enforce Collateral*, 462
- D. *Action for Pledgee's Failure To Enforce Collateral*, 463

III. REMEDIES BY AND AGAINST THIRD PERSONS, 463

- A. *Proceedings by Third Persons*, 463
- B. *Proceedings Against Third Persons*, 463
 - 1. *By Pledgee*, 463
 - 2. *By Pledgor*, 464

CROSS-REFERENCES:

Chattel Mortgages;
Liens;

Mortgages;
Pawnbrokers;

Personal Property.

For forms, see 9 STANDARD PROC. 985, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. REMEDIES OF PLEDGEE.—A. IN GENERAL.—Upon default of the pledgor, the pledgee may sue on the debt¹ or resort to the appropriate remedy to enforce the security.²

B. ACTION ON THE DEBT.—1. **Generally.**—The acceptance of a pledge as security for a loan does not prevent the pledgee from proceeding personally against the pledgor for his debt.³ without first restoring,⁴ or offering to restore,⁵ the pledged property or attempting to enforce the collateral.⁶

2. **Parties.**—Parties to instruments pledged, other than the debtor, are neither necessary,⁷ nor proper⁸ parties defendant.

1. See *infra*, I, B.

2. See *infra*, I, C.

3. **U. S.**—Childs *v.* Carlstein Co., 76 Fed. 86. **Cal.**—Sonoma Valley Bank *v.* Hill, 59 Cal. 107. **Ill.**—Darst *v.* Bates, 95 Ill. 493. **Ind.**—Grant *v.* School Town of Monticello, 71 Ind. 58. **Ia.**—Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 497. **Kan.**—Jones *v.* Scott, 10 Kan. 33. **Me.**—Smith *v.* Strout, 63 Me. 205. **Mass.**—Cumnock *v.* Institution for Savings, 142 Mass. 342, 7 N. E. 869, 56 Am. Rep. 679; Whitaker *v.* Sumner, 20 Pick. 399. **N. Y.**—Ketcham *v.* Provost, 156 App. Div. 477, 141 N. Y. Supp. 437. **Tenn.**—Arendale *v.* Samuel D. Morgan & Co., 5 Sneed 703. **Vt.**—Rutland Bank *v.* Woodruff, 34 Vt. 89.

4. **Ark.**—West *v.* Carolina Life Ins. Co., 31 Ark. 476. **Cal.**—Sonoma Valley Bank *v.* Hill, 59 Cal. 107. **D. C.**—Ambler *v.* Ames, 1 App. Cas. 191. **Ill.**—Darst *v.* Bates, 95 Ill. 493. **Ind.**—Grant *v.* School Town of Monticello, 71 Ind. 58. **Md.**—Rich *v.* Boyce, 39 Md. 314. **Mass.**—Taylor *v.* Cheever, 6 Gray 146. **Mo.**—American Nat. Bank *v.* Harrison Wire Co., 11 Mo. App. 446. **Neb.**—Lormer *v.* Bain, 14 Neb. 178, 15 N. W. 323. **Vt.**—Rutland Bank *v.* Woodruff, 34 Vt. 89.

5. Cumnock *v.* Institution for Sav-

ings, 142 Mass. 342, 7 N. E. 869, 56 Am. Rep. 679.

6. **U. S.**—Childs *v.* Carlstein Co., 76 Fed. 86. **Cal.**—Commercial Sav. Bank *v.* Hornberger, 140 Cal. 16, 73 Pac. 625; Williams *v.* Parker, 30 Cal. App. 71, 157 Pac. 550. **Ga.**—Colquitt *v.* Stultz, 65 Ga. 305. **Ill.**—Darst *v.* Bates, 95 Ill. 493. **Ind.**—Olvey *v.* Jackson, 106 Ind. 286, 4 N. E. 149. **Mass.**—Cornwall *v.* Gould, 4 Pick. 444. **Mich.**—Wallace *v.* Finnegan, 14 Mich. 170, 90 Am. Dec. 243. **N. J.**—Freehold Nat. Bkg. Co. *v.* Brick, 37 N. J. L. 307. **N. Y.**—Ketcham *v.* Provost, 156 App. Div. 477, 141 N. Y. Supp. 437. **N. C.**—Sykes *v.* Everett, 167 N. C. 600, 83 S. E. 585. **Pa.**—Leas *v.* James, 10 Serg. & R. 307.

7. Styers *v.* Alsbaugh, 118 N. C. 631, 24 S. E. 422.

[a] The mortgagee of a mortgage assigned to the debtor and by him pledged to secure the debt is not a necessary party. Styers *v.* Alsbaugh, 118 N. C. 631, 24 S. E. 422.

8. Forstall *v.* Farmers' etc. Assn., 47 La. Ann. 105, 16 So. 651.

[a] The maker of notes pledged by the holder, should not be joined as defendant. Forstall *v.* Farmers' Union Com. Assn., 47 La. Ann. 105, 16 So. 651.

3. Pleading.—If payment of the debt is relied upon by the defendant he must allege and prove it.⁹

Set-Off and Counterclaim.—A pledgor may set up a conversion of the pledge as a defense to an action on the debt by way of counterclaim¹⁰ or set-off,¹¹ and if he wishes to rely on such defense he must specially plead it.¹² If there has been an illegal sale defendant may ask as damages the difference between what the property actually sold for and what it would have brought at a valid sale.¹³

4. Return of Pledged Property Upon Payment of Judgment. The defendant has the right to insist on a return of the pledged property as condition of the payment of a judgment rendered against him,¹⁴ and it is incumbent upon the plaintiff to produce and restore the collateral security or to account satisfactorily for its non-production.¹⁵

C. ENFORCEMENT OF THE SECURITY.—**1. Choses in Action.**—**a. Generally.**—Where the security is a chose in action, the pledgee may sue thereon,¹⁶ and he need not first exhaust his other remedies¹⁷ or collaterals.¹⁸ He may ordinarily sue for the entire amount due on the collateral though it exceeds the amount of the debt,¹⁹ but when there

9. *Barnes v. Bradley*, 56 Ark. 103, 19 S. W. 319. See "Payment."

[a] **Collection of the collateral security** must be pleaded to be available as a defense. *Barnes v. Bradley*, 56 Ark. 103, 19 S. W. 319.

10. U. S.—*Dibert v. Wernicke*, 214 Fed. 673, 131 C. C. A. 109. **Cal.**—*Williams v. Parker*, 30 Cal. App. 71, 157 Pac. 550. **Ga.**—*Turner v. Commercial Sav. Bank*, 17 Ga. App. 631, 87 S. E. 918. **N. Y.**—*Weston v. Turver*, 49 Hun 605, 1 N. Y. Supp. 807, 17 N. Y. St. 502.

11. *Carver Bros. v. Merrett* (Tex. Civ. App.), 155 S. W. 633.

[a] **The facts constituting the basis for the counterclaim** must be pleaded. *Williams v. Parker*, 30 Cal. App. 71, 157 Pac. 550.

12. *Carver Bros. v. Merrett* (Tex. Civ. App.), 155 S. W. 633.

13. *Beardsley v. Fulton*, 22 Pa. Dist. 921.

14. *Semple & Birge Mfg. Co. v. Detwiler*, 30 Kan. 386, 2 Pac. 511.

15. *Turner v. Commercial Sav. Bank*, 17 Ga. App. 631, 87 S. E. 918.

16. U. S.—*McDougall v. Hazeltan T.-B. Co.*, 88 Fed. 217, 31 C. C. A. 487. **Ala.**—*Keeble v. Jones*, 187 Ala. 207, 65 So. 384. **Ill.**—*Dallemand v. Bank of Nova Scotia*, 54 Ill. App. 600. **Kan.**—*Farmers' State Bank v. Blevins*, 46 Kan. 536, 26 Pac. 1044. **Ky.**—*Elk Valley Coal Co. v. Third Nat. Bank*, 157 Ky. 617, 163 S. W. 766. **La.**—*Deposit Co. of Maryland v. Johnston*, 117 La. 880, 42 So. 357. **Me.**—*Gowen v. Wentworth*, 17 Me. 66. **Mass.**—*Skilling v. Marcus*, 159 Mass. 51, 34 N. E. 80. **Minn.**—*St. Paul Nat. Bank v. Cannon*, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189. **N. J.**—*Allaire v. Hartshorne*, 21 N. J. L. 665, 47 Am. Dec. 175. **N. Y.**—*Field v. Sibley*, 74 App. Div. 81, 77 N. Y. Supp. 252, 11 N. Y. Ann. Cas. 187; *Van Riper v. Baldwin*, 19 Hun 344. **Ohio.**—*Handy v. Sibley*, 46 Ohio St. 9, 17 N. E. 329. **Pa.**—*Logan v. Cassell*, 88 Pa. 288, 32 Am. Rep. 453. **R. I.**—*Atlas Bank v. Doyle*, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219. **S. C.**—*Ruberg v. Brown*, 71 S. C. 287, 51 S. E. 96. **Tex.**—*Jackson v. Chemical Nat. Bank* (Tex. Civ. App.), 46 S. W. 295. **Va.**—*Berkeley v. Tinsley*, 88 Va. 1001, 14 S. E. 842. **Wis.**—*Morgan v. South Milwaukee Lake View Co.*, 97 Wis. 275, 72 N. W. 872.

[a] **Before maturity of debt secured.** *Seeley v. Wickstrom*, 49 Neb. 730, 68 N. W. 1017.

[b] **No conversion of the instruments sued on is effected by such suit.** *Fernandez v. Tormey*, 121 Cal. 515, 53 Pac. 1119.

17. *Dallemand v. Bank of Nova Scotia*, 54 Ill. App. 600.

18. *Third Nat. Bank v. Harrison*, 10 Fed. 243, 3 McCrary 316; *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N. W. 85.

19. Ill.—*Tooke v. Newman*, 75 Ill. 215. **Me.**—*Gowen v. Wentworth*, 17

are defenses to the obligation which are available only as against the pledgor, the pledgee can recover on the collateral no greater sum than the amount of the loan.²⁰

b. *Parties*.—The suit may be brought in the name of the pledgee²¹ without joining the pledgor,²² though it is proper to do so.²³

c. *Pleading*.—The plaintiff should set out the pledge agreement where that is necessary to disclose his interest in the note sued on,²⁴ otherwise no allegations respecting the pledge are necessary.²⁵

2. **Foreclosure of the Lien**.—a. *Generally*.—The pledgee, upon default of the pledgor, has a right to sell the pledged property after proper notice to redeem,²⁶ or he may proceed by foreclosure suit and

Me. 66. **Neb.**—Seeley *v.* Wickstrom, 49 Neb. 730, 68 N. W. 1017. **Tex.** Jackson *v.* Chemical Nat. Bank (Tex. Civ. App.), 46 S. W. 295. **Vt.**—TARBELL *v.* Sturtevant, 26 Vt. 513. **Va.** Dudley *v.* Minor's Exr., 100 Va. 728, 42 S. E. 870. **Wis.**—Northwestern Mutual Life Ins. Co. *v.* Germania F. Ins. Co., 40 Wis. 446.

20. **Ark.**—Brown *v.* Callaway, 41 Ark. 418. **Cal.**—Bell *v.* Bean, 75 Cal. 86, 16 Pac. 521. **Ga.**—Hancock *v.* Empire Cotton Oil Co., 17 Ga. App. 170, 86 S. E. 434. **Kan.**—Farmers' State Bank *v.* Blevins, 46 Kan. 536, 26 Pac. 1044. **Ky.**—Elk Valley Coal Co. *v.* Third Nat. Bank, 157 Ky. 617, 163 S. W. 766. **La.**—Deposit Co. of Maryland *v.* Johnston, 117 La. 880, 42 So. 357. **Md.**—Maitland *v.* Citizens Nat. Bank, 40 Md. 540, 17 Am. Rep. 620. **Mass.**—Skillings *v.* Marcus, 159 Mass. 51, 34 N. E. 80. **Minn.**—St. Paul Nat. Bank *v.* Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189. **Mo.** Crawford *v.* Spencer, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745. **Neb.** Helmer *v.* Commercial Bank, 28 Neb. 474, 44 N. W. 482. **Nev.**—Hayden *v.* Nicoletti, 18 Nev. 290, 3 Pac. 473. **N. J.**—Allaire *v.* Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175. **N. Y.**—Continental Nat. Bank *v.* Bell, 125 N. Y. 38, 25 N. E. 1070. **Ohio.**—Handy *v.* Sibley, 46 Ohio St. 9, 17 N. E. 329. **Pa.**—Logan *v.* Cassell, 88 Pa. 288, 32 Am. Rep. 453. **R. I.**—Atlas Bank *v.* Doyle, 9 R. I. 76, 98 Am. Dec. 368, 11 Am. Rep. 219. **Tenn.**—Stephenson *v.* Landis, 14 Lea 433. **Tex.**—Wright *v.* Hardie, 88 Tex. 653, 32 S. W. 885. **Va.**—Berkeley *v.* Tinsley, 88 Va. 1001, 14 S. E. 842. **Wis.**—Union Nat. Bank *v.* Roberts, 45 Wis. 373.

21. **U. S.**—Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33. **Cal.**—Graham *v.*

Light, 4 Cal. App. 400, 88 Pac. 373. **Colo.**—Lake *v.* Schradsky, 31 Colo. 178, 71 Pac. 1104. **Fla.**—Withers *v.* Sandlin, 36 Fla. 619, 18 So. 856. **La.**—Deposit Co. of Maryland *v.* Johnston, 117 La. 880, 42 So. 357. **Mo.**—Dickey *v.* Porter, 203 Mo. 1, 101 S. W. 586. **N. Y.**—Ridgway *v.* Bacon, 72 Hun 211, 25 N. Y. Supp. 651. **S. D.**—Citizens' Nat. Bank *v.* Great Western E. Co., 13 S. D. 1, 82 N. W. 186. **Wis.**—Morgan *v.* South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872.

[a] A pledgee of corporate stock may bring an action thereon in his own name. Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261, 276.

22. Graham *v.* Light, 4 Cal. App. 400, 88 Pac. 373; Curtis *v.* Mohr, 18 Wis. 615; Hilton *v.* Waring, 7 Wis. 492.

23. Michigan State Bank *v.* Gardner, 3 Gray (Mass.) 305.

24. Sharmer *v.* McIntosh, 43 Neb. 509, 61 N. W. 727.

[a] Thus where the note is not indorsed to the pledgee it may be necessary to show the agreement under which he holds it. Sharmer *v.* McIntosh, 43 Neb. 509, 61 N. W. 727.

25. Curtis *v.* Mohr, 18 Wis. 615; Hilton *v.* Waring, 7 Wis. 492.

26. **U. S.**—Land Title & Tr. Co. *v.* Asphalt Co., 121 Fed. 192. **Ala.**—Keeble *v.* Jones, 187 Ala. 207, 65 So. 384. **Cal.**—Colton *v.* Oakland Sav. Bank, 137 Cal. 376, 70 Pac. 225; McArthur *v.* Magee, 114 Cal. 126, 45 Pac. 1068. **Conn.**—Stevens *v.* Hurlbut Bank, 31 Conn. 146. **Ill.**—National Bank of Illinois *v.* Baker, 128 Ill. 533, 21 N. E. 510, 4 L. R. A. 586. **Ind.**—Evans *v.* Darlington, 5 Blackf. 320. **Ia.**—Robinson *v.* Hurley, 11 Iowa 410, 79 Am. Dec. 497. **La.**—Smith *v.* Shippers' Oil Co., 120 La. 640, 45 So. 533. **Md.**

judicial sale.²⁷

b. *Parties*.—It is necessary to make parties to a foreclosure suit all those who have a right to pay the debt and redeem the pledge.²⁸

c. *Pleading*.—The bill or complaint should set out the facts as to the pledge,²⁹ the ensuing default,³⁰ and if it is sought to recover expenses incurred in efforts to realize on the collateral the items thereof should be set out.³¹

Accounting.—As an incident to the foreclosure an accounting may be asked for.³²

Dungan v. Newark Mutual Ben. Life Ins. Co., 46 Md. 469, **Mass.**—Merchants' Nat. Bank v. Thompson, 133 Mass. 482. **Mo.**—Greer v. Lafayette Bank, 128 Mo. 559, 30 S. W. 319. **Neb.** Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383. **N. Y.**—Smith v. Savin, 141 N. Y. 315, 36 N. E. 338. **Pa.** Eichbaum v. Sample, 30 Pa. Co. Ct. 497; Smith v. Coale, 12 Phila. 177. **Va.**—Alexandria, L. & H. R. Co. v. Burke, 22 Gratt (63 Va.) 254. **Wash.** Nagel v. Ham, 88 Wash. 99, 152 Pac. 520. **W. Va.**—Crawford v. LeFevre, 78 W. Va. 73, 88 S. E. 1087.

27. **U. S.**—Land Title & Tr. Co. v. Asphalt Co., 121 Fed. 192. **Ala.** American Pig Iron Storage Warrant Co. v. German, 126 Ala. 194, 28 So. 603; Sharpe v. National Bank, 87 Ala. 644, 7 So. 106. **Cal.**—McArthur v. Magee, 114 Cal. 126, 45 Pac. 1068. **Fla.**—Springfield Co. v. Ely, 44 Fla. 319, 32 So. 892. **Ind.**—Indiana & I. C. Ry. Co. v. McKernan, 24 Ind. 62. **Kan.**—Blood v. Shepard, 69 Kan. 752, 77 Pac. 565. **La.**—Richardson v. Turner, 52 La. Ann. 1613, 28 So. 158. **Me.**—Boynton v. Payrow, 67 Me. 587. **Mass.**—Crossman v. Griggs, 186 Mass. 275, 71 N. E. 560. **Neb.**—Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. 727. **N. J.**—Endicott v. Marvel, 83 N. J. Eq. 632, 92 Atl. 373. **Ohio.**—Robinson v. Boyd, 60 Ohio St. 57, 53 N. E. 494. **Tex.**—Killman v. Young (Tex. Civ. App.), 171 S. W. 1065. **Vt.** Thomas v. Graves, 89 Vt. 339, 95 Atl. 643. **Wash.**—Nagel v. Ham, 88 Wash. 99, 152 Pac. 520; Denny v. Cole, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940.

[a] The remedy in equity is more complete than the pledgee's common law right to sell the property, it concludes all the parties. Boynton v. Payrow, 67 Me. 587.

28. Richardson v. Turner, 52 La. Ann. 1613, 28 So. 158; Brown v. Hotel

Assn., 63 Neb. 181, 88 N. W. 175.

[a] But in Springfield Co. v. Ely, 44 Fla. 319, 32 So. 892, the pledgor, being beyond the reach of the process of the court, was held not to be an indispensable party to an action to foreclose pledged stock.

[b] An assignee of pledged stock, who became such with the knowledge of the pledgee, is a necessary party. Brown v. Hotel Assn., 63 Neb. 181, 88 N. W. 175.

[c] A receiver of a partnership is a necessary party to an action to foreclose a lien on personal property belonging to the partnership. Denny v. Cole, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940.

[d] Where a contract of sale of realty is pledged, the owner of the property is not a necessary party. Vaughn v. Cushing, 23 Ind. 184.

29. As to allegation of contract generally, see 11 STANDARD PROC. 981.

[a] The consideration of the pledge need not be stated, it being a matter of defense. Robinson v. Boyd, 60 Ohio St. 57, 53 N. E. 494.

30. Land Title & Tr. Co. v. Asphalt Co., 121 Fed. 192.

[a] **Partial Default**.—A complaint for the foreclosure of a pledgor's lien is not subject to dismissal on the ground that the complaint shows but a partial default while the plaintiff seeks to sell all the pledged securities. Land Title & Tr. Co. v. Asphalt Co., 121 Fed. 192.

31. Kountze v. Bonner, 12 Tex. Civ. App. 131, 34 S. W. 163.

[a] **Demurrer** upheld for failure to make an itemized statement of such expenses. Kountze v. Bonner, 12 Tex. Civ. App. 131, 34 S. W. 163.

32. Thomas v. Graves, 89 Vt. 339, 95 Atl. 643.

[a] **Joinder of Causes**.—A complaint for the foreclosure of a pledge and for an accounting based upon a

Cross-Complaint. — The pledgor may cross-complain to redeem the pledged property upon tendering the balance due.³³

d. *Decree and Sale Thereunder.* — A decree in favor of the pledgee usually directs a sale of the property and the application of the proceeds to pay the indebtedness,³⁴ and the pledgee may purchase the property at the foreclosure sale.³⁵ The court may render a deficiency judgment against the pledgor.³⁶

II. REMEDIES OF PLEDGOR. — A. To RECOVER PROPERTY OR ITS VALUE. — 1. In General. — Replevin,³⁷ detinue,³⁸ or claim and delivery,³⁹ will lie to recover the pledged property where the pledgee without right refuses to return it, and upon conversion of the property by the pledgee, trover or its code equivalent is a proper remedy,⁴⁰ and under certain circumstances assumpsit,⁴¹ or a special action on the

number of transactions necessary to determine the amount for which the lien may be enforced is not subject to demurrer upon the ground that several causes of action are improperly united. *San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588, 44 Pac. 309.

33. *Kountze v. Bonner*, 12 Tex. Civ. App. 131, 34 S. W. 163.

34. *Mahoney v. Caperton*, 15 Cal. 313.

[a] **Sale in Gross of Shares of Stock.** — Where shares of stock of a corporation were pledged at various times as security for separate loans it is error to order a sale in gross and direct the application of the proceeds to the payment of the entire indebtedness. *Mahoney v. Caperton*, 15 Cal. 313.

As to sale, see the title "Judicial Sales."

35. *Adams & Co. v. Coons*, 37 La. Ann. 305; *Register v. Sellers*, 4 Pa. Co. Ct. 490, 44 Leg. Int. 502.

36. *Commercial Nat. Bank v. Grant*, 73 Neb. 435; 103 N. W. 68.

37. **U. S.** — *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. 321, 23 L. ed. 886. **Md.** — *Dowler v. Cushwa*, 27 Md. 354. **Mo.** — *Miles v. Walther*, 3 Mo. App. 96. **Neb.** — *Wilkins v. Redding*, 70 Neb. 182, 97 N. W. 238. **N. J.** — *Meisel v. Merchants' Nat. Bank*, 85 N. J. L. 253, 88 Atl. 1067.

38. **Ala.** — *Minge v. Clark*, 196 Ala. 617, 72 So. 167. **Ky.** — *Flowers v. Sproule*, 2 A. K. Marsh. 54. **Eng.** — *Donald v. Suckling*, L. R. 1 Q. B. 585, 7 B. & S. 783, 35 L. J. Q. B. 232, 12 Jur. (N. S.) 795, 14 L. T. N. S. 772, 15 Wkly. Rep. 13.

39. *Latta v. Tutton*, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30.

40. **U. S.** — *Brown v. Newton First Nat. Bank*, 132 Fed. 450, 66 C. C. A. 293. **Cal.** — *Newell v. Sexton*, 61 Cal. 645; *Lowe v. Ozmun*, 3 Cal. App. 387, 86 Pac. 729. **Conn.** — *Ayres v. French*, 41 Conn. 142. **D. C.** — *Stiles v. Selinger*, 2 Mackey 429. **Ill.** — *Union Nat. Bank v. Post*, 192 Ill. 385, 61 N. E. 507. **Ind.** — *Cox v. Albert*, 78 Ind. 241. **Mass.** — *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Fletcher v. Dickinson*, 7 Allen 23. **Minn.** — *Upham v. Barbour*, 65 Minn. 364, 68 N. W. 42. **Mo.** — *Southworth Co. v. Lamb*, 82 Mo. 242; *Schaaf v. Fries*, 90 Mo. App. 111. **Mont.** — *De Mars v. Hudon*, 33 Mont. 170, 82 Pac. 952. **Neb.** — *Wilkins v. Redding*, 70 Neb. 182, 97 N. W. 238. **N. H.** — *Kimball v. Jackman*, 42 N. H. 242. **N. J.** — *Dimock v. United States Nat. Bank*, 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643. **N. Y.** — *Usher v. Van Vranken*, 48 App. Div. 413, 63 N. Y. Supp. 104. **Pa.** — *Blood v. Erie Dime Savings & L. Co.*, 164 Pa. 95, 30 Atl. 362. **S. C.** — *Abrahams & Son v. Southwestern R. Bank*, 1 S. C. 441, 7 Am. Rep. 33. **Tex.** — *King v. Boerne State Bank* (Tex. Civ. App.), 159 S. W. 433. **Wis.** — *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21.

[a] **Conversion of Shares of Stock.** *Nabring v. Mobile Bank*, 58 Ala. 204.

[b] **For Excess Value of Pledged Property.** — The pledgor in case of conversion of the pledged property by the pledgee may maintain an action for damages to recover the excess of the value of the property over the pledgee's lien thereon. *Farrar v. Paine*, 173 Mass. 58, 53 N. E. 146.

41. **Mich.** — *Dowler v. Cushwa*, 27 Md. 354. **Mich.** — *Wallace v. Finnegan*, 14 Mich. 170, 90 Am. Dec. 243. **Minn.**

case,⁴² or an action for accounting⁴³ are available.

2. Prerequisites.—Where the pledgee converts the pledged property, demand for its return,⁴⁴ or tender of the debt,⁴⁵ are not necessary before suing in trover. But where the pledgor seeks to recover the specific property in replevin, detainue or claim and delivery he must first tender the amount of the debt.⁴⁶

3. Pleading.—Allegations as to tender of the amount of the debt are necessary where such tender is a prerequisite to suit,⁴⁷ but not otherwise.⁴⁸ The consideration for a transfer by the pledgor need not be alleged in an action to recover the pledged property from the transferee.⁴⁹

4. Judgment.—Where plaintiff sues only for damages for conversion he is not entitled to a judgment for the property itself,⁵⁰ and the amount due to the pledgee must be deducted from the amount in which plaintiff has been damaged.⁵¹

B. SUIT TO REDEEM.—1. Generally.—Under certain circumstances a suit in equity will lie to redeem the pledge.⁵² To warrant equitable intervention⁵³ it must, as in other cases, appear that the legal

Upham *v.* Barbour, 65 Minn. 364, 68 N. W. 42.

[a] Where pledged property sold unlawfully. **Conn.**—Bulkeley *v.* Welch, 31 Conn. 339; Whiting *v.* McDonald, 1 Root 444. **Ill.**—Belden *v.* Perkins, 78 Ill. 449. **Me.**—Fletcher *v.* Harmon, 78 Me. 465, 7 Atl. 271.

42. Sharpe *v.* National Bank, 87 Ala. 644, 7 So. 106; Nabring *v.* Mobile Bank, 58 Ala. 204; Post *v.* Union Nat. Bank, 159 Ill. 421, 42 N. E. 976; Union Trust Co. *v.* Rigdon, 93 Ill. 458.

43. Maxwell *v.* Foster, 64 S. C. 1, 41 S. E. 776.

Accounting in foreclosure suit, see *supra*, I, C, 2, c.

44. Latta *v.* Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30.

45. **U. S.**—Dibert *v.* Wernicke, 214 Fed. 673, 131 C. C. A. 109. **Kan.**—Lynn *v.* McCue, 94 Kan. 761, 147 Pac. 808. **N. Y.**—Barber *v.* Hathaway, 169 N. Y. 575, 61 N. E. 1127; Toplitz *v.* Bauer, 34 App. Div. 526, 55 N. Y. Supp. 29. **Pa.**—Learock *v.* Paxson, 208 Pa. 602, 57 Atl. 1097; Neiler *v.* Kelley, 69 Pa. 403. **S. C.**—Gregg *v.* Bank of Columbia, 72 S. C. 458, 52 S. E. 195, 110 Am. St. Rep. 633.

But see Cumnock *v.* Institution for Savings, 142 Mass. 342, 7 N. E. 869, 56 Am. Rep. 679.

46. **U. S.**—Talty *v.* Freedman's Savings & Trust Co., 93 U. S. 321, 23 L. ed. 886. **Neb.**—Wilkins *v.* Redding,

70 Neb. 182, 97 N. W. 238. **N. J.**—Meisel *v.* Merchants' Nat. Bank, 85 N. J. L. 253, 88 Atl. 1067.

47. Cumnock *v.* Institution for Savings, 142 Mass. 342, 7 N. E. 869, 56 Am. Rep. 679. See *supra*, II, A, 2.

48. Sharpe *v.* National Bank, 87 Ala. 644, 7 So. 106; Lowe *v.* Ozmun, 3 Cal. App. 387, 86 Pac. 729.

49. Nelson *v.* Owen, 113 Ala. 372, 21 So. 75.

50. King *v.* Boerne State Bank (Tex. Civ. App.), 159 S. W. 433.

51. **Mich.**—Feige *v.* Burt, 118 Mich. 243, 77 N. W. 928, 74 Am. St. Rep. 390. **N. Y.**—Bailey *v.* American Deposit & Loan Co., 52 App. Div. 402, 65 N. Y. Supp. 330. **Tenn.**—Clark *v.* Cullen, 44 S. W. 204.

See Farrar *v.* Paine, 173 Mass. 58, 53 N. E. 146.

52. **Ala.**—Nelson *v.* Owen, 113 Ala. 372, 21 So. 75. **Colo.**—Colburn *v.* Riley, 11 Colo. App. 184, 52 Pac. 684. **Ill.**—Stokes *v.* Frazier, 72 Ill. 428. **Mo.**—Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171. **Nev.**—Beatty *v.* Sylvester, 3 Nev. 228. **N. J.**—De Bevoise *v.* H. & W. Co., 67 N. J. Eq. 472, 58 Atl. 91. **N. Y.**—Treadwell *v.* Clark, 73 App. Div. 473, 77 N. Y. Supp. 350. **S. C.**—Maxwell *v.* Foster, 64 S. C. 1, 41 S. E. 776. **Tex.**—Smith *v.* Anderson, 8 Tex. Civ. App. 188, 27 S. W. 775.

53. **Ala.**—Minge *v.* Clark, 196 Ala. 617, 72 So. 167; Nelson *v.* Owen, 113

remedy is insufficient or that there is some other special ground for equity interference.

2. Tender.—Tender of the amount of the debt is not necessary before suing to redeem, where the pledge is void,⁵⁴ or the pledgee expressly denies the right to redeem,⁵⁵ or where the goods are pledged to secure a running account.⁵⁶

3. Judgment or Decree.—The judgment or decree is ordinarily for the return of the pledged property, but if through the pledgee's act a return cannot be decreed the court may render a money judgment for its value.⁵⁷ The judgment should direct that the plaintiff pay the debt prior to the delivery of the property.⁵⁸

C. ACTION TO ENFORCE COLLATERAL.—A pledgor who transfers a promissory note⁵⁹ or lien⁶⁰ as security for a loan generally may maintain an action thereon,⁶¹ even before discharging his debt to the pledgee;⁶² but the pledgee, as a rule, is a necessary party to such ac-

Ala. 372, 21 So. 75; *Smith v. Anderson*, 8 Tex. Civ. App. 188, 27 S. W. 775.

[a] **A prayer for discovery** in an action to redeem a pledge furnishes no ground for equitable jurisdiction, where the single purpose of the discovery is in aid of the relief sought as to which his legal remedy is adequate. *De Bevoise v. H. & W. Co.*, 67 N. J. Eq. 472, 58 Atl. 91.

[a] **Where an accounting** between the parties is required a suit in equity for redemption and an accounting is proper. *Rennie v. Deshon*, 31 N. J. Eq. 378; *Mann & Co. v. Bamberger, Bloom & Co.*, 4 Heisk. (Tenn.) 486.

[b] **Assignment or transfer of the pledge**, will justifiably resort to equity. *Ala.*—*Nelson v. Owen*, 113 Ala. 372, 21 So. 75. *Mo.*—*Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943. *N. Y.* *Lewis v. Varnum*, 12 Abb. Pr. 305.

[c] **Where shares of a corporation are pledged** and transferred by the pledgee on the books of the corporation in his own name the pledgor may maintain a suit in equity to redeem the stock where the pledgee refuses to retransfer the same. *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171; *Houston & T. C. R. Co. v. Conner*, 29 Tex. Civ. App. 259, 67 S. W. 773; *Studebaker Bros. Mfg. Co. v. Santo Tomas Coal Co.*, 8 Tex. Civ. App. 194, 27 S. W. 787.

54. *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

55. *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

56. *Beatty v. Sylvester*, 3 Nev. 228.

57. *Hagan v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

58. *Studebaker Bros. Mfg. Co. v. Santo Tomas Coal Co.*, 8 Tex. Civ. App. 194, 27 S. W. 787.

59. *Cal.*—*Graham v. Light*, 4 Cal. App. 400, 88 Pac. 373. *Miss.*—*Baker v. Burkett*, 75 Miss. 89, 21 So. 970. *N. C.*—*Ball-Thrash & Co. v. McCormick*, 162 N. C. 471, 78 S. E. 303.

60. *Diekey v. Porter*, 203 Mo. 1, 101 S. W. 586; *Ridgway v. Bacon*, 72 Hun 211, 25 N. Y. Supp. 651.

61. *Ball-Thrash & Co. v. McCormick*, 162 N. C. 471, 78 S. E. 303.

[a] **Action on pledged notes** by pledgor who is payee. *Ball-Thrash & Co. v. McCormick*, 162 N. C. 471, 78 S. E. 303.

[b] **Bill in equity** to enforce notes which the pledgee as holder fails to enforce. *Baker v. Burkett*, 75 Miss. 89, 21 So. 970.

[c] **From the maker of a note pledged**, who obtains the same at a discount from the pledgee and without authority from the pledgor, the latter may recover the residue on the note. *Ill.*—*Zimpleman v. Veeder*, 98 Ill. 613. *Pa.*—*Craig v. McHenry*, 35 Pa. 120. *Wyo.*—*De Clark v. Waters*, 10 Wyo. 31, 65 Pac. 855.

[d] **To recover the property from a bona fide purchaser** the pledgor must first tender him the amount due on the pledge. *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. 321, 23 L. ed. 886.

[e] **Not From Holder in Due Course.** *Crawford v. Dollar Sav. Fund & Trust Co.*, 236 Pa. 206, 84 Atl. 694.

62. *Ball-Thrash & Co. v. McCormick*, 162 N. C. 471, 78 S. E. 303.

tion,⁶³ though in some jurisdictions the pledgor may sue on the security pledged without joining the pledgee as party.⁶⁴

D. ACTION FOR PLEDGEE'S FAILURE TO ENFORCE COLLATERAL. — The pledgor may sue the pledgee for the value of a pledged chose in action which the pledgee negligently failed to enforce.⁶⁵ The complaint must show that the pledgee's negligence caused the loss.⁶⁶

III. REMEDIES BY AND AGAINST THIRD PERSONS. — A. PROCEEDINGS BY THIRD PERSONS. — The owner of property, wrongfully pledged by another, may recover the same, or its value, in any appropriate proceeding⁶⁷ unless the pledge is made under such circumstances as to constitute the pledgee a bona fide holder in which case a suit will lie only for the proceeds in excess of the debt.⁶⁸

Prior lienholders are entitled to assert their lien in the pledged property⁶⁹ by sequestration,⁷⁰ suit for the possession of the property,⁷¹ or other proceeding.⁷²

B. PROCEEDINGS AGAINST THIRD PERSONS. — 1. By Pledgee. — The pledgee's special or qualified property in the pledged chattel entitles

63. Cal.—Graham *v.* Light, 4 Cal. App. 400, 88 Pac. 373. Miss.—Baker *v.* Burkett, 75 Miss. 89, 21 So. 970. Mo.—Dickey *v.* Porter, 203 Mo. 1, 101 S. W. 586. N. Y.—Ridgway *v.* Bacon, 72 Hun 211, 25 N. Y. Supp. 651.

64. Ball-Thrash & Co. *v.* McCormick, 162 N. C. 471, 78 S. E. 303.

65. Baker *v.* Burkett, 75 Miss. 89, 21 So. 970.

66. Fernandez *v.* Tormey, 121 Cal. 515, 53 Pac. 1119.

[a] A general allegation that the pledgee failed to take and hindered the pledgor from taking the necessary steps to enforce the pledge states mere conclusions and is not sufficient. Thomas *v.* Davis, 15 Tex. Civ. App. 359, 39 S. W. 579.

67. U. S.—Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33. Mass.—O'Herron *v.* Gray, 168 Mass. 573, 47 N. E. 429, 60 Am. St. Rep. 411, 40 L. R. A. 498. N. Y.—Farwell *v.* Importers' & Traders' Nat. Bank, 15 Jones & S. 409.

[a] Bill in Equity.—O'Herron *v.* Gray, 168 Mass. 573, 47 N. E. 429, 60 Am. St. Rep. 411, 40 L. R. A. 498.

[b] Stock pledged by guardian recovered in equity by ward. O'Herron *v.* Gray, 168 Mass. 573, 47 N. E. 429, 60 Am. St. Rep. 411, 40 L. R. A. 498.

[c] Bill for Goods Pledged by Consignee.—Skinner *v.* Dodge, 4 Hen. & M. (14 Va.) 432.

[d] Suit for possession of notes pledged and to enjoin the payment

thereof to the pledgee. Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33.

[e] Trover for conversion. Cal. Brittan *v.* Oakland Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58, certificate of stock indorsed in blank pledged for private account of the plaintiff's agent. Conn.—Freeman *v.* Bristol Sav. Bank, 76 Conn. 212, 56 Atl. 527. Me.—Jones *v.* Farley, 6 Greenl. 226, for conversion of principal's note pledged by agent to secure his own debt. Pa.—Ryman *v.* Gerlach, 153 Pa. 197, 25 Atl. 1031, 26 Atl. 302.

[f] Assumpsit.—Kaminski *v.* Schaffer, 46 App. Div. 170, 61 N. Y. Supp. 771.

[g] Purchasers in good faith from owner are entitled to the same remedies. Hoyt *v.* Selby Smelting & L. Co., 90 Cal. 339, 27 Pac. 288.

68. Brittan *v.* Oakland Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; Freeman *v.* Bristol Sav. Bank, 76 Conn. 212, 56 Atl. 527.

69. Blalock, Allison & Co. *v.* Keys, 13 Ky. L. Rep. 205; Cohen *v.* Haynes, 41 La. Ann. 545, 6 So. 472.

[a] Vendor's Lien.—Cohen *v.* Haynes, 41 La. Ann. 545, 6 So. 472.

70. Cohen *v.* Haynes, 41 La. Ann. 545, 6 So. 472.

71. Gregory *v.* Pike, 67 Fed. 837, 15 C. C. A. 33.

72. As to remedies of lienholders, see the title "Liens," and other titles dealing with specific liens.

him to sue in respect thereto in detinue,⁷³ replevin,⁷⁴ trespass,⁷⁵ assumpsit,⁷⁶ trover,⁷⁷ or by bill in equity.⁷⁸

Prior demand for the property converted is not necessary before bringing trover.⁷⁹

Parties. — The pledgor need not be made a party plaintiff to a bill by the pledgee to recover the property from a third person,⁸⁰ but is properly made a party defendant to such bill.⁸¹

Pleading. — A complaint in trover should show that the plaintiff had possession or right to the possession of the pledge.⁸²

Judgment or Decree. — The judgment is for the property or its value irrespective of the amount for which it was pledged,⁸³ but as against one who is entitled to the surplus above the amount of the indebtedness secured only the amount of the debt is recoverable.⁸⁴

2. By Pledgor. — The pledgor, upon discharging the debt, may recover the property or its proceeds from third persons⁸⁵ not holders

73. *Gafford v. Stearns*, 51 Ala. 434; *Noles v. Marable*, 50 Ala. 366; *Bryan v. Smith*, 22 Ala. 534.

74. *Selleck v. Macon Compress & W. Co.*, 72 Miss. 1019, 17 So. 603; *Peebles v. Murphy* (Miss.), 17 So. 278; *Hanover Nat. Bank v. American Dock & Trust Co.*, 14 App. Div. 255, 43 N. Y. Supp. 544.

75. *Soule v. White*, 14 Me. 436.

76. *St. Louis National Bank v. Equitable Trust Co.*, 227 Fed. 526, 142 C. C. A. 158.

[a] **A dividend on pledged corporate shares recoverable by the pledgee in an action for money had and received against a third person who collects it with knowledge of plaintiff's rights.** *St. Louis National Bank v. Equitable Trust Co.*, 227 Fed. 526, 142 C. C. A. 158.

77. *Ga.*—*Miller v. McKenzie*, 11 Ga. App. 494, 75 S. E. 820. *Me.*—*Porter v. Foster*, 20 Me. 391, 37 Am. Dec. 59. *Mo.*—*Citizens' Bank v. Tiger Tail Mill & Land Co.*, 152 Mo. 145, 53 S. W. 902. *N. Y.*—*Mercantile Trust Co. v. Atlantic Trust Co.*, 69 Hun 264, 23 N. Y. Supp. 496, 53 N. Y. St. 374. *S. C.*—*Lyons v. Rogers*, 1 Brev. 5.

[a] **But where the third person acquires the general property in the chattel, trover is not maintainable against him by the pledgee whose property is only special or qualified; a special action on the case is pledgee's remedy.** *Lyons v. Rogers*, 1 Brev. (S. C.) 5.

[b] **Refusal to transfer pledged stock on the books of the company is a conversion for which the pledgee**

may recover damages. *Second Nat. Bank v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504.

78. *Colo.*—*Tomboy Gold Mines Co. v. Green*, 11 Colo. App. 447, 53 Pac. 845. *Mass.*—*Michigan State Bank v. Gardner*, 3 Gray 305. *N. Y.*—*Page v. Boggess*, 41 Misc. 46, 83 N. Y. Supp. 569.

[a] **To compel transfer of pledged stock on the company's books, see** *Second Nat. Bank v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504.

79. *Porter v. Foster*, 20 Me. 391, 37 Am. Dec. 59.

80. *Michigan State Bank v. Gardner*, 3 Gray (Mass.) 305.

[a] **That the pledgor may be interpleaded in a suit by the pledgee against third persons, see** *Tomboy Gold Mines Co. v. Green*, 11 Colo. App. 447, 53 Pac. 845.

81. *Michigan State Bank v. Gardner*, 3 Gray (Mass.) 305.

82. *Citizens' Bank v. Tiger Tail Mill & Land Co.*, 152 Mo. 145, 53 S. W. 902.

83. *Me.*—*Soule v. White*, 14 Me. 436. *Miss.*—*Jones v. Hicks*, 52 Miss. 682. *N. Y.*—*Hanover Nat. Bank v. American Dock & Trust Co.*, 14 App. Div. 255, 43 N. Y. Supp. 544.

84. *Second Nat. Bank v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504.

[a] **Against Purchaser From Pledgor.**—*Second Nat. Bank v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504.

85. *German Sav. Bank v. Renshaw*, 78 Md. 475, 28 Atl. 281; *McCutcheon v. Dittman*, 164 N. Y. 355, 58 N. E. 97.

in due course, and to that end may bring trover,⁸⁶ replevin,⁸⁷ bill in equity,⁸⁸ or other appropriate action.

[a] **Tender of the debt to a second pledgee** not necessary where it has been paid to the first pledgee. *German Sav. Bank v. Renshaw*, 78 Md. 475, 28 Atl. 281.

86. *German Sav. Bank v. Renshaw*, 78 Md. 475, 28 Atl. 281; *Craig v. McHenry*, 35 Pa. 120.

[a] **Against Pledgee of Pledgee.** *German Sav. Bank v. Renshaw*, 78 Md. 475, 28 Atl. 281.

87. **U. S.**—*Talty v. Freedman's*

Savings & Trust Co., 93 U. S. 321, 23 L. ed. 886. **P. I.**—*Arenas v. Raymundo*, 19 Phil. Isl. 46. **Tex.**—*Featherston v. Greer* (Tex. Civ. App.), 169 S. W. 912.

88. *Strong v. Chaney*, 182 Mich. 37, 148 N. W. 168.

[a] **For accounting** where the proceeds of the pledged property have become intermingled in a fund. *Van Woert v. Olmstead*, 71 N. Y. Supp. 431.

POINTS AND AUTHORITIES. — See Briefs.

POISONS. — See Health; Homicide.

POLICE COURT. — See Justices of the Peace; Municipal Corporations.

POLICEMEN. — See Municipal Corporations; Sheriffs, Constables and Marshals.

POLYGAMY. — See Bigamy.

POOL. — See Gaming.

POOR LAWS. — See Paupers.

POOR PERSONS. — See Paupers.

PORT. — See Navigable Waters; Ships and Shipping.

PORTO RICO. — See States and Territories.

POSSESSION. — See Adverse Possession; Assistance, Writs of; Ejectment; Forcible Entry and Detainer; Judgments and Decrees, Enforcement of; Use and Occupation; Writ of Entry.

POSSESSORY WARRANT. — See Summary Proceedings.

POSTEA. — See Records.

POST OFFICE

By the Editorial Staff.

I. PROSECUTION OF OFFENSES AGAINST POSTAL LAWS, 467

- A. *Jurisdiction and Venue*, 467
- B. *Indictment*, 467
 - 1. *Generally*, 467
 - 2. *For Unlawful Use of Mail*, 468
 - a. *To Defraud*, 468
 - (I.) *In General*, 468
 - (II.) *Describing Fraudulent Scheme, etc.*, 469
 - (III.) *Intent To Defraud, etc.*, 470
 - (IV.) *Names of Persons Defrauded*, 470
 - (V.) *Use of Mails*, 471
 - (VI.) *Conspiracy To Defraud*, 471
 - (VII.) *Joinder of Offenses*, 472
 - b. *For Mailing Non-mailable Matter*, 472
 - (I.) *In General*, 472
 - (II.) *Matter Concerning Lotteries*, 473
 - (III.) *Obscene Matter*, 473
 - (A.) *In General*, 473
 - (B.) *Charging Knowledge on Part of Defendant*, 474
 - (IV.) *Information Concerning Obscene Matter*, 475
 - 3. *For Opening Mail Matter*, 475
 - 4. *For Embezzlement of Mail Matter*, 476
 - a. *In General*, 476
 - b. *By Postal Employees*, 477
 - 5. *For Robbery of Mails*, 477
 - 6. *For Receiving Stolen Mail Matter*, 477
 - 7. *For Obstructing the Mails*, 477
 - 8. *For Detaining a Letter*, 478
 - 9. *For Breaking and Entering Post Office*, 478
 - 10. *For Unlawful Carriage of Mail Matter Outside of Mail*, 478
 - 11. *For Violation of Franking Privileges*, 478
 - 12. *For Conspiracy To Defraud Through Weight of Mail*, 478
- C. *Trial*, 479
 - 1. *In General*, 479
 - 2. *Variance*, 479

3. *Province of Judge and Jury*, 479
4. *Instructions*, 479

II. REMEDIES AGAINST POSTMASTERS, 480

CROSS-REFERENCES:

Indictment and Information; Obscenity.

For forms, see 9 STANDARD PROC. 987, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PROSECUTION OF OFFENSES AGAINST POSTAL LAWS.

A. JURISDICTION AND VENUE.¹ — Offenses against the postal laws cannot usually be tried in the state courts.²

Where the offense is committed by means of a communication through the post office, the sender is punishable at the place where the communication is mailed,³ or at the place where it is received.⁴

B. INDICTMENT.⁵ — 1. **Generally.** — Offenses against the postal laws are misdemeanors as a rule and the same technical nicety of pleading adopted in cases of felonies is not required in indictments for such offenses.⁶ The general rules governing indictments are applicable in the main, however.⁷

1. See generally the titles "Jurisdiction;" "Venue."

2. *State v. M'Bride*, Rice (S. C.) 400. See also 17 STANDARD PROC. 822, et seq.

Compare *Charles Gill's Case*, 3 City Hall Rec. (N. Y.) 61.

3. *In re Palliser*, 136 U. S. 257, 266, 10 Sup. Ct. 1034, 34 L. ed. 514. See also the title "Obtaining Property by False Pretenses."

4. *In re Palliser*, 136 U. S. 257, 266, 10 Sup. Ct. 1034, 34 L. ed. 514, prosecution for tender of a contract for payment of money to postmaster, with intent to induce him to sell postage stamps on credit in violation of his duty.

[a] Where an indictment charges in one count the depositing in the mails of lottery matter in New York and in another count charges that defendant caused it to be delivered through the mails in Illinois, the offense is triable in Illinois where it was consummated. *Horner v. United States*, 143 U. S. 207, 12 Sup. Ct. 407, 36 L. ed. 126.

[b] But a prosecution under a statute prohibiting the use of the mails for promoting fraudulent schemes is properly instituted only in the district from which the fraudulent matter was transmitted,—where it was placed in the post office. *United States v. Sauer*, 88 Fed. 249.

5. See generally the title "Indictment and Information."

6. *United States v. Lancaster*, 2 McLean 431, 26 Fed. Cas. No. 15,556.

7. See *infra*, this note, and generally the title "Indictment and Information."

[a] **Need Not Negative Matter of Defense.**—*Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. ed. 667. See generally 12 STANDARD PROC. 350, et seq.

[b] **Need Not Set Forth Evidence.** *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. ed. 667. See generally 12 STANDARD PROC. 346, et seq.

[c] **Sufficient if indictment substantially follows language of statute** (1) where statute describes all elements of offense. *Samuels v. United States*, 232 Fed. 536, 146 C. C. A.

2. For Unlawful Use of Mail. — a. *To Defraud.* — (I.) In General.

The essential averments in an indictment for the offense of using the mails to defraud are that the person charged had devised a scheme or artifice to defraud,⁸ and that for the purpose of carrying into execution the scheme or artifice, a letter or other writing was sent through or taken from the post office establishment.⁹ Formerly, the definition of

494, Ann. Cas. 1917A, 711; *Stern v. United States*, 223 Fed. 762, 139 C. C. A. 292 (indictment for using mails to defraud); *Ackley v. United States*, 200 Fed. 217, 118 C. C. A. 403; *Grey v. United States*, 172 Fed. 101, 96 C. C. A. 415; *United States v. Maxey*, 200 Fed. 997; *Deweese's Case*, Chase 531, 7 Fed. Cas. No. 3,848 (for unlawful franking); *Farnum v. United States*, 1 Colo. 309. (2) It is otherwise where the statute does not specifically set forth all the elements necessary to constitute the offense intended to be punished. *Jones v. United States*, 27 Fed. 447. See generally 12 STANDARD PROC. 442, et seq.

[d] **Precise Words of Statute Need Not Be Used.**—*Lemon v. United States*, 164 Fed. 953, 90 C. C. A. 617 (sufficient if offense as charged brings defendant within purview of statute); *Deweese's Case*, Chase 531, 7 Fed. Cas. No. 3,848.

[e] **Where generic terms are used in the statute**, indictment must be so specific that a person of ordinary understanding may comprehend what he is charged with. *Ackley v. United States*, 200 Fed. 217, 118 C. C. A. 403.

[f] **Where the statute uses the disjunctive in defining the offense**, the indictment must imply the conjunctive in charging the same. *Ackley v. United States*, 200 Fed. 217, 118 C. C. A. 403.

[g] **Objection that indictment charges one offense in several counts** should be made by motion to require the prosecution to elect and not by a motion to quash. *Wetzel v. United States*, 233 Fed. 984, 147 C. C. A. 658.

[h] **Erroneous indorsement** is not fatal. *Smith v. United States*, 208 Fed. 131, 125 C. C. A. 353.

[i] **Duplicity.** — See *Gourdain v. United States*, 154 Fed. 453, 83 C. C. A. 309; *Kellogg v. United States*, 126 Fed. 323, 61 C. C. A. 229.

8. *United States v. Young*, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. ed. 548; *Trent v. United States*, 228 Fed. 648,

143 C. C. A. 170; *Belden v. United States*, 223 Fed. 726, 139 C. C. A. 256; *Horn v. United States*, 182 Fed. 721, 105 C. C. A. 163; *United States v. Young*, 215 Fed. 267.

Describing fraudulent scheme or device, see *infra*, I, B, 2, a, (II).

9. *United States v. Young*, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. ed. 548; *Trent v. United States*, 228 Fed. 648, 143 C. C. A. 170; *Belden v. United States*, 223 Fed. 726, 139 C. C. A. 256; *Colburn v. United States*, 223 Fed. 590, 139 C. C. A. 136; *Horn v. United States*, 182 Fed. 721, 105 C. C. A. 163; *United States v. Dale*, 230 Fed. 750.

[a] **No overt act**, as the term is used in connection with the offense of conspiracy, is essential to be set up, but it must be made to appear that a letter or card, etc., has been mailed for the purpose of carrying into execution the scheme or artifice devised. In the one case the conspiracy is the gist of the offense, while in the other the misuse of the mails is the material thing denounced. "Nor is it essential, in offering proof respecting the existence of a conspiracy with relation to a scheme to defraud, and the use of the mails in furtherance thereof, that such conspiracy be alleged in the indictment. It is a common thing to have the question arise whether one defendant is bound by the statements and acts of another, or of persons not even connected by indictment with the offense charged, and the constant ruling has been that, if there has been a joint contrivance, or joint participation, with a common purpose, the acts and statements of the one, while engaged in carrying into effect the common purpose, are evidence against the other; and this without the necessity of alleging conspiracy in the commission of the offense." *Belden v. United States*, 223 Fed. 726, 139 C. C. A. 256.

[b] **"The mailing of the letter or other mentioned article**, being the gist of the offense, must therefore be pleaded in an indictment with great certainty as to time, place, and cir-

the offense by the statute made it necessary to charge a third element thereof.¹⁰ Where the indictment not only charges the offense in the language of the statute, but accompanies it with a statement of facts fully apprising the defendants of what they have to meet, it is sufficient.¹¹

Time of Offense. — It is not objectionable that the indictment charges both the date upon which the scheme was devised and that upon which it was executed.¹²

(II) **Describing Fraudulent Scheme, etc.** — In charging the use of the mails to defraud, the indictment must describe the alleged fraudulent scheme or artifice with such certainty as to clearly inform defendant of the charge against him.¹³ But the fraudulent scheme need not be pleaded with all the certainty as to time, place, and circumstances requisite in regard to charging of the mailing of the letter in further-

cumstance, so as thereby to advise the accused of the exact nature and cause of the accusation against him, in order that he may properly prepare his defense and be able to make use of a conviction or acquittal as a protection against a further prosecution for the same offense." *Colburn v. United States*, 223 Fed. 590, 139 C. C. A. 136.

10. See *infra*, I, B, 2, a, (V).

11. *Samuels v. United States*, 232 Fed. 536, 146 C. C. A. 494, Ann. Cas. 1917A, 711; *Stern v. United States*, 223 Fed. 762, 139 C. C. A. 292. See also *Brown v. United States*, 143 Fed. 60, 74 C. C. A. 214.

[a] An indictment drawn in accordance with the old statute defining the offense is more than adequate in its allegations under the new one. *Sandals v. United States*, 213 Fed. 569, 130 C. C. A. 149.

[b] **Need Not Negative Matter of Defense.**—Where a fraudulent scheme to obtain money by false pretenses is charged, it is not necessary to negative in the indictment that the defendant believed the representations made by him to be true. *Horn v. United States*, 182 Fed. 721, 105 C. C. A. 163.

12. *Sandals v. United States*, 213 Fed. 569, 130 C. C. A. 149, not objectionable as alleging two distinct dates as the time of the offense.

13. *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. ed. 516 (omission to describe the fraudulent scheme is a fatal defect which cannot be cured by verdict); *Gardner v. United States*, 230 Fed. 575, 144 C. C. A. 629; *McClendon v. United States*, 229 Fed. 523, 143 C. C. A. 591; *Spear v. United*

States, 228 Fed. 485, 143 C. C. A. 67; *Colburn v. United States*, 223 Fed. 590, 139 C. C. A. 136; *Sandals v. United States*, 213 Fed. 569, 130 C. C. A. 149; *Foster v. United States*, 178 Fed. 165, 101 C. C. A. 485; *Stewart v. United States*, 119 Fed. 89, 55 C. C. A. 641; *United States v. Goldman*, 207 Fed. 1002; *Dufour v. United States*, 37 App. Cas. (D. C.) 497.

[a] **Indictment must affirmatively state facts showing the fraudulent scheme;** it is not sufficient that such scheme may be inferred from the allegations. *Dalton v. United States*, 127 Fed. 544, 62 C. C. A. 238.

[b] **That the scheme alleged is of a fraudulent nature need not appear upon the face of the indictment;** "all that is necessary is that it be a scheme reasonably calculated to deceive persons of ordinary comprehension and prudence and that the mail service of the United States be used and intended to be used in execution of the same." *Oesting v. United States*, 234 Fed. 304, 148 C. C. A. 206. And see *United States v. Young*, 215 Fed. 267.

[c] **If the scheme is sufficiently outlined to show its design and adaptability to deceive and to fairly acquaint the accused with what he is required to meet, it is sufficient.** *Moffatt v. United States*, 232 Fed. 522, 146 C. C. A. 480.

[d] **A general averment that defendants devised a scheme to defraud is by itself not sufficient without descriptive details showing the character, and that it was reasonably calculated to effect the wrongful design.** *Spear v. United States*, 228 Fed. 485, 143 C. C. A. 67.

ance of such scheme.¹⁴ And the fraud need not be stated with the technical details required when swindling, or a like crime, is the subject of the indictment.¹⁵ There is no rule requiring that the description of the fraudulent scheme should mention all the auxiliary devices.¹⁶ It is not necessary to allege that the fraudulent scheme met with success or that an advantage accrued to perpetrator or loss to another.¹⁷

(III.) **Intent To Defraud, etc.** — Although the indictment must show defendant's intent to defraud other persons,¹⁸ it is sufficient if this appears in any part of the indictment.¹⁹ It is not necessary to charge that the defendant deposited or caused to be deposited the letters set out in the indictment, "knowingly," where knowledge on the part of the defendant is otherwise sufficiently charged.²⁰

(IV.) **Names of Persons Defrauded.** — Where it was defendant's intention to defraud certain persons, the names of such persons should be given, or an excuse for their omission.²¹ But this is unnecessary where

14. *Gardner v. United States*, 230 Fed. 575, 144 C. C. A. 629; *McClen-don v. United States*, 229 Fed. 523, 143 C. C. A. 591; *Colburn v. United States*, 223 Fed. 590, 139 C. C. A. 136; *Gould v. United States*, 209 Fed. 730, 126 C. C. A. 454; *Brooks v. United States*, 146 Fed. 223, 76 C. C. A. 581.

15. *Whitehead v. United States*, 245 Fed. 385, 157 C. C. A. 547.

[a] Such indictments are not to be tested for sufficiency by rules applied to indictments for obtaining money under false pretenses. *Emanuel v. United States*, 196 Fed. 317, 116 C. C. A. 137.

[b] For indictments sufficiently indicating wherein and how scheme devised was fraudulent, see *Whitehead v. United States*, 245 Fed. 385, 157 C. C. A. 547; *Riddell v. United States*, 244 Fed. 695, 157 C. C. A. 143; *United States v. Baxter*, 221 Fed. 473.

[c] Where the alleged fraudulent scheme is set out in detail in one count of the indictment, reference may be made thereto in other counts of the indictment. *Riddell v. United States*, 244 Fed. 695, 157 C. C. A. 143; *Linn v. United States*, 234 Fed. 543, 148 C. C. A. 309; *Bartholomew v. United States*, 177 Fed. 902, 101 C. C. A. 182.

16. *Whitehead v. United States*, 245 Fed. 385, 157 C. C. A. 547, holding it unnecessary to set forth contract which was basis of scheme in full.

[a] **Setting Forth Contract.**—An indictment for fraudulent use of the mails was not defective where in set-

ting forth the contract which was the basis of the fraud, the pleader introduced it with: "A contract of tenor in substance as follows:" There is no conflict between the words "tenor" and "in substance" in such case; the words "in substance" modify "tenor" and indicate that the contract is substantially set forth. *Whitehead v. United States*, 245 Fed. 385, 157 C. C. A. 547.

[b] The particular instruments of the fraud need not be described. *United States v. Farmer*, 218 Fed. 929.

17. *Linn v. United States*, 234 Fed. 543, 148 C. C. A. 309; *Weeber v. United States*, 62 Fed. 740.

18. *Bettman v. United States*, 224 Fed. 819, 140 C. C. A. 265; *United States v. Schwarz*, 230 Fed. 537; *United States v. Post*, 113 Fed. 852; *United States v. Long*, 68 Fed. 348; *United States v. Harris*, 68 Fed. 347.

19. *Moffatt v. United States*, 232 Fed. 522, 146 C. C. A. 480, need not follow *videlicet*.

[a] May be charged in descriptive part of indictment. *Moffatt v. United States*, 232 Fed. 522, 146 C. C. A. 480; *United States v. Maxey*, 200 Fed. 997.

20. *Samuels v. United States*, 232 Fed. 536, 146 C. C. A. 494, Ann. Cas. 1917A, 711.

21. *Stewart v. United States*, 119 Fed. 89, 55 C. C. A. 641; *Milby v. United States*, 109 Fed. 638, 48 C. C. A. 574; *Larkin v. United States*, 107 Fed. 697, 46 C. C. A. 588.

[a] **Where Names Unknown.**—An allegation that the names and ad-

a scheme to defraud the public generally is charged.²²

(V.) **Use of Mails.** — Formerly, in order to constitute the offense, it was requisite that the person charged intended to effect the scheme by initiating or intending to initiate correspondence through the post-office establishment, or by inciting other persons to open communication with him, and the indictment was required to so charge.²³ Under the present statute defining the offense, however, if the indictment sufficiently charges a scheme or artifice to defraud, it need not aver that such scheme or artifice was to be effected by use of the mails.²⁴ That the mails were actually used in furtherance of such scheme or artifice should be clearly alleged, however.²⁵ In this connection, the letter or postal card deposited in the mail for the purpose of executing the fraudulent scheme must be sufficiently identified and described in the indictment.²⁶

(VI.) **Conspiri To Defraud.** — In prosecutions for using the mails to defraud, a conspiracy count is usually joined for the purpose of widening the field of evidence.²⁷ In addition to charging all the essential elements of the offense itself,²⁸ a count for conspiracy must state a combination between the defendants to do these things.²⁹

dresses of the parties to whom the letters were mailed are not known to the grand jury dispenses with alleging the names of the parties who were intended to be defrauded. *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. ed. 709; *McClendon v. United States*, 229 Fed. 523, 143 C. C. A. 591; *Farmer v. United States*, 223 Fed. 903, 139 C. C. A. 341.

[b] **Names of as many persons as are known** may be used in indictment. *United States v. Marrin*, 159 Fed. 767.

[c] **All Names Need Not Appear in Each Count.**—An indictment is not invalid where it charges that the scheme was to defraud a person named and various other persons to the grand jurors unknown, though each count names a different person as the one to be defrauded. *Mounday v. United States*, 225 Fed. 965, 140 C. C. A. 93.

22. *Gould v. United States*, 209 Fed. 730, 126 C. C. A. 454. See also *Finnegan v. United States*, 231 Fed. 561, 145 C. C. A. 447.

23. See the following: *United States v. Young*, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. ed. 548; *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. ed. 667; *Oesting v. United States*, 234 Fed. 304, 148 C. C. A. 206; *Belden v. United States*, 223 Fed. 726, 139 C. C. A. 256; *Horn v. United States*, 182 Fed. 721, 105 C. C. A. 163; *United States v. Young*, 215 Fed. 267.

24. *United States v. Young*, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. ed. 548; *Trent v. United States*, 223 Fed. 648, 143 C. C. A. 170; *Belden v. United States*, 223 Fed. 726, 139 C. C. A. 256; *Ruthven v. United States*, 222 Fed. 70, 137 C. C. A. 364; *United States v. Young*, 215 Fed. 267.

25. See *supra*, I, B, 2, a, (I).

26. *United States v. Wupperman*, 215 Fed. 135.

[a] **Contents need not be set out.** *Hume v. United States*, 118 Fed. 689, 55 C. C. A. 407, *citing Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. ed. 709. See also *United States v. Loring*, 91 Fed. 881.

[b] **Letter Need Not Show Fraudulent Character of Scheme.**—*United States v. Loring*, 91 Fed. 881. See also *Rumble v. United States*, 143 Fed. 772, 75 C. C. A. 30.

[c] **Name of addressee need not be alleged;** sufficient to charge that his name is to the grand jurors unknown. *McClendon v. United States*, 229 Fed. 523, 143 C. C. A. 591, *citing Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. ed. 709.

27. *Hart v. United States*, 240 Fed. 911, 153 C. C. A. 597.

28. See *supra*, I, B, 2, a, (I).

29. *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. ed. 667.

[a] **It is sufficient to allege the conspiracy and the doing of some**

(VII.) **Joinder of Offenses.**³⁰ — The present statute describing the offense of using the mails to defraud prescribes no restrictions as to the number of counts the indictment may contain or as to the period within which the separate offenses charged must have been committed.³¹ Counts charging the fraudulent use of the mails as the overt acts may be joined with one for a conspiracy to commit the offenses charged in such other counts.³²

b. *For Mailing Non-mailable Matter.* — (I.) **In General.** — An indictment for mailing matter declared by statute to be non-mailable is sufficient where it is in the language of the statute,³³ or otherwise shows the essential elements of the offense.³⁴ It is not necessary to aver that the letter deposited for mailing or delivery was sent to any particular person,³⁵ nor at what particular point or post office it was addressed.³⁶ Knowledge on the part of the defendant that the matter

overt act by one or more of the defendants intended to effect the object of the conspiracy, even though it did not accomplish such result. *United States v. Wupperman*, 215 Fed. 135.

[b] **But where the specific acts constituting the conspiracy to commit fraud by the use of the mails are set forth, it is not necessary to charge in terms that the defendants conspired to commit the offense.** *United States v. Maxey*, 200 Fed. 997.

30. See generally the title "Indictment and Information."

31. *Stern v. United States*, 223 Fed. 762, 139 C. C. A. 292, under §215 of the Crim. Code.

[a] **Formerly** (1) the statute expressly provided that but three distinct offenses of this character committed within the same six calendar months might be joined in a single indictment. *In re Henry*, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. ed. 174; *United States v. Clark*, 125 Fed. 92; *United States v. Nye*, 4 Fed. 888, all decided under §5480 of the U. S. Rev. St. (2) But such a statute did not prevent the prosecution of defendant for other offenses of the same character by a separate indictment (*In re Henry*, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. ed. 174; *Hall v. United States*, 152 Fed. 420, 81 C. C. A. 562; *United States v. Clark*, 125 Fed. 92), nor (3) prevent any number of counts in the same indictment charging by different acts the execution of the same fraudulent scheme. *United States v. Loring*, 91 Fed. 881. Compare on this point *United States v. Clark*, 125 Fed. 92.

32. *United States v. Clark*, 125 Fed. 92.

33. *Murray v. United States* (C. C. A.), 247 Fed. 874.

[a] **Duplicity.**—An indictment charging that defendant "did deposit, and cause to be deposited" in a post office for mailing and delivery a poison, etc., is not vitiated on the ground of duplicity. *Murray v. United States* (C. C. A.), 247 Fed. 874.

34. See *infra*, this note.

[a] **Where the indictment averred the time and place of mailing the letter, and set forth the letter in extenso and identified a circular inclosed therewith, which was nonmailable beyond doubt, it was sufficient.** *Pilson v. United States* (C. C. A.), 249 Fed. 328, not necessary to set forth circular in extenso.

[b] **There need not be a particular averment that the matter was non-mailable, where it is averred that the newspaper "contained certain indecent, vile, and filthy substance and language, and was a publication of an indecent character, and which said indecent, vile, and filthy substance and language . . . was of a character to incite, in the minds of persons reading the same, murder and assassination," and the objectionable language is then set out in full.** *Magon v. United States* (C. C. A.), 248 Fed. 201.

35. *Magon v. United States* (C. C. A.), 248 Fed. 201 (*citing Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. ed. 709); *Murray v. United States* (C. C. A.), 247 Fed. 874; *Ackley v. United States*, 200 Fed. 217, 118 C. C. A. 403.

36. *Murray v. United States* (C. C. A.), 247 Fed. 874.

mailed was non-mailable should be averred.³⁷

(II.) **Matter Concerning Lotteries.** — An indictment under a statute prohibiting the mailing of a letter or circular concerning a lottery should set out the letter or circular in *haec verba*.³⁸ If it appears upon the face of the communication that it had reference to a lottery, this fact need not be specifically alleged.³⁹ The indictment should aver knowledge on the part of defendant that the letter or circular was concerning a lottery.⁴⁰ It is not necessary to allege that the postage was prepaid.⁴¹

An averment that defendant deposited or caused to be deposited in the post office a letter concerning a lottery is not bad for duplicity.⁴² An indictment charging the mailing of a "letter and circular" is not inconsistent as the paper may be both a letter and circular.⁴³

(III.) **Obscene Matter.** — (A.) **IN GENERAL.** — In accordance with the general rule, an indictment charging the offense of mailing obscene matter should apprise the defendant of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense.⁴⁴ This rule is not violated by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court,⁴⁵ provided the crime charged, however general the language used, is yet so described as reasonably to inform the

37. See *United States v. Clifford*, 104 Fed. 296.

[a] **Knowledge Sufficiently Alleged.** But an indictment charging that defendant deposited a letter in the post office which he knew to contain information how to prevent conception is sufficient without an allegation that defendant knew that the articles named in the letter were intended for that purpose. *United States v. Currey*, 206 Fed. 322.

[b] **Where the indictment states that the defendants "knowingly, willfully, unlawfully, and feloniously deposited"** the matter in question, it is not insufficient because it does not appear that defendants knew that the papers deposited by them contained indecent matter, or knew its import, or that it was of a character tending to incite murder or assassination. *Magon v. United States (C. C. A.)*, 248 Fed. 201.

38. *United States v. Conrad*, 59 Fed. 458; *United States v. Noelke*, 1 Fed. 426, 17 Blatchf. 554.

39. *United States v. Noelke*, 1 Fed. 426, 17 Blatchf. 554.

[a] **Indictment need not show how they referred to a lottery unless it does not appear upon the face of the circulars that they refer to such lot-**

tery. *United States v. Bailey*, 47 Fed. 117.

[b] **A general allegation that the letter or circular related to a lottery is sufficient.** *United States v. Fulkerson*, 74 Fed. 619.

40. See *infra*, this note.

[a] **Allegation that defendant knowingly deposited in the post office a letter concerning a lottery shows that he knew the contents thereof.** *Glass v. United States*, 222 Fed. 773, 138 C. C. A. 321; *United States v. Ridgway*, 199 Fed. 286; *United States v. Purvis*, 195 Fed. 618; *United States v. Fulkerson*, 74 Fed. 619, pamphlet.

41. *United States v. McDonald*, 65 Fed. 486.

42. *United States v. Purvis*, 195 Fed. 618. See also *Glass v. United States*, 222 Fed. 773, 138 C. C. A. 321.

43. *United States v. Noelke*, 1 Fed. 426, 17 Blatchf. 554.

44. *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. ed. 606; *Coomer v. United States*, 213 Fed. 1, 129 C. C. A. 617; *Floren v. United States*, 186 Fed. 961, 108 C. C. A. 577.

45. *Rosen v. United States*, 161 U. S. 29, 40, 16 Sup. Ct. 434, 480, 40

accused of the nature of the charge sought to be established against him;⁴⁶ and in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd and lascivious.⁴⁷ It must be alleged that the matter described was obscene, lewd and lascivious.⁴⁸ It is also essential that the indictment aver that the obscene matter was addressed to some person.⁴⁹ It is not necessary to allege that the defendant wrote the alleged obscene communication or caused it to be written.⁵⁰ The necessity of negating provisos or exceptions in the statute is governed by the general rules elsewhere treated.⁵¹

(B.) CHARGING KNOWLEDGE ON PART OF DEFENDANT. — Defendant's knowledge, at the time he sent it, of the non-mailable contents of the alleged

L. ed. 606; *Tubbs v. United States*, 105 Fed. 59, 44 C. C. A. 357.

46. *Rosen v. United States*, 161 U. S. 29, 40, 16 Sup. Ct. 434, 480, 40 L. ed. 606; *United States v. Harris*, 122 Fed. 551; *Bates v. United States*, 10 Fed. 92, 10 Biss. 70; *United States v. Bennett*, 16 Blatchf. 338, 24 Fed. Cas. No. 14,571.

[a] An indictment setting out parts of an obscene letter and omitting the objectionable parts thereof is sufficient. *Winters v. United States*, 201 Fed. 845, 120 C. C. A. 175.

[b] An indictment giving a general description of the indecent pictures alleged to have been sent by defendant through the mails is sufficient to apprise defendant of the nature of the charge. *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. ed. 550; *De Gignac v. United States*, 113 Fed. 197, 52 C. C. A. 71.

[c] But a mere allegation that the matter is too obscene to be spread upon the records of the court is not sufficient. *United States v. Tubbs*, 94 Fed. 356; *United States v. Fuller*, 72 Fed. 771; *United States v. Harmon*, 34 Fed. 872.

[d] It is not sufficient to designate a paper of an indecent character by name only without stating the date of the paper or the title and the subject of the article. *United States v. Harmon*, 34 Fed. 872. See also *United States v. Reid*, 73 Fed. 289.

47. *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. ed. 606; *Rinker v. United States*, 151 Fed. 755, 81 C. C. A. 379.

[a] Effect of Bill of Particulars. An indictment for mailing obscene matter which is not demurrable on its

face does not become so by the addition of a bill of particulars. *Coomer v. United States*, 213 Fed. 1, 129 C. C. A. 617.

48. *United States v. Clifford*, 104 Fed. 296; *United States v. Slenker*, 32 Fed. 691.

[a] Use of Phrase "Indecent Character."—Under a statute prohibiting the mailing of "every obscene, lewd or lascivious book, pamphlet or other publication of an indecent character," the latter word is used in the statute only to qualify the character of other publications therein referred to and it need not be used in addition to the words "obscene, lewd and lascivious." *Rinker v. United States*, 151 Fed. 755, 81 C. C. A. 379; *United States v. O'Donnell*, 165 Fed. 218.

[b] The conclusion "contrary to the form of the statute" is insufficient to show that the matter mailed by him comes within the purview of the statute. *United States v. Clifford*, 104 Fed. 296.

49. *United States v. Brazeau*, 78 Fed. 464.

[a] Unless the communication is set out in *haec verba* and it appears therefrom that it commences with an address. *United States v. Harris*, 122 Fed. 551.

50. *United States v. Currey*, 206 Fed. 322.

51. See 12 STANDARD PROC. 458.

[a] Where under the statute a prohibited article may be lawfully sent through the mails to certain persons, the indictment need not negative the fact that it was mailed to such a person. *United States v. Clark*, 38 Fed. 500.

obscene matter, must be set forth.⁵² But an indictment alleging that defendant "knowingly deposited in the post office" the alleged obscene matter sufficiently charges the defendant with knowledge that it was obscene, at least where no objection is made until after verdict.⁵³

(IV.) **Information Concerning Obscene Matter.** — Under a statute prohibiting the sending of information through the mails as to where obscene matter or articles can be obtained, an indictment need not aver that the information was given to one who inquired for or desired the same,⁵⁴ or that it reached such person.⁵⁵ Nor is it necessary to aver ownership or possession of the obscene matter.⁵⁶ The letter giving the information should be so described as to identify the offense.⁵⁷ But it is unnecessary to describe any particular pictures or articles about which information was given,⁵⁸ further than to simply allege that they were obscene, lewd and lascivious.⁵⁹

3. For Opening Mail Matter. — Under a statute, making it a penal offense to open a letter which has been in a post office, before delivery to the person to whom it is directed, with intent to obstruct his correspondence or pry into his business, an indictment is sufficient which follows the language of the statute.⁶⁰ It is not essential to allege that the opening of the letter was unlawful,⁶¹ or that the letter was sealed,⁶² or that the person to whom it was addressed was a real person.⁶³ Un-

52. *United States v. Clifford*, 104 Fed. 296; *United States v. Slenker*, 32 Fed. 691, failure to do so renders indictment fatal on motion in arrest.

53. *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. ed. 606; *Stayton v. United States*, 213 Fed. 224, 129 C. C. A. 568; *United States v. Nathan*, 61 Fed. 936; *United States v. Clark*, 37 Fed. 106 (obscene pictures); *United States v. Bennett*, 16 Blatchf. 338, 24 Fed. Cas. No. 14,571, obscene book. But see *United States v. Reid*, 73 Fed. 289.

[a] **Obscene Publication.**—*Price v. United States*, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. ed. 727; *Tyomies Pub. Co. v. United States*, 211 Fed. 385, 128 C. C. A. 47; *King v. United States*, 112 Fed. 988, 50 C. C. A. 647.

[b] **An allegation that defendant knew that the envelope deposited by him contained a certain letter by reasonable intendment shows that the defendant knew of the purpose of the letter.** *United States v. Currey*, 206 Fed. 322.

54. *De Gignac v. United States*, 113 Fed. 197, 52 C. C. A. 71.

55. *United States v. Grimm*, 45 Fed. 558.

56. *De Gignac v. United States*, 113 Fed. 197, 52 C. C. A. 71.

57. *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. ed. 550.

[a] "But it does not follow that everything referred to in the letter, or concerning which information is given therein, should be spread at length on the indictment. On the contrary, it is sufficient to allege its character and leave further disclosures to the introduction of evidence." *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. ed. 550.

[b] **Where the document is set out in full and nothing therein contained shows that it conveys the information averred, the indictment cannot be upheld unless other extrinsic facts showing it are alleged therein.** *United States v. Grimm*, 45 Fed. 558.

58. *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. ed. 550.

59. *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. ed. 550.

60. *United States v. Pond*, 2 Curt. 265, 27 Fed. Cas. No. 16,067.

61. *United States v. Pond*, 2 Curt. 265, 27 Fed. Cas. No. 16,067.

62. *United States v. Pond*, 2 Curt. 265, 27 Fed. Cas. No. 16,067, offense whether letter sealed or unsealed.

63. *United States v. Pond*, 2 Curt. 265, 27 Fed. Cas. No. 16,067.

der a statute prohibiting the opening, reading, or making public of a sealed letter or telegram, the indictment must show that the letter was sealed,⁶⁴ and that defendant published it knowing it to have been opened or read without authority.⁶⁵

4. **For Embezzlement of Mail Matter.** — a. *In General.* — An indictment charging the embezzlement or theft of mail matter in the language of the statute is generally sufficient.⁶⁶ Fraudulent intent, unless made essential by statute, need not be alleged.⁶⁷ Nor is it necessary to allege all the ingredients of the crime of larceny.⁶⁸ An indictment which fails to show the unlawful taking of the letter or mail matter is fatally defective, however.⁶⁹

Description of Mail Matter. — The letter or mail matter must be so described in the indictment as to identify it,⁷⁰ unless it is stated to be unknown to the grand jurors.⁷¹ It need not be stated that the matter taken was mailable,⁷² or that it was in the post office for transmission through the mails,⁷³ or that the letter was intended to be conveyed to any particular place.⁷⁴ The value of the article stolen need not be alleged, where the article itself is sufficiently described.⁷⁵ The indictment need not show who owned the article.⁷⁶

Duplicity and Joinder. — The general rules as to duplicity and joinder are applied.⁷⁷

64. *State v. Bagwell*, 107 N. C. 859, 12 S. E. 254, 9 L. R. A. 840.

65. *State v. Bagwell*, 107 N. C. 859, 12 S. E. 254, 9 L. R. A. 840.

66. *United States v. Atkinson*, 34 Fed. 316. See generally *supra*, I, B, 1, and 12 STANDARD PROC. 442, et seq.

67. *United States v. Atkinson*, 34 Fed. 316.

[a] The use of the word "steal" sufficiently charges wrongful intent. *United States v. Trosper*, 127 Fed. 476.

68. *Thompson v. United States*, 202 Fed. 401, 120 C. C. A. 575, 47 L. R. A. (N. S.) 206.

69. *United States v. Meyers*, 142 Fed. 907.

70. *Bromberger v. United States*, 128 Fed. 346, 63 C. C. A. 76; *United States v. Fuller*, 5 N. M. 80, 20 Pac. 175.

[a] It is not necessary to set out in *hæc verba* a check stolen from the mails; but a sufficient description of the check so as to identify it and inform the accused of what he was charged with stealing and protect him from being again put in jeopardy for the same offense must be made. *Jones v. United States*, 27 Fed. 447.

[b] Neither (1) the name of the person who wrote it (*Farnum v. United States*, 1 Colo. 309), nor (2) the per-

son to whom it was addressed (*Farnum v. United States*, 1 Colo. 309) need be set forth.

71. *United States v. Golding*, 2 Cranch C. C. 212, 25 Fed. Cas. No. 15,224.

72. *Beery v. United States*, 2 Colo. 186.

73. *Bowers v. United States*, 148 Fed. 379, 78 C. C. A. 193.

74. *United States v. Okie*, 5 Blatchf. 516, 27 Fed. Cas. No. 15,916; *United States v. Laws*, 26 Fed. Cas. No. 15,579.

75. *Bowers v. United States*, 148 Fed. 379, 78 C. C. A. 193; *Jones v. United States*, 27 Fed. 447; *United States v. Fisher*, 5 McLean 23, 25 Fed. Cas. No. 15,102; *United States v. Clark*, Crabbe 584, 25 Fed. Cas. No. 14,801.

[a] Unless the nature of the sentence in case of conviction is by statute made dependent upon the value of the property. *United States v. Cummings*, 25 Fed. Cas. No. 14,901a; *Farnum v. United States*, 1 Colo. 309.

76. *United States v. Trosper*, 127 Fed. 476; *United States v. Falkenhainer*, 21 Fed. 624; *United States v. Okie*, 5 Blatchf. 516, 27 Fed. Cas. No. 15,916. See *United States v. Baugh*, 1 Fed. 784, 4 Hughes 501.

77. See the title "Indictment and Information."

b. *By Postal Employees.*—Where a postal employee is charged with such offense, it is not necessary to expressly allege that the defendant came into possession of the mail matter by virtue of his employment.⁷⁸ But it must affirmatively appear that the defendant was an employee of the post office department.⁷⁹ It is not necessary to aver that the letter or article was intended to be conveyed by mail,⁸⁰ or delivered by a letter carrier.⁸¹ Nor is it necessary to negative the delivery of the letter to the party to whom it was directed.⁸²

5. *For Robbery of Mails.*—An indictment founded on a statute punishing one for advising, procuring and assisting a mail carrier to rob the mail, should show that the carrier did in fact commit the offense of robbing the mail.⁸³

6. *For Receiving Stolen Mail Matter.*⁸⁴—An indictment charging the receiving and concealing of stolen mailmatter is sufficient if it covers all the elements of the crime as described in the statute.⁸⁵

7. *For Obstructing the Mails.*—An indictment for a conspiracy to obstruct the passage of the mails need not charge that the overt

[a] **Embezzlement and Stealing.**

(1) Under the statute making the embezzlement of a letter and the stealing of its contents two distinct offenses, an indictment charging the embezzlement of a letter alone is sufficient to support a verdict. *United States v. Taylor*, 1 Hughes 514, 28 Fed. Cas. No. 16,438. (2) But the two offenses may be charged in a single count of an indictment as constituting a single offense without rendering the indictment bad for duplicity, as the whole transaction may be regarded as a single continuous act. *United States v. Byrne*, 44 Fed. 188; *United States v. Golding*, 2 Cranch C. C. 212, 25 Fed. Cas. No. 15,224. See also *Bromberger v. United States*, 128 Fed. 346, 63 C. C. A. 76; *United States v. Sander*, 6 McLean 598, 27 Fed. Cas. No. 16,219.

78. *United States v. Laws*, 26 Fed. Cas. No. 15,579, it is sufficient to show that the defendant was employed in the post office department and obtained possession of the letter. See also *United States v. Patterson*, 6 McLean 466, 27 Fed. Cas. No. 16,011.

[a] But a charge that while the accused was a postmaster he unlawfully and feloniously converted to his own use money of the United States which came into his hands by virtue of his office, sufficiently charges that the money was in his official possession when it was converted. *Corbin v. United States*, 203 Fed. 273, 125 C. C. A. 111.

79. *United States v. Allen*, 150 Fed. 152.

[a] **An allegation of the particular office occupied by the defendant is not essential.** *United States v. Clark*, Crabbe 584, 25 Fed. Cas. No. 14,801.

80. *Hall v. United States*, 168 U. S. 632, 18 Sup. Ct. 237, 42 L. ed. 607.

[a] **For sufficient averment (if same is considered necessary), see** *In re Wight*, 134 U. S. 136, 148, 10 Sup. Ct. 487, 33 L. ed. 865.

81. *Hall v. United States*, 168 U. S. 632, 18 Sup. Ct. 237, 42 L. ed. 607.

82. *In re Wight*, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. ed. 865; *United States v. Jenther*, 13 Blatchf. 335, 26 Fed. Cas. No. 15,476.

83. *United States v. Mills*, 7 Pet. (U. S.) 138, 8 L. ed. 636, but a distinct substantive averment of that fact is not necessary.

84. See the title "**Receiving Stolen Goods.**"

85. *Thompson v. United States*, 202 Fed. 401, 120 C. C. A. 575, 47 L. R. A. (N. S.) 206.

[a] **An indictment charging the receipt of stolen stamps must allege that the stamps were stolen from the United States, describe the stamps, and charge the time and post offices from which they were stolen.** *Naftzger v. United States*, 200 Fed. 494, 118 C. C. A. 598.

[b] **All the essential elements of the crime of larceny need not be alleged.** *Thompson v. United States*, 202

acts done were done feloniously;⁸⁶ nor is it necessary to negative the existence of any circumstances that might make them possibly lawful, if on their face they appear to be unlawful.⁸⁷ Where wilfully delaying a mail train is charged, knowledge that the train carried mails must be specifically alleged.⁸⁸

8. For Detaining a Letter.—In charging a postmaster with detaining mail it is sufficient to follow the language of the statute.⁸⁹

9. For Breaking and Entering Post Office.—While the acts and intents constituting the crime of breaking into a post office building must be set forth with reasonable particularity of time, place and circumstance,⁹⁰ it is sufficient to follow the language of the statute,⁹¹ though no averment is made that the forcible breaking and entering was into that part of the building used as a post office.⁹² A count charging both the forcible breaking into a post office building with intent to commit larceny and also the larceny of certain stamps is not fatally defective.⁹³

10. For Unlawful Carriage of Mail Matter Outside of Mail.—An indictment for the offense of carrying a letter over a mail route outside of the mail need not negative the fact that the letter transported by the defendant was stamped.⁹⁴

11. For Violation of Franking Privileges.—The official capacity of one charged with violating the franking privilege, need not be alleged.⁹⁵ But the indictment should show that the letters were not written by others under defendant's direction and on the business of his office.⁹⁶

12. For Conspiracy to Defraud Through Weight of Mail.—In charging a conspiracy to defraud the government by deceiving it as to the average amount of mail carried, it is unnecessary to show that the object of the conspiracy was accomplished,⁹⁷ or what particular

Fed. 401, 120 C. C. A. 575, 47 L. R. A. (N. S.) 206.

86. *United States v. Debs*, 65 Fed. 210.

87. *United States v. Debs*, 65 Fed. 210.

88. *Salla v. United States*, 104 Fed. 544, 44 C. C. A. 26. But see *United States v. Debs*, 65 Fed. 210.

[a] **For indictment sufficiently averring** such knowledge, see *United States v. Hall*, 206 Fed. 484.

89. *United States v. Holmes*, 40 Fed. 750, sufficient to aver in the words of the statute that the letter in question was unlawfully detained, with intent to prevent its arrival; not necessary to aver that the detention was knowingly and wilfully done. See generally *supra*, I, B, 1, and 12 STANDARD PROC. 442, et seq.

90. *Cosidine v. United States*, 112 Fed. 342, 50 C. C. A. 272.

91. *United States v. Williams*, 57 Fed. 201. See generally *supra*, I, B, 1, and 12 STANDARD PROC. 442, et seq.

92. *United States v. Williams*, 57 Fed. 201.

[a] **Breaking in To Commit Larceny.**—But an indictment charging the defendant with breaking into a building used in part as a post office, with intent to commit larceny "in that building" is insufficient, because it fails to charge the intention to commit larceny in that portion of the building used as a post office. *United States v. Campbell*, 16 Fed. 233, 9 Sawy. 20, indictment did not follow language of statute. See also *United States v. Martin*, 140 Fed. 256.

93. *United States v. Yennie*, 74 Fed. 221, since both offenses relate to and are parts of the same transaction.

94. *United States v. Tilden*, 28 Fed. Cas. No. 16,523.

95. *Deweese's Case*, Chase 531, 7 Fed. Cas. No. 3,848, holding that if such requirement was necessary, it is a sufficient allegation that D, member of congress, committed the offense.

96. *Deweese's Case*, Chase 531, 7 Fed. Cas. No. 3,848.

97. *United States v. Newton*, 48 Fed. 218.

officer was intended to be deceived,⁹⁸ or that the fraudulent mail matter carried was of sufficient weight to increase the average compensation to the carrier,⁹⁹ or that the carrying of such mail matter would not continue beyond the time fixed for weighing the mails.¹

C. TRIAL. — 1. **In General.** — The general rules governing trials in criminal cases obtain in prosecutions for offenses under the postal laws.²

2. **Variance.** — The general rules in reference to variance between the allegations of an indictment and the proof are applicable in prosecutions for the violation of the postal laws.³

3. **Province of Judge and Jury.**⁴ — While it is for the judge to decide whether the matter can be reasonably deemed of such character as to come within the purview of the statute,⁵ yet the character of the matter mailed, whether it was obscene, lewd, lascivious, or indecent is a question of fact for the jury under instructions of the court as to the meaning of such terms.⁶ Whether or not a scheme was fraudulent is a question for the jury,⁷ as is the question whether defendants were actuated by an intent to defraud when using the mails.⁸

4. **Instructions** are governed by the general rules elsewhere treated.⁹

98. *United States v. Newton*, 48 Fed. 218.

99. *United States v. Newton*, 48 Fed. 218.

1. *United States v. Newton*, 48 Fed. 218.

2. See *infra*, this note, and generally the title "Trial," and cross-references there found.

[a] Where the indictment shows the joint participation of the defendants in the particular offense charged, a motion for separate trials is not improperly denied. *Belden v. United States*, 223 Fed. 726, 139 C. C. A. 256. See generally the title "Separate Trials."

[b] **Effect of consolidation of number of indictments on right to peremptory challenges**, see *Betts v. United States*, 132 Fed. 228, 65 C. C. A. 452; and generally 17 STANDARD PROC. 235, et seq.

3. See *Harrison v. United States*, 200 Fed. 662, 119 C. C. A. 78; *United States v. Jones*, 31 Fed. 718; *Kemp v. United States*, 41 App. Cas. (D. C.) 539, 51 L. R. A. (N. S.) 825, and the title "Variance and Failure of Proof."

[a] **There is no material variance** (1) though a number of persons are charged with a conspiracy to commit an offense against the postal laws, and the guilt of all of them is not proven by the government (*Farmer v. United States*, 223 Fed. 903, 139 C. C. A. 341), (2) nor when the indictment charges

that the defendant intended to defraud through the mails certain persons named and others, some of whose names are unknown, and the proof shows an intent to defraud that portion of the public which might respond to an advertisement. *Harrison v. United States*, 200 Fed. 662, 119 C. C. A. 78.

4. See generally the title "Province of Judge and Jury."

5. *United States v. Kennerley*, 209 Fed. 119; *United States v. Journal Co.*, 197 Fed. 415.

6. *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. ed. 606; *Magon v. United States* (C. C. A.), 248 Fed. 201 (whether matter was "indecent" within meaning of §211 of Crim. Code as amended in 1911); *Parish v. United States* (C. C. A.), 247 Fed. 40; *Tyomies Pub. Co. v. United States*, 211 Fed. 385, 128 C. C. A. 47; *United States v. Davis*, 38 Fed. 326.

7. *Gould v. United States*, 209 Fed. 730, 126 C. C. A. 454. See also *Whitehead v. United States*, 245 Fed. 385, 157 C. C. A. 547.

8. *Edwards v. United States* (C. C. A.), 249 Fed. 686; *Sandals v. United States*, 213 Fed. 569, 130 C. C. A. 149.

9. See generally 13 STANDARD PROC. 698, et seq., and *Hendrey v. United States*, 233 Fed. 5, 147 C. C. A. 75; *Spears v. United States*, 228 Fed. 485,

II. REMEDIES AGAINST POSTMASTERS.—The jurisdiction of civil actions against postmasters for the loss of mail matter, is determined by the general rules elsewhere treated,¹⁰ and the same is true as to the averments of the declaration or complaint.¹¹

143 C. C. A. 67; *Colburn v. United States*, 223 Fed. 590, 139 C. C. A. 136; *Blanton v. United States*, 213 Fed. 320, 130 C. C. A. 22, Ann. Cas. 1914D, 1238.

[a] Where the substance or equivalent of requested instructions is embodied in the charge to the jury, it is not error to refuse to give such instructions in the language as requested. *Colburn v. United States*, 223 Fed. 590, 139 C. C. A. 136. See also *Blanton v. United States*, 213 Fed. 320, 130 C. C. A. 22, Ann. Cas. 1914D, 1238.

10. See the title "**Jurisdiction.**"

[a] **Justice's Court.**—*McNamee v. United States*, 11 Ark. 148; *Ford v. Parker*, 4 Ohio St. 576. See generally the title "**Justices of the Peace.**"

11. See the title "**Declaration and Complaint,**" and *Dunlop v. Munroe*, 1 Cranch C. C. 536, 8 Fed. Cas. No. 4,167.

[a] Where the action is brought by the United States against a postmaster and the sureties on his official bond to recover money lost through the negligence of the postmaster, it is not essential to allege that the action is brought for the use or at the relation of the injured party. *United States v. Griswold*, 8 Ariz. 453, 76 Pac. 596.

[b] In an action against a postmaster for the negligent loss of a letter, an averment that the defendant neglected to forward the letter "as it was his duty to do" is only an allegation that such defendant was bound to send it by mail, not that he did not send it by the next mail. *Dunlop v. Munroe*, 1 Cranch C. C. 536, 8 Fed. Cas. No. 4,167.

[c] **Action for Misfeasance of Agent.**—*Bishop v. Williamson*, 11 Me. 495. See also *Dunlop v. Munroe*, 1 Cranch C. C. 536, 8 Fed. Cas. No. 4,167.

POSTPONEMENT.—See **Continuances; Judgments and Decrees, Enforcement of; Judicial Sales.**

POVERTY.—See **Paupers; Security for Costs.**

POWERS

By the Editorial Staff.

I. NATURE OF, 481

II. PROCEEDINGS TO COMPEL OR RESTRAIN EXECUTION, 481

A. *Compelling Execution*, 481

B. *Restraining Execution*, 483

III. THE EXERCISE OF THE POWER OF SALE, 483

A. *Order of Court*, 483

B. *Notice of Sale*, 484

C. *Confirmation of Sale*, 484

D. *Vacating Sale*, 484

IV. REMEDYING DEFECTIVE EXECUTION, 485

A. *In General*, 485

B. *For and Against Whom*, 486

CROSS-REFERENCES:

Decedents' Estates; Mortgages;
Principal and Agent.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. NATURE OF.—A power is an authority to do some act in relation to property or the creation of estates therein or of charges thereon, which act the owner granting or reserving such power might himself lawfully perform.¹

II. PROCEEDINGS TO COMPEL OR RESTRAIN EXECUTION.

A. COMPELLING EXECUTION.—An imperative power, one charged with a trust, will upon donee's default, be enforced by a court of equity,² unless the purpose for which it was created has already been

1. See the following cases: **Conn.** Bouton v. Doty, 69 Conn. 531, 37 Atl. 1064. **Md.**—Maryland Mut. Ben. Soc. v. Clendinen, 44 Md. 429, 22 Am. Rep. 52. **Minn.**—Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130. **N. Y.**—Murray v. Miller, 178 N. Y. 316, 70 N. E. 870.

2. **D. C.**—Fitzgerald v. Wynne, 1 App. Cas. 107. **Ga.**—Mastin v. Barnard, 33 Ga. 520; Heard v. Sill, 26 Ga. 302. **Ind.**—Kintner v. Jones, 122 Ind. 148, 23 N. E. 701. **Mass.**—Greenough v. Welles, 10 Cush. 571. **N. J.**—Berrien v. Berrien, 4 N. J. Eq. 37. **N. Y.**

accomplished.³ But when the power is general or discretionary equity will not except under unusual or peculiar circumstances,⁴ interfere to compel its execution.⁵

Smith v. Floyd, 140 N. Y. 337, 35 N. E. 606; *In re Gantert*, 136 N. Y. 106, 32 N. E. 551; Van Boskerek v. Herrick, 63 Barb. 250. Ohio.—Neff v. Neff, 3 Ohio Dec. (Reprint) 75. Pa.—Fahnestock v. Fahnestock, 152 Pa. 56, 25 Atl. 213, 34 Am. St. Rep. 623; *In re Philadelphia's Appeal*, 112 Pa. 470, 4 Atl. 4; *In re Lafferty's Estate*, 2 Pa. Dist. 215. Va.—McCamant v. Nuckolls, 85 Va. 331, 12 S. E. 160. Eng.—Joel v. Mills, 3 K. & J. 458, 69 Eng. Reprint 1189; Robson v. Flight, 4 De G., J. & S. 608, 34 Beav. 110, 11 L. T. N. S. 558, 34 L. J. Ch. 226, 13 Wkly. Rep. 195, 46 Eng. Reprint 1054; Cruwys v. Colman, 9 Ves. Jr. 319, 7 Rev. Rep. 210, 32 Eng. Reprint 626.

[a] "It is settled doctrine, that where the power is one which it is the duty of the trustee to execute, he becomes a trustee for the exercise of the power, and not as one having a discretion, whether he will exercise it or not, and the court adopts the principle as to trusts, and will not permit his refusal, negligence, accident, or other circumstances, to disappoint the interest of those for whose benefit he was clothed with the power." Fitzgerald v. Wynne, 1 App. Cas. (D. C.) 107, 119.

3. Wilks v. Burns, 60 Md. 64; Prentice v. Janssen, 79 N. Y. 478.

[a] **Subject of Power Taken by Beneficiary.**—Thus where land is directed to be converted into money and turned over to a certain beneficiary, the party entitled to the beneficial interest may, if he elects to do so, prevent any conversion of the property and hold it as it is. Where this is done no further interest remains in the donee of the power, and equity will not interfere to compel the execution of the power because its purpose has been accomplished without its exercise. Prentice v. Janssen, 79 N. Y. 478.

4. Taussig v. Reel, 134 Mo. 530, 34 S. W. 1104.

[a] **To Enforce Performance of Contract To Lease.**—"That a court of equity will enforce the execution of a power under certain conditions is beyond question. For instance, if in this case Mrs. Reel had the power

from the remaindermen to make a lease to the property in futuro, had contracted to do so, and then refused to execute the lease, or had died before so doing, its execution might have been compelled by a court of equity, in a proceeding against her if living, or if dead against the remaindermen. Especially will this be done where the lessee is in possession under the contract to lease." Taussig v. Reel, 134 Mo. 530, 547, 34 S. W. 1104.

[b] **Death of Trustee Before Executing Power.**—In some jurisdictions it is provided by statute that if a trustee of a power with right of selection shall die leaving the power unexecuted, its execution shall be adjudged by a court for the benefit equally of all the persons designated as objects of the trust. Derse v. Derse, 103 Wis. 113, 79 N. W. 44.

[c] **The statutes of some jurisdictions specifically authorize the courts to proceed in certain cases.** Derse v. Derse, 103 Wis. 113, 79 N. W. 44.

5. Fla.—Lines v. Darden, 5 Fla. 51. Ill.—Crozier v. Hoyt, 97 Ill. 23. Ky.—Flint v. Spurr, 17 B. Mon. 499; McGaughey's Admr. v. Henry, 15 B. Mon. 383. Mass.—Proctor v. Heyer, 122 Mass. 525; Eldredge v. Heard, 106 Mass. 579; Amory v. Green, 13 Allen 413. Neb.—Loosing v. Loosing, 85 Neb. 66, 122 N. W. 707, 25 L. R. A. (N. S.) 920. N. Y.—Towler v. Towler, 142 N. Y. 371, 36 N. E. 869; Bunner v. Storm, 1 Sandf. Ch. 357. N. C.—Young v. Young, 97 N. C. 132, 2 S. E. 78. Pa.—*In re Ingles' Estate*, 76 Pa. 430; *In re Andrews' Estate*, 6 Pa. Dist. 24; *In re Peterson's Estate*, 13 Phila. 265. R. I.—Brown v. Phillips, 16 R. I. 612, 18 Atl. 249. S. C.—Fronty v. Fronty's Exrs., 1 Bailey Eq. 517. Tenn.—Bedford v. Bedford, 110 Tenn. 204, 75 S. W. 1017. Va.—McCamant v. Nuckolls, 85 Va. 331, 12 S. E. 160; Dixon v. McCue, 14 Gratt. (55 Va.) 540. Eng.—Brook v. Brook, 3 Sm. & G. 280, 65 Eng. Reprint 659; Cox v. Basset, 3 Ves. Jr. 155, 30 Eng. Reprint 945; Tollet v. Tollet, 2 P. Wms. 489, 24 Eng. Reprint 828.

[a] **Nature of Power Not To Be Changed.**—Equity will not control the execution of a power by changing an

B. RESTRAINING EXECUTION.—A court of equity may restrain one who is recklessly or fraudulently wasting an estate over which he has a discretionary power of sale,⁶ but as a general rule will not interfere with the execution of a power in the absence of abuse of discretion or fraud.⁷ However, equity will act when a power is about to be executed contrary to the directions of its donor,⁸ or when there is a doubt as to the donee's authority to act.⁹

III. THE EXERCISE OF THE POWER OF SALE.—**A. ORDER OF COURT.**—While the donee of a power may request a court of equity to direct him in its execution,¹⁰ he may proceed without an order of court to execute a power that is general and unrestricted,¹¹ so long as

imperative or special power into a general beneficial power by striking out the beneficiaries of the special power. *McLean v. McLean*, 158 N. Y. Supp. 59.

6. *Griffin v. Nicholas*, 224 Mo. 275, 123 S. W. 1063.

7. **U. S.**—*Giles v. Little*, 104 U. S. 291, 26 L. ed. 745. **Ill.**—*Crozier v. Hoyt*, 97 Ill. 23. **Ia.**—*Dickey v. Barnstable*, 122 Iowa 572, 98 N. W. 368. **Mass.**—*Proctor v. Heyer*, 122 Mass. 525. **N. Y.**—*McDonald v. O'Hara*, 9 Misc. 686, 30 N. Y. Supp. 545, 62 N. Y. St. 122 (*affirmed*, 144 N. Y. 566, 39 N. E. 642); *Blodgett v. Schofield*, 15 N. Y. St. 488. **Pa.**—*In re Andrews' Estate*, 6 Pa. Dist. 24; *Bruner v. Naglee*, 7 Phila. 384. **Tenn.**—*Hamilton v. Mound City Mut. L. Ins. Co.*, 6 Lea 402. **Va.**—*Dixon v. McCue*, 14 Gratt. (55 Va.) 540. **Eng.**—*Marker v. Kekewich*, 8 Hare 291, 42 E. R. 280, 3 Mac. & G. 311, 68 Eng. Reprint 372; *Roberts v. Bozen*, 3 L. J. Ch. O. S. 113.

8. *Napier v. Napier*, 89 Ga. 48, 14 S. E. 870.

9. *Galbreath v. Everett*, 84 N. C. 546.

10. *Hinton v. Cole*, 3 Humph. (Tenn.) 656.

11. **U. S.**—*Ames v. Holderbaum*, 44 Fed. 224; *Woolworth v. Root*, 40 Fed. 723. **Ala.**—*McRae's Admr. v. McDonald*, 57 Ala. 423. **Cal.**—*In re Delaney's Estate*, 49 Cal. 76; *White v. Moses*, 21 Cal. 43; *Payne v. Payne*, 18 Cal. 291. **Conn.**—*Bartlett v. Buckland*, 78 Conn. 517, 63 Atl. 350. **Ill.**—*White v. Glover*, 59 Ill. 459. **Ind.**—*Hes v. Martin*, 69 Ind. 114. **Mich.**—*Tracy v. Murray*, 49 Mich. 35, 12 N. W. 900; *Battelle v. Parks*, 2 Mich. 531. **Mo.**—*Griffin v. Nicholas*, 224 Mo. 275, 123 S. W. 1063. **Ohio.**—*Wanzer v. Widow*, 2 Ohio Dec. (Reprint) 323.

Ore.—*Northrop v. Marquam*, 16 Ore. 173, 18 Pac. 449. **Pa.**—*Hamlin v. Thomas*, 126 Pa. 20, 17 Atl. 506. **Tex.**—*De Zbrankov v. Burnett*, 10 Tex. Civ. App. 442, 31 S. W. 71; *Smith v. Swan*, 2 Tex. Civ. App. 563, 22 S. W. 247.

See 6 STANDARD PROC. 543, note 42.

[a] **Rule Applies to Executors.**—In a case where executors were given a general unqualified power to sell, the question arose as to whether or not they could act without the direction and supervision of the probate court. Justice Cooley said: "We do not think much importance is to be attached to the fact that the donees of the power are called executors. Wills are informal instruments commonly, and the question arising upon them is not so much what words have been made use of as what was intended by them. And we do not think there is any policy of the state which restricts the power of control which one may exercise over his estate, in favor of probate supervision. Clearly the words of a will are not to be given an unnatural interpretation on any supposition that the testator confided less in the judgment and fidelity of his chosen executors than in the person who might chance to be judge of probate at some future time when his estates might need to be sold." *Tracy v. Murray*, 49 Mich. 35, 12 N. W. 900. See to the same effect, *In re Delaney's Estate*, 49 Cal. 76.

[b] **When the beneficiary of a life estate is given power to sell as much of the estate as may be necessary within his discretion for his comfort and support, an order of court is not necessary to effect a valid sale.** *Griffin v. Nicholas*, 224 Mo. 275, 123 S. W. 1063.

[c] **When the trustee of a power is a foreign corporation, before executing a power to sell real estate, it**

he follows the directions of the donor of the power.¹² In some jurisdictions the power of an executor to sell can only be exercised without an order of court when the will expressly provides for such procedure,¹³ while in others a distinction is made between cases where the power is coupled with an interest and a naked power, an order being necessary in the latter but not in the former.¹⁴ It has been held that where a sale is directed to be made according to law,¹⁵ or is to be made for a purpose other than that directed by the donor an order is necessary.¹⁶

B. NOTICE OF SALE.—Unless otherwise provided by statute,¹⁷ a notice of sale is not usually necessary, where the power is coupled with a trust,¹⁸ but a different rule prevails in the case of a naked power when the donor has given no specific directions controlling a sale,¹⁹ or has directed that it be made according to law.²⁰

C. CONFIRMATION OF SALE.—The confirmation of a sale by an executor is frequently regulated by statute,²¹ but as a general rule a sale by an executor under a naked power of sale must be confirmed,²² while a sale made as a trustee and not as a mere executor, that is, the execution of a power coupled with an interest, need not be confirmed.²³ In some jurisdictions confirmation is not necessary in any case in which an order of sale is not required,²⁴ in others it is required by statute in all cases where the power of sale is exercised by an executor.²⁵

D. VACATING SALE.—Very rarely, if ever, will equity interfere with the honest exercise of discretion by the donee of a power and vacate a sale;²⁶ but it will look into what has been done to ascertain

must comply with the statute concerning permission to do business in the state by a foreign corporation. *Pennsylvania Co., etc. v. Bauerle*, 143 Ill. 459, 33 N. E. 166.

12. *O'Bannon v. Musselman*, 2 Duv. (Ky.) 523.

13. *Brooks v. Bergner*, 83 Md. 352, 35 Atl. 98; *Gafney v. Kenison*, 64 N. H. 354, 10 Atl. 706.

14. *Mott v. Ackerman*, 92 N. Y. 539; *Pollock v. Hooley*, 67 Hun 370, 22 N. Y. Supp. 215, 51 N. Y. St. 922. See also *In re Delaney's Estate*, 49 Cal. 76.

15. *Jones v. Morris*, 61 Ala. 518.

16. *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198.

17. See the statutes.

18. *In re Walker's Estate*, 6 Utah 369, 23 Pac. 930.

19. *In re Durham's Estate*, 49 Cal. 490; *In re Walker's Estate*, 6 Utah 369, 23 Pac. 930.

20. *Jones v. Morris*, 61 Ala. 518.

21. See the statutes.

22. *Perkins v. Gridley*, 50 Cal. 97; *In re Durham's Estate*, 49 Cal. 490.

[a] **Naked Power To Sell.**—When a power not coupled with an interest is created by a will, without special directions as to the manner of sale, confirmation is necessary. *In re Durham's Estate*, 49 Cal. 490.

23. *Cal.*—*Morffew v. San Francisco & S. R. R. Co.*, 107 Cal. 587, 40 Pac. 810; *In re Delaney's Estate*, 49 Cal. 76. *Me.*—*Deering v. Adams*, 37 Me. 264. *Mass.*—*Larned v. Bridge*, 17 Pick. 339. *N. Y.*—*Conklin v. Egerton's Admr.*, 21 Wend. 430; *Judson v. Gibbons*, 5 Wend. 224; *Jackson ex dem. Bogert v. Schaubert*, 7 Cow. 194. *Pa.* See *In re Schwartz's Estate*, 168 Pa. 204, 31 Atl. 1085. *Utah.*—*In re Walker's Estate*, 6 Utah 369, 23 Pac. 930.

24. *Smith v. Swan*, 2 Tex. Civ. App. 563, 22 S. W. 247.

25. *Ogle v. Reynolds*, 75 Md. 145, 23 Atl. 137; *Montgomery v. Williamson*, 37 Md. 421; *Northrop v. Marquam*, 16 Ore. 173, 18 Pac. 449.

26. *In re Southworth*, 164 App. Div. 825, 150 N. Y. Supp. 509; *Castor's Estate*, 16 Phila. (Pa.) 360.

whether, in the execution of the power, the donee has been guilty of bad faith, or intentionally did not exercise his best judgment, but acted from improper or ulterior motives,²⁷ and when the donee has gained an incidental benefit from the execution of the power, equity will act only on being convinced that without the benefit gained he would have acted otherwise.²⁸

IV. REMEDYING DEFECTIVE EXECUTION.—A. IN GENERAL.—Unless the power is created by law,²⁹ a court of equity will aid its defective execution when the defect relates to matter of form in the execution,³⁰ provided the party had authority³¹ to execute the

27. *In re Southworth*, 164 App. Div. 825, 150 N. Y. Supp. 509. See also *Scheidt v. Creelius*, 94 Mo. 322, 7 S. W. 412, 4 Am. St. Rep. 384.

28. *In re Southworth*, 164 App. Div. 825, 150 N. Y. Supp. 509. See also *Littell v. Gouge*, 17 Ky. L. Rep. 747, 32 S. W. 411.

29. **U. S.**—Bright *v. Boyd*, 1 Story 478, 4 Fed. Cas. No. 1,875. **Ala.** Ellett *v. Wade*, 47 Ala. 456; *McBryde's Heirs v. Wilkinson*, 29 Ala. 662. **Md.** Smith *v. Bowes*, 38 Md. 463. **Miss.** Miller *v. Palmer*, 55 Miss. 323. **Mo.** Grayson *v. Weddle*, 63 Mo. 523; *Houx v. Bates*, 61 Mo. 391; *Wannall v. Kem*, 51 Mo. 150; *Moreau v. Detchemendy*, 18 Mo. 522.

30. **U. S.**—American Freehold Land Mtg. Co. *v. Walker*, 31 Fed. 103. **Ala.** *McBryde's Heirs v. Wilkinson*, 29 Ala. 662; *Mitchell v. Denson*, 29 Ala. 327, 65 Am. Dec. 403. **Cal.**—Beatty *v. Clark*, 20 Cal. 11. **Conn.**—Lockwood *v. Sturdevant*, 6 Conn. 373. **Fla.** Lines *v. Darden*, 5 Fla. 51. **Ga.**—Satterfield *v. Tate*, 132 Ga. 256, 64 S. E. 60. **Ill.**—Breit *v. Yeaton*, 101 Ill. 242; *Bond v. Ramsey*, 72 Ill. 550. **Ia.**—Long *v. Hewitt*, 44 Iowa 363; *Wilkinson v. Getty*, 13 Iowa 157, 81 Am. Dec. 428. **Ky.**—Muldrow's Heirs *v. Fox's Heirs*, 2 Dana 74. **Md.**—Howard *v. Carpenter*, 11 Md. 259. **Mass.**—Coates *v. Lunt*, 210 Mass. 314, 96 N. E. 685. **Miss.**—McCaleb *v. Pradat*, 25 Miss. 257. **N. J.**—Robeson *v. Shotwell*, 55 N. J. Eq. 318, 36 Atl. 780; *Hampton v. Nicholson*, 23 N. J. Eq. 423; *Lippincott v. Stokes*, 6 N. J. Eq. 122. **N. Y.**—Ward *v. Stanard*, 82 App. Div. 386, 81 N. Y. Supp. 906; *Kemp v. Kemp*, 36 Miss. 79, 72 N. Y. Supp. 617; *Correll v. Lauterbach*, 14 Misc. 469, 36 N. Y. Supp. 615, 71 N. Y. St. 754. **N. C.**—Harrison *v. Battle*, 21 N. C. 213; *Sanderlin v. Thompson*, 17 N. C. 539. **Ohio.**—Stableton *v. Ellison*, 21

Ohio St. 527; *Barr v. Hatch*, 3 Ohio 527. **R. I.**—Brown *v. Phillips*, 16 R. I. 612, 18 Atl. 249. **Tex.**—Cheverall *v. McCormick*, 58 Tex. 440; *Giddings v. Butler*, 47 Tex. 535. **Va.**—Morris' Exr. *v. Morris*, 33 Gratt. (74 Va.) 51; *Justis v. English*, 30 Gratt. (71 Va.) 565; *Knight v. Yarbrough*, 1 Gilm. (21 Va.) 27. **Eng.**—Buckell *v. Blenkhorn*, 5 Hare 131, 67 Eng. Reprint 857; *Cockerell v. Cholmeley*, 1 Russ. & M. 418, 39 Eng. Reprint 161; *Lowson v. Lowson*, 3 Bro. C. C. 272, 29 Eng. Reprint 532.

[a] **Signature Omitted.**—**Mass.** Coates *v. Lunt*, 210 Mass. 314, 96 N. E. 685. **N. J.**—Robeson *v. Shotwell*, 55 N. J. Eq. 318, 36 Atl. 780; *Lippincott v. Stokes*, 6 N. J. Eq. 122. **Eng.**—Garth *v. Townsend*, L. R. 7 Eq. 220.

[b] **A power to be executed by deed**, executed by will. *Sergeson v. Sealey*, 2 Atk. 412, 26 Eng. Reprint 648, 9 Mod. 370, 88 Eng. Reprint 513; *Wade v. Paget*, 1 Bro. C. C. 363, 28 Eng. Reprint 1180, 1 Cox 74, 29 Eng. Reprint 1069; *Tollet v. Tollet*, 2 P. Wms. 489, 24 Eng. Reprint 828.

31. **Ga.**—Satterfield *v. Tate*, 132 Ga. 256, 64 S. E. 60. **Tex.**—Cheverall *v. McCormick*, 58 Tex. 440. **Va.**—Morris' Exr. *v. Morris*, 33 Gratt. (74 Va.) 51.

[a] **Acting Outside Prescribed Conditions.**—(1) When an executor is authorized to sell land only when certain beneficiaries need the proceeds for their support and maintenance, a sale under other conditions, even with their consent and with the purchaser's knowledge of such limitations, is invalid, and cannot be aided by a court of equity. *Satterfield v. Tate*, 132 Ga. 256, 64 S. E. 60. (2) So, too, where a power of appointment is limited to be made, whether by deed or will, only after a certain child has attained the

power, and made a bona fide attempt to do so.³² The equitable right of the party seeking aid must be superior to that of the defendant.³³

B. FOR AND AGAINST WHOM. — Within the limitations as to form, substance and authority expressed above,³⁴ equity has aided defective execution of a power at the instance of a wife,³⁵ a child,³⁶ charities,³⁷ creditors,³⁸ and purchasers for value;³⁹ but has refused such relief in favor of grandchildren as against children,⁴⁰ or in favor of a husband as against the wife,⁴¹ or in favor of an illegitimate child,⁴² brothers and sisters,⁴³ nephews and nieces,⁴⁴ cousins,⁴⁵ legatees,⁴⁶ or volunteers.⁴⁷

age of twenty-five, an appointment is void and cannot be aided in equity which was made by will before such time, even though the will did not become effective until after the child was twenty-five. *Cooper v. Martin*, L. R. 3 Ch. 47, 17 L. T. N. S. 587, 16 Wkly. Rep. 234.

32. *Coates v. Lunt*, 210 Mass. 314, 96 N. E. 685.

[a] "The elements necessary for its exercise are that there should be a fixed intent to execute the power upon a sufficient consideration and an attempt to effectuate that intent, partial in its nature and falling short of accomplishing the purpose by reason of some defect in the instrument by which the attempt is made. *Coats v. Lunt*, 210 Mass. 314, 96 N. E. 685.

33. *Lines v. Darden*, 5 Fla. 51; *Morriss' Exr. v. Morriss*, 33 Gratt. 51.

34. See *supra*, III, A.

35. *Lynn v. Lynn*, 33 Ill. App. 299; *Bruce v. Bruce*, L. R. 11 Eq. 371, 40 L. J. Ch. 141, 24 L. T. N. S. 212; *Hervey v. Hervey*, 1 Atk. 561, 26 Eng. Reprint 352; *Allford v. Allford*, Gilb. 167, 25 Eng. Reprint 117.

36. *Lynn v. Lynn*, 33 Ill. App. 299; *Sergeson v. Sealey*, 2 Atk. 412, 26 Eng. Reprint 648, 9 Mod. 370, 88 Eng. Reprint 513; *Sing v. Leslie*, 2 Hem. & M. 68, 10 Jur. N. S. 794, 33 L. J. Ch. 549, 10 L. T. N. S. 332, 4 New Rep. 17, 71 Eng. Reprint 385; *Morse v. Martin*, 34 Beav. 500, 55 Eng. Reprint 728.

37. *Innes v. Sayer*, 3 Mac. & G. 606, 16 Jur. 21, 21 L. J. Ch. 190, 18 L. J. Ch. 274, 13 Jur. 402, 7 Hare 377, 42 Eng. Reprint 393; *Atty.-Gen. v. Burdet*, 2 Vern. Ch. 755, 23 Eng. Reprint 1093.

38. *Evans v. Saunders*, 1 Drew.

415, 17 Jur. 338, 22 L. J. Ch. 471, 1 Wkly. Rep. 529, 61 Eng. Reprint 511; *Hervey v. Hervey*, 1 Atk. 561, 26 Eng. Reprint 352.

39. *Hughes v. Wells*, 9 Hare 749, 16 Jur. 927, 68 Eng. Reprint 717; *Thackwell v. Gardiner*, 5 DeG. & Sm. 58, 16 Jur. 588, 21 L. J. Ch. 777, 64 Eng. Reprint 1017; *Wilkie v. Holme*, Dick. 165, 21 Eng. Reprint 232.

40. Ill.—*Lynn v. Lynn*, 33 Ill. App. 299. Va.—*Morriss' Exr. v. Morriss*, 33 Gratt. (74 Va.) 51. Eng.—*Kettle v. Townsend*, 1 Salk. 187, 91 Eng. Reprint 170; *Perry v. Whitehead*, 6 Ves. Jr. 544, 31 Eng. Reprint 1187; *Tudor v. Anson*, 2 Ves. Sen. 582, 28 Eng. Reprint 371.

41. *Breit v. Yeaton*, 101 Ill. 242; *Hughes v. Wells*, 9 Hare 749, 16 Jur. 927, 68 Eng. Reprint 717; *Moodie v. Reid*, 1 Madd. 516, 2 Madd. 156, 56 Eng. Reprint 189, 292, 16 Rev. Rep. 257.

42. *Bramhall v. Hall*, Amb. 467, 27 Eng. Reprint 307, 2 Eden 220, 28 Eng. Reprint 882; *Tudor v. Anson*, 2 Ves. Sen. 582, 28 Eng. Reprint 371.

43. *Goodwyn v. Goodwyn*, 1 Ves. Sen. 226, 27 Eng. Reprint 998.

44. *Marston v. Gowan*, 3 Bro. C. C. 170, 29 Eng. Reprint 471.

45. *Tudor v. Anson*, 2 Ves. Sen. 582, 28 Eng. Reprint 371.

46. *Evans v. Saunders*, 1 Drew. 415, 17 Jur. 338, 22 L. J. Ch. 471, 1 Wkly. Rep. 529, 61 Eng. Reprint 511.

47. *Wooster v. Cooper*, 59 N. J. Eq. 204, 45 Atl. 381; *Sergeson v. Sealey*, 2 Atk. 412, 26 Eng. Reprint 648, 9 Mod. 370, 88 Eng. Reprint 513; *Evans v. Evans*, 1 Drew. 654, 61 Eng. Reprint 601; *Ellison v. Ellison*, 6 Ves. Jr. 656, 6 Rev. Rep. 19, 31 Eng. Reprint 1243.

PRACTICE. — See Admiralty; Equity Jurisdiction and Procedure.
See also the specific titles.

PRAECIPE

By the Editorial Staff.

I. DEFINITION AND GENERAL STATEMENT, 487

II. TIME OF FILING, 488

III. FORM AND SUFFICIENCY, 488

CROSS-REFERENCES:

Process;

Service of Process and Papers.

For further references and cross-references, see the index to this work.

I. DEFINITION AND GENERAL STATEMENT.—A praecipe is a written direction to the clerk of the court to issue a particular writ.¹ In some states it constitutes part of the record,² and it is a prerequisite to the issuance of the writ under some statutes,³ and the clerk is not bound to issue the process without the written praecipe.⁴ It is not jurisdictional, however;⁵ hence a writ issued without such

1. *Parsons v. Hill*, 15 App. Cas. (D. C.) 532; *Potter v. Hutchinson Mfg. Co.*, 87 Mich. 59, 49 N. W. 517; *Black's Law Dict.*; *Bouvier Law Dict.*

[a] "Praecipe (command), a slip of paper upon which the particulars of a writ are written; it is lodged in the office out of which the required writ is to be issued." *Wharton's Law Lexicon*, 11th ed., p. 668.

[b] It is given to the clerk for his guidance and contains the data from which he may frame the required process.—*Parsons v. Hill*, 15 App. Cas. (D. C.) 532.

2. *Fitzsimons v. Salomon*, 2 Bin. (Pa.) 436; *Wilkinson v. North East Borough*, 215 Pa. 486, 64 Atl. 734.

3. **Fla.**—*McMillon v. Harrison*, 66 Fla. 200, 63 So. 427, 49 L. R. A. (N. S.) 946. **Ind.**—*Johnson v. Lynch*, 87 Ind. 326; *Robinson v. Brown*, 74 Ind. 365. **Kan.**—*Kennedy v. Beck*, 15 Kan. 555; *Manspeaker v. Bank of Topeka*, 4 Kan. App. 768, 46 Pac. 1012. **Ohio**—*State v. Caffee*, 6 Ohio 150; *Smith v. Whitflesey*, 19 Ohio Cir. Ct. 412, 10 Ohio Cir. Dec. 377; *Collins v. Baltimore &*

O. R. R. Co., 7 Ohio N. P. 270, 7 Ohio Dec. 445. **Okla.**—*State Life Ins. Co. v. Oklahoma City Nat. Bank*, 21 Okla. 823, 97 Pac. 574. **Pa.**—*Brothers v. Mitchell*, 157 Pa. 484, 27 Atl. 760; *Loeb v. Allen*, 32 Pa. Super. 137.

[a] Such statutes are merely declarative of the common law. *Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174.

[b] Prerequisite to the Issuance of a Writ of Error.—*Schwabacher v. Wells*, 1 Wash. Ter. 506.

4. **Kan.**—*Goff v. Russell*, 3 Kan. 212. **Ohio**—*State v. Caffee*, 6 Ohio 150. **Okla.** *Atchison, T. & S. F. Ry. Co. v. Lambert*, 31 Okla. 300, 121 Pac. 654, Ann. Cas. 1913E, 329; *State Life Ins. Co. v. Oklahoma City Nat. Bank*, 21 Okla. 823, 97 Pac. 574.

[a] The clerk is not bound to issue process without a praecipe in writing as his authority and indemnity. *State v. Caffee*, 6 Ohio 150.

5. *McMillon v. Harrison*, 66 Fla. 200, 63 So. 427, 49 L. R. A. (N. S.) 946.

[a] The praecipe "serves the two-

praecipe,⁶ or one issued upon a praecipe filed by the defendant,⁷ is valid.

II. TIME OF FILING.—In those jurisdictions where an action is commenced by the filing of a declaration or complaint, the praecipe, if one is required, must be filed after the filing of the declaration or complaint.⁸ In the federal courts the district attorney in a criminal prosecution may give the clerk instructions in the form of a praecipe directing the arrest of the defendant immediately upon return of an indictment.⁹

III. FORM AND SUFFICIENCY.¹⁰—The praecipe should specify the court,¹¹ the names of the parties,¹² the nature of the action,¹³ the kind of writ,¹⁴ when it is to be made returnable,¹⁵ and the amount of the debt or damages.¹⁶ Defects¹⁷ or omissions¹⁸ in the praecipe do not oust the court of jurisdiction, or invalidate the writ.¹⁹ Failure to sign the praecipe does not invalidate it.²⁰

fold purpose of marking the time when the action begins, even though the clerk should be dilatory in issuing the summons, and also as a guide to the clerk in preparing the summons." *McMillon v. Harrison*, 66 Fla. 200, 63 So. 427, 49 L. R. A. (N. S.) 946; *Benedict v. Hadlow Co.*, 52 Fla. 188, 196, 42 So. 239.

6. *Ind.*—*Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174. *Kan.*—*Goff v. Russell*, 3 Kan. 212. *Okla.* *Achison, T. & S. F. Ry. Co. v. Lambert*, 31 Okla. 300, 121 Pac. 654, Ann. Cas. 1913E, 329; *State Life Ins. Co. v. Oklahoma City Nat. Bank*, 21 Okla. 823, 97 Pac. 574.

[a] Under the common law, the issuance of a writ without the authority of the plaintiff did not render it void. *Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174.

7. *Goff v. Russell*, 3 Kan. 212; *State Life Ins. Co. v. Oklahoma City Nat. Bank*, 21 Okla. 823, 97 Pac. 574.

8. *Hust v. Conn*, 12 Ind. 257, where summons is issued upon a praecipe filed prior thereto it must be quashed on motion.

9. *United States v. Van Duzee*, 140 U. S. 169, 11 Sup. Ct. 758, 35 L. ed. 399.

10. **Of praecipe on appeal**, see *Napier v. Short*, 17 Ill. 119; *Carr v. King Co.*, 1 Wash. Ter. 418; *McAlmond v. Adams*, 1 Wash. Ter. 230.

11. *Potter v. Hutchinson Mfg. Co.*, 87 Mich. 59, 49 N. W. 517.

12. *Potter v. Hutchinson Mfg. Co.*, 87 Mich. 59, 49 N. W. 517.

13. *Potter v. Hutchinson Mfg. Co.*, 87 Mich. 59, 49 N. W. 517.

14. *Potter v. Hutchinson Mfg. Co.*, 87 Mich. 59, 49 N. W. 517.

[a] A praecipe directing the clerk to issue "process" in a replevin suit is sufficient both for the issuance of summons and for the order of delivery. *Kennedy v. Beck*, 15 Kan. 555.

15. *Potter v. Hutchinson Mfg. Co.*, 87 Mich. 59, 49 N. W. 517.

[a] Under a statute providing that the plaintiff may fix the day by endorsement upon the complaint on which the defendant shall appear, which day shall be stated in the summons, an endorsement of the date without designating such day as the day of appearance is sufficient. *Johnson v. Lynch*, 87 Ind. 326.

16. *Potter v. Hutchinson Mfg. Co.*, 87 Mich. 59, 49 N. W. 517.

[a] A variance between the praecipe and the declaration in the amount of damages affords no ground for an appeal. *McKay v. Friebele*, 8 Fla. 21.

17. *Moore v. Glover*, 115 Ind. 367, 16 N. E. 163; *Johnson v. Lynch*, 87 Ind. 326; *Robinson v. Brown*, 74 Ind. 365; *Kennedy v. Beck*, 15 Kan. 555; *Man-speaker v. Bank of Topeka*, 4 Kan. App. 768, 46 Pac. 1012.

18. *Benedict v. W. T. Hadlow Co.*, 52 Fla. 188, 42 So. 239; *Dusenberry v. Bennett*, 7 Kan. App. 123, 53 Pac. 82.

19. *Davis v. Brode*, 13 Pa. Co. Ct. 631.

[a] Praecipe may be amended to conform to the writ. *Davis v. Brode*, 13 Pa. Co. Ct. 631.

20. See *infra*, this note.

[a] Where the statute does not in terms require the plaintiff to subscribe his name to the praecipe, an endorse-

Amendment. - A praecipe may be amended.²¹

ment on the complaint requesting the issuance of summons and signed by certain attorneys is sufficient. *Robinson v. Brown*, 74 Ind. 365, even though it does not appear that they were the attorneys for plaintiff.

[b] **Mere formal defect** which may be corrected by amendment. *Manspeaker v. Bank of Topeka*, 4 Kan. App. 768, 46 Pac. 1012.

21. *Johnson v. Lynch*, 87 Ind. 326; *Manspeaker v. Bank of Topeka*, 4 Kan. App. 768, 46 Pac. 1012.

[a] **In the appellate court**, so as to correct such mistake. *Brothers v. Mitchell*, 157 Pa. 484, 27 Atl. 760.

[b] **To Conform to Writ.**—*Davis v. Brode*, 13 Pa. Co. Ct. 631.

Amendment of writ to conform to praecipe, see the title "**Process.**"

Vol. XXI

PRAAYER

By the Editorial Staff.

I. GENERAL STATEMENT, 490

II. AMENDMENT, 491

III. WAIVER, 492

IV. DEMURRER, 492

CROSS-REFERENCES:

Bills and Answers;	Indictment and Information;
Declaration and Complaint;	Set-off, Counterclaim and
Equity Jurisdiction and	Recoupment.
Procedure;	

Prayer or request for instructions, see 13 STANDARD PROC. 717, et seq.

Prayer for relief in particular actions or proceedings, see the specific titles.

For forms, see 9 STANDARD PROC. 990.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. GENERAL STATEMENT. — Owing to the nature of the subject it has been found more convenient to treat the prayer for relief in connection with the specific matter to which it is related, to which reference is therefore made.¹

General Necessity and Propriety. — As a general rule, whatever may be the relief desired it should be prayed for.² Thus, in equity without a prayer for relief, either general or special, a decree may not be

1. See particular titles, and the index to this work.

In plea, see generally the titles "Pleas;" "Pleas in Equity;" in plea in abatement, see 1 STANDARD PROC. 43.

In bill in equity, see 4 STANDARD PROC. 136.

In cross-bill, see 6 STANDARD PROC. 280, et seq.

In cross-complaint, see 6 STANDARD PROC. 306.

In declaration or complaint, see 6 STANDARD PROC. 712, et seq.

In replications, replies, rejoinders and subsequent pleadings, see the titles "Replication and Reply;" "Rejoinder and Subsequent Pleadings."

In suit for injunction, see 13 STANDARD PROC. 346.

Prayer for process, see 4 STANDARD PROC. 144.

As determining the nature of the action, see 5 STANDARD PROC. 361; 6 STANDARD PROC. 718; 16 STANDARD PROC. 878, note 49 [a] and [d].

2. See the references in the preceding note.

rendered for the plaintiff,³ unless, as has been held, the defendant has previously waived its omission.⁴ Similarly, if there is a prayer for special, but not for general relief, the relief awarded cannot go beyond such as is specifically prayed for.⁵ On the other hand, a single prayer is sufficient, and therefore, though a pleading may present several grounds for the relief sought, as where a complaint consists of several counts, it is not necessary that a prayer should be appended to the statement of each such ground for relief, but a single prayer made at the end of the pleading is sufficient,⁶ and, as a general rule, the prayer need not be specific, i. e., if a general prayer be made, the party may be awarded whatever relief the pleadings and evidence entitled him to.⁷ But the prayer must be adapted to the matters contained in the pleading:⁸ thus in an action at law a prayer for equitable relief will be of no avail, unless the petition states facts sufficient to authorize, and the court has the power, to grant such relief.⁹ A prayer for relief forms no part of the statement of the cause of action to which it is attached,¹⁰ except as it may be looked to in aid of an ambiguous pleading,¹¹ or to determine the right to a trial by jury.¹² So, though the relief prayed for may be inappropriate, the petition to which it is attached is not thereby rendered insufficient.¹³

II. AMENDMENT.—Amendments to prayers for relief are usually controlled by the same principles which regulate the allowance of amendments generally.¹⁴ Amendments of the prayer for relief may be made at the time of trial.¹⁵

Increasing the Prayer.—It is proper to allow an amendment of the

3. *Dews v. Cornish*, 20 Ark. 332; *Perry v. Perry*, 65 Me. 399.

Effect on scope and extent of judgment or relief awarded, see generally 15 STANDARD PROC. 46; default judgments, see 4 STANDARD PROC. 137; in equity, 6 STANDARD PROC. 754; 14 STANDARD PROC. 904.

4. *Smith v. Smith*, 4 Rand. (25 Va.) 95.

5. *Wyatt v. Greer*, 4 Stew. & P. (Ala.) 318; *Dews v. Cornish*, 20 Ark. 332.

6. *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169. See 6 STANDARD PROC. 714.

7. *Kelley v. Wehn*, 63 Neb. 410, 88 N. W. 682. See 4 STANDARD PROC. 137; 6 STANDARD PROC. 240; 11 STANDARD PROC. 432; 14 STANDARD PROC. 121.

8. See 6 STANDARD PROC. 715.

Demurrer when not germane, see *infra*, IV.

9. *Emanuel v. Barnard*, 71 Neb. 756, 99 N. W. 666.

10. *King v. Milner* (Colo.), 167 Pac. 957; *Smith v. Smith*, 67 Kan. 841, 73 Pac. 56. See 6 STANDARD PROC. 716, et seq.

11. *Frick v. Freudenthal*, 45 Misc. 348, 90 N. Y. Supp. 344; *Wheatley v. Oregon Short Line R. Co.*, 49 Utah 105, 162 Pac. 86. See 5 STANDARD PROC. 361; 6 STANDARD PROC. 718.

12. *Schafberg v. Schafberg*, 52 Mich. 429, 18 N. W. 202. See 16 STANDARD PROC. 877. But see *Morton B. & T. Co. v. Sodergren*, 130 Minn. 252, 153 N. W. 527; *Gandy v. Wiltse*, 79 Neb. 280, 112 N. W. 569.

13. **U. S.**—*Erie City Iron Works v. Thomas*, 139 Fed. 995. **Ind.**—*Mark v. Murphy*, 76 Ind. 534. **Ky.**—*Bassett v. Bassett*, 9 Bush 696.

See 6 STANDARD PROC. 715, et seq.

14. See the title "Amendments."

As changing the cause of action, see 1 STANDARD PROC. 927.

Omission of prayer may be supplied by amendment. See 6 STANDARD PROC. 713, note 41.

15. *King v. Milner* (Colo.), 167 Pac. 957; *Kreuger v. Sylvester*, 100 Iowa 647, 69 N. W. 1059.

In equity, prayer for process may be supplied by amendment, 4 STANDARD PROC. 146.

Prayer for instructions, amendment

prayer to increase the relief therein asked for.¹⁶

III. WAIVER. — The omission of a prayer may be waived by the defendant.¹⁷

IV. DEMURRER. — The propriety of a demurrer to reach defects in a prayer for relief is fully treated in another part of this work.¹⁸

or modification of, 13 STANDARD PROC. 745, et seq.

16. *King v. Milner* (Colo.), 167 Pac. 957.

On appeal from justice, see 18 STANDARD PROC. 325, 330.

17. *Smith v. Smith*, 4 Rand. (25 Va.) 95.

[a] In equity, prayer for process,

waived by general appearance, 4 STANDARD PROC. 146, and, it has been held, the omission of any prayer for relief may be waived in a similar manner. *Smith v. Smith*, 4 Rand. (25 Va.) 95.

18. See 6 STANDARD PROC. 912, 935, note 11; in equity, generally, see 4 STANDARD PROC. 136, and for want of prayer for process, see 4 STANDARD PROC. 146.

PREJUDICE. — See **Change of Venue; Juries and Jurors; Transfer of Causes.**

PRELIMINARY EXAMINATION

By the Editorial Staff.

I. GENERAL STATEMENT, 495

II. RIGHT TO, 497

- A. *Generally*, 497
- B. *Waiver of Right*, 499
 - 1. *In General*, 499
 - 2. *What Constitutes*, 501
 - 3. *Effect of*, 501

III. TIME FOR, 502

IV. JURISDICTION AND VENUE, 504

- A. *Jurisdiction and Authority To Conduct*, 504
- B. *Venue*, 505

V. CONDUCT OF, 506

- A. *In General*, 506
- B. *Rights of Accused*, 507
- C. *Scope of Inquiry*, 509
- D. *Examination of Witnesses*, 510
 - 1. *Generally*, 510
 - 2. *Separation and Exclusion of Witnesses*, 511
 - 3. *Extent of Examination, Sufficiency of Evidence, etc.*, 511
 - 4. *Reducing Testimony to Writing*, 513
 - a. *In General*, 513
 - b. *Form and Sufficiency*, 514
 - (I.) *In General*, 514
 - (II.) *Signature of Witnesses and Certification of Magistrate*, 514
- E. *Examination of Accused*, 516
 - 1. *Generally*, 516

2. *Statement of Accused*, 516
 - a. *In General*, 516
 - b. *Manner of Taking and Preserving for Use at Trial*, 516
3. *Admissibility of Statement or Confession of Accused as Evidence Against Him at Trial*, 517

VI. DETERMINATION AND COMMITMENT, 517

- A. *Generally*, 517
- B. *Form and Sufficiency of Commitment*, 518
 1. *In General*, 518
 2. *Essential Recitals, etc.*, 520

VII. RECORD OF PROCEEDINGS AND RETURN THEREOF, 521

- A. *In General*, 521
- B. *Form and Sufficiency*, 522

VIII. OBJECTIONS AND EXCEPTIONS, 523

- A. *In General*, 523
- B. *How Objections Raised*, 523
 1. *In General*, 523
 2. *Habeas Corpus*, 524
- C. *Bill of Exceptions*, 525

IX. ARREST OF REMOVAL OF OFFENDERS AGAINST UNITED STATES, 525

- A. *In General*, 525
- B. *Arrest, Examination and Commitment*, 525
 1. *In General*, 525
 2. *Preliminary Hearing*, 526
 - a. *Jurisdiction and Venue*, 526
 - b. *Purpose and Scope*, 526
 - c. *Discharge or Commitment*, 526
- C. *Return of Judge or Commissioner*, 526
- D. *Removal Proceedings*, 527
 1. *Application for Removal*, 527
 2. *Hearing of Application*, 527
 3. *Warrant for Removal*, 528
- E. *Conclusiveness of Proceedings on Habeas Corpus*, 528

CROSS-REFERENCES:

Grand Jury;

Indictment and Information;

Jeopardy.

For forms, see 9 STANDARD PROC. 991, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. GENERAL STATEMENT.—A preliminary examination is a hearing given to one charged with a crime by a magistrate or judge exercising the functions of a committing magistrate in order to ascertain whether a crime has been committed, and whether there is probable cause to believe that the accused is guilty thereof.¹ Its object is to obviate the possibility of groundless prosecutions,² and to secure the presence of the accused at the trial, if subsequently indicted or if an information is filed against him.³ It also serves to perpetuate testimony.⁴ It is probably also for the purpose of giving

1. See the following: **U. S.**—United States v. Greene, 100 Fed. 941. **Cal.**—People v. Sherman, 98 Cal. xviii, 32 Pac. 879. **Colo.**—*In re Dolph*, 17 Colo. 35, 28 Pac. 470. **Haw.**—Hawaii v. Yamane Nenchiro, 12 Hawaii 189. **Kan.**—State v. Pigg, 80 Kan. 481, 103 Pac. 121, 18 Ann. Cas. 521; State v. Bailey, 32 Kan. 83, 3 Pac. 769. **La.**—State v. Brunot, 104 La. 237, 28 So. 996. **Me.**—State v. Hartwell, 35 Me. 129. **Mich.**—McCurdy v. New York Life Ins. Co., 115 Mich. 20, 72 N. W. 996; Yaner v. People, 34 Mich. 286. **Minn.**—Wagener v. Ramsey, 76 Minn. 368, 79 N. W. 166. **Mont.**—State v. District Court, 26 Mont. 275, 67 Pac. 943. **Neb.**—Jahnke v. State, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; Van Buren v. State, 65 Neb. 223, 91 N. W. 201; Latimer v. State, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403. **Nev.**—*Ex parte* Oxley, 38 Nev. 379, 149 Pac. 992. **N. Y.**—People *ex rel.* Murphy v. Crane, 80 App. Div. 202, 80 N. Y. Supp. 408. **N. D.**—State v. Wisnewski, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907. **Phil. Isl.**—United States v. McGovern, 6 Phil. Lsl. 621. **Tex.**—*Ex parte* Burkham (Tex. Crim.), 33 S. W. 974. **Wis.**—Campbell v. State, 111 Wis. 152, 86 N. W. 855; State v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

[a] "It is a proceeding before a regularly constituted court or judicial magistrate in which the accused has the right to be present and hear all the witnesses, participate in their examination, and be heard also in his own behalf." *In re Dolph*, 17 Colo.

35, 28 Pac. 470. As to conduct of examination, see *infra*, V.

[b] **Such an Examination Is a Mere Inquest.**—State v. McGinley, 153 Wis. 5, 140 N. W. 332.

2. State v. Flannery, 263 Mo. 579, 173 S. W. 1053; State v. Sassaman, 214 Mo. 695, 723, 114 S. W. 590; State v. Jeffries, 210 Mo. 302, 320, 109 S. W. 614, 14 Ann. Cas. 524; United States v. Grant, 18 Phil. Isl. 122, 147. See also McDonald v. King, 26 Can. Crim. Cas. 175.

[a] The chief object is (1) to prevent innocent persons from being incarcerated for a considerable length of time awaiting trial (State v. Solomon, 158 Wis. 146, 147 N. W. 640, 148 N. W. 1095, Ann. Cas. 1916E, 309), (2) to protect the citizen against the arbitrary action of the prosecuting officer. State v. Hasledahl, 3 N. D. 36, 53 N. W. 430.

3. **Mo.**—State v. Flannery, 263 Mo. 579, 173 S. W. 1053; State v. Jeffries, 210 Mo. 302, 320, 109 S. W. 614, 14 Ann. Cas. 524. **Neb.**—Jahnke v. State, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154. **N. D.**—State v. Wisnewski, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907.

[a] To fix the amount of bail under which the accused should be held to answer. State v. Pigg, 80 Kan. 481, 103 Pac. 121, 18 Ann. Cas. 521.

Preliminary examination as prerequisite to indictment or information, see the title "Indictment and Information."

4. **Haw.**—Hawaii v. Yamane Nenchiro, 12 Hawaii 189. **Kan.**—State v.

the defendant a reasonable notice of the nature and character of the offense charged against him;⁵ and, further, that the prosecuting attorney may have something to guide him in determining the character of the offense he will charge against the accused in the information.⁶

The preliminary examination is in no sense a judicial trial, in which the guilt or innocence of the accused is determined or adjudged.⁷ A

Pigg, 80 Kan. 481, 103 Pac. 121, 18 Ann. Cas. 521. **La.**—*State v. Brunot*, 104 La. 237, 28 So. 996; *Ex parte Johnson*, 48 La. Ann. 1405, 20 So. 892; *State v. Ozer*, 5 La. Ann. 744. **Mo.** *State v. Sassaman*, 214 Mo. 695, 723, 114 S. W. 590; *State v. Jeffries*, 210 Mo. 302, 320, 109 S. W. 614, 14 Ann. Cas. 524.

[a] One purpose is "to preserve the evidence against a defendant and enable the state to have the witnesses enter into a recognizance to appear before the court that had jurisdiction to finally try the cause." *State v. Sassaman*, 214 Mo. 695, 723, 114 S. W. 590.

[b] "Witnesses may die, or leave the state, or become disqualified to testify. Hence the necessity to perpetuate their testimony in form for future use, and the best and most practical way to do this is through a preliminary examination." *State ex rel. Guion v. Brunot*, 104 La. 237, 28 So. 996.

5. *State v. Myers*, 54 Kan. 206, 213, 38 Pac. 296; *State v. Bailey*, 32 Kan. 83, 88, 3 Pac. 769; *State v. Jensen*, 34 Utah 166, 96 Pac. 1085.

6. *Hawaii v. Yamane Nenchihiro*, 12 Hawaii 189.

7. See the following: **U. S.**—*United States v. Lantry*, 30 Fed. 232. **Idaho.** *State v. Raaf*, 16 Idaho 411, 101 Pac. 747. **La.**—*State v. Brunot*, 104 La. 237, 28 So. 996. **Mich.**—*McCurdy v. New York Life Ins. Co.*, 115 Mich. 20, 72 N. W. 996; *Turner v. People*, 33 Mich. 363. **Mo.**—*State v. Flannery*, 263 Mo. 579, 173 S. W. 1053. **Neb.** *Sothman v. State*, 66 Neb. 302, 92 N. W. 303; *Van Buren v. State*, 65 Neb. 223, 91 N. W. 201; *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403. **Nev.**—*Ex parte Oxley*, 38 Nev. 379, 149 Pac. 992. **N. D.** *State v. Wisniewski*, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907. See *Harris v. Rolette County*, 16 N. D. 204, 112 N. W. 971. **Okla.**—*Ex parte Beville*, 6 Okla. Crim. 145, 117 Pac. 725.

S. D.—*State v. Sonnenschein*, 37 S. D. 139, 156 N. W. 906. **Wash.**—*State v. Newton*, 29 Wash. 373, 70 Pac. 31. **Wis.**—*Campbell v. State*, 111 Wis. 152, 86 N. W. 855; *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

See also *McDonald v. The King*, 26 Can. Crim. Cas. 175.

Compare infra, notes 9 and 10; also *State v. Beaverstad*, 12 N. D. 527, 97 N. W. 548.

[a] "It is a mere judicial inquiry, as before indicated, for the purpose of determining whether an offense has been committed and there is a probability that the accused is guilty thereof and should be placed on trial therefor. No plea or issue is necessary. No jury is demandable or proper. The doctrine of *res adjudicata* does not apply so that the result of one inquiry will preclude another." *State ex rel. Durner v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

[b] "The preliminary examination is a proceeding had both in conformity with the constitution . . . and the statute, whereby a person charged with the commission of an offense cognizable only in the district court may be held either in prison or under bail, to appear before the district court, there to answer any indictment by a grand jury or information by the prosecuting attorney that may be filed against him." *State v. Raaf*, 16 Idaho 411, 107 Pac. 747.

[c] **Defendant Need Not Plead.** "It is not even necessary that the person charged with having committed a crime on being brought before a magistrate should be asked to plead, or enter a plea of guilty, or not guilty, to the complaint." *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403.

Defendant cannot plead former jeopardy on a subsequent trial for the same offense, see generally 14 **STANDARD PROC.** 576, et seq.

criminal prosecution is regarded as pending from the time of commencement of the proceedings before a committing magistrate, however.⁸ The proceeding, while somewhat informal, is an adversary one.⁹

The same strictness is not required on a preliminary examination in matters of pleading as is required in framing and construing informations or indictments.¹⁰

II. RIGHT TO.—A. **GENERALLY.**—In the absence of a statute, no preliminary examination is necessary.¹¹ Such a proceeding was unknown to the common law;¹² and it is not usually a constitutional right,¹³ though in a few states a person charged by information with

8. *State v. Dlugi*, 123 Minn. 392, 143 N. W. 971. See also **U. S.**—*In re Kelly*, 46 Fed. 653, 659. **Mo.**—*Ex parte Bedard*, 106 Mo. 616, 17 S. W. 693. **N. D.**—*State v. Wisniewski*, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907, commencement of criminal prosecution.

But see *Kemper v. State*, 63 Tex. Crim. 1, 138 S. W. 1025.

See generally the title "**Suits and Actions.**"

9. *Foley v. Ham*, 102 Kan. 66, 169 Pac. 183, L. R. A. 1918C, 204. "It is accusatory or litigious, rather than inquisitorial in character. It has something of the aspect of a voluntary investigation conducted by the magistrate, while exercising a function somewhat analogous to that of a grand jury, to determine whether or not there is ground for a prosecution. But under our practice it is quite different from that. It constitutes actual litigation between opposing parties. Testimony taken at such a hearing may be used at the trial in the district court, if the attendance of the witness cannot be had . . . , a course which could scarcely be justified if the proceedings were not essentially judicial—a trial between opposing parties presided over by a judge."

10. See the following: **Mich.**—*Turner v. People*, 33 Mich. 363. **Mo.**—*State v. Flannery*, 263 Mo. 579, 173 S. W. 1053. **N. D.**—*State v. Hart*, 30 N. D. 368, 152 N. W. 672; *State v. Wisniewski*, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907; *State v. Barnes*, 3 N. D. 131, 54 N. W. 541. **Okla.**—*Ponosky v. State*, 8 Okla. Crim. 116, 126 Pac. 451. **Utah.**—*State v. Pay*, 45 Utah 411, 146 Pac. 300, Ann. Cas. 1917E, 173.

[a] It "is not necessary that the

papers and proceedings . . . should set forth the offense in all its details and with perfect and exhaustive accuracy. For the purpose of authorizing a final trial and of requiring that the defendant should plead to the merits of the action, all that is necessary is that the defendant should be given a fair opportunity to know by a proffered preliminary examination the general character and outlines of the offense charged against him." *State v. Bailey*, 32 Kan. 83, 89, 3 Pac. 769. See also *State v. Moon*, 71 Kan. 349, 80 Pac. 597; *State v. Wisniewski*, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907.

11. See the following: **Colo.**—*Holt v. State*, 23 Colo. 1, 45 Pac. 374. **La.**—*State v. Mates*, 133 La. 714, 63 So. 294. **Mo.**—*State v. Jeffries*, 210 Mo. 302, 109 S. W. 614, 14 Ann. Cas. 524. **N. D.**—*State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477. **Wis.**—*State v. Solomon*, 158 Wis. 146, 147 N. W. 640, 148 N. W. 1095, Ann. Cas. 1916E, 309.

See also 12 **STANDARD PROC.** 90; 113.

12. *State v. Solomon*, 158 Wis. 146, 147 N. W. 640, 148 N. W. 1095, Ann. Cas. 1916E, 309; *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

13. *Holt v. People*, 23 Colo. 1, 45 Pac. 374; *State v. Hart*, 30 N. D. 368, 152 N. W. 672; *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460; *State v. Winbauer*, 21 N. D. 161, 129 N. W. 97; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477. See also *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115.

[a] The "due process of law" clause of the federal constitution does not render it obligatory upon the states to provide for a preliminary examina-

the commission of a crime has a constitutional right to a preliminary examination therefor.¹⁴ Statutes, however, exist in many states providing for a preliminary examination in certain cases as a condition precedent to the prosecution of one charged with crime.¹⁵ And the statutory scheme or statutory declarations must govern.¹⁶ The right to a preliminary examination is not confined to the person accused. It exists in the prosecution as well.¹⁷

Where Examining Magistrate Has Jurisdiction To Try Offense.—For minor offenses, which the examining magistrate has jurisdiction to try, no preliminary examination is required or demandable as of right;¹⁸ it is the duty of the magistrate to try and render final judgment in such case; he has no authority to bind the defendant over to a court of record.¹⁹

tion prior to the formal accusation by the district attorney. *Lem Woon v. State*, 229 U. S. 586, 33 Sup. Ct. 783, 57 L. ed. 1340. See also *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460.

[b] A statute expressly providing that "no preliminary examination shall be necessary before trial in criminal actions in the county court" is not unconstitutional. *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460.

14. See the following: **Ariz.**—Const. of 1910, art. II, §10; *Vincent v. State*, 16 Ariz. 297, 145 Pac. 241. **Idaho.** Const., 1889, art. I, §8; *State v. Frederic*, 28 Idaho 709, 155 Pac. 977; *State v. West*, 20 Idaho 387, 118 Pac. 773. **Okla.**—Const., 1907, art. II, §17; *Sayers v. State*, 10 Okla. Crim. 195, 135 Pac. 944; *Wines v. State*, 7 Okla. Crim. 450, 124 Pac. 466; *Williams v. State*, 6 Okla. Crim. 373, 118 Pac. 1006; *Fields v. State*, 5 Okla. Crim. 520, 115 Pac. 608. **Utah.**—Const., 1895, art. I, §13; *State v. Hoben*, 36 Utah 186, 102 Pac. 1000; *State v. Jensen*, 34 Utah 166, 96 Pac. 1085.

See also 12 STANDARD PROC. 114.

15. See the statutes, and the following: **Mich.**—*People v. Wright*, 89 Mich. 70, 50 N. W. 792; *O'Hara v. People*, 41 Mich. 623, 3 N. W. 161. **Mo.**—*State v. Anderson*, 252 Mo. 83, 158 S. W. 817; *State v. Schenk*, 238 Mo. 429, 142 S. W. 263. **Neb.**—*Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403.

Preliminary examination as prerequisite to indictment, see 12 STANDARD PROC. 90, et seq.; to information, see 12 STANDARD PROC. 113, et seq.

16. *State v. Solomon*, 158 Wis. 146, 147 N. W. 640, 148 N. W. 1095, Ann. Cas. 1916E, 309.

[a] **Under Missouri statute**, (1) preliminary hearing can only be demanded as of right where the accused is charged with a capital offense. *State v. Anderson*, 252 Mo. 83, 158 S. W. 817; *State v. Schenk*, 238 Mo. 429, 142 S. W. 263. (2) Parties charged with an ordinary felony are not entitled to a preliminary examination before a committing magistrate. *State v. Pierce*, 243 Mo. 524, 147 S. W. 970.

17. *State v. Brunot*, 104 La. 237, 28 So. 996. See also *State v. Pay*, 45 Utah 411, 146 Pac. 300; *State v. Hoben*, 36 Utah 186, 201, 102 Pac. 1000.

18. See the following: **Idaho.**—*State v. Raaf*, 16 Idaho 411, 101 Pac. 747. **Mich.**—*Byrnes v. People*, 37 Mich. 515. **N. Y.**—*People ex rel. Cohen v. Warden Third Dist. Prison*, 150 App. Div. 419, 135 N. Y. Supp. 159; *People v. Cuatt*, 70 Misc. 453, 126 N. Y. Supp. 1114. **Wis.**—*State v. Solomon*, 158 Wis. 146, 147 N. W. 640, 148 N. W. 1095, Ann. Cas. 1916E, 309. **Wyo.**—*State v. Sureties of Krohne*, 4 Wyo. 347, 358, 34 Pac. 3.

See also *People v. Grote*, 153 N. Y. Supp. 631, affirmed, 170 App. Div. 898, 154 N. Y. Supp. 1137.

[a] "The principle runs through all the provisions of the statute providing for preliminary examinations that they are to be held only in such cases as are beyond the jurisdiction of justices' courts." *State v. Raaf*, 16 Idaho 411, 101 Pac. 747.

19. See the following: **Ala.**—*Jones v. State*, 168 Ala. 107, 53 So. 286; *State v. McPherson*, 165 Ala. 140, 51 So. 603. **Ark.**—*Thomm v. State*, 35 Ark. 327. **Conn.**—*Darling v. Hubbell*, 9 Conn. 350. **Kan.**—*In re Crandall*, 59 Kan. 671, 54 Pac. 686. **Mich.**—*Byrnes*

Rule in Federal Courts.—Though the practice in the state court may require a preliminary examination as a prerequisite to a prosecution for an offense therein, such practice does not necessarily obtain in a federal court sitting in the state.²⁰

Compelling Examination.—Where the right exists, the magistrate may be compelled by mandamus to proceed with the preliminary examination.²¹

B. WAIVER OF RIGHT.—**1. In General.**—Though no express provision of statute authorizes a defendant to waive a preliminary examination,²² such examination, being primarily a personal right or privilege for his benefit, may be waived, if the defendant so desires.²³ But

v. People, 37 Mich. 515. **Miss.**—*Smith v. State*, 86 Miss. 315, 38 So. 319. **N. C.**—*State v. Clayton*, 146 N. C. 599, 60 S. E. 415. **Pa.**—*Com. v. Hooper*, 55 Pa. Super. 518. **Tenn.**—*Leech v. State*, 124 Tenn. 74, 135 S. W. 320. **Wis.** *State v. Solomon*, 158 Wis. 146, 147 N. W. 640, 148 N. W. 1095, Ann. Cas. 1916E, 309.

Compare State ex rel. Thurston v. Sargent, 71 Minn. 28, 73 N. W. 626.

[a] But where two offenses are embodied in an affidavit filed with a magistrate, one of which is triable by him, and the other by a court of record and it appears from the preliminary examination that there is probable cause to believe the defendant guilty of the latter offense, it is proper to bind the accused over for trial before a court of general jurisdiction. *Ex parte Holcomb*, 60 Tex. Crim. 204, 131 S. W. 604.

20. *United States v. Kerr*, 159 Fed. 185, wherein the court said: "Whatever may be said concerning the power of a grand jury in the Pennsylvania courts to find an indictment where the accused has not had a previous hearing before a magistrate, it is clear that no such hearing is necessary in the federal courts. No doubt a prosecution before these tribunals is ordinarily begun in much the same way as in the criminal courts of the state. Information is laid before a commissioner, who hears the government's case and thereupon either discharges the accused or holds him to answer; but this preliminary examination is not essential as the federal authorities abundantly show. If the grand jury sees proper to act upon evidence that is brought to their attention, they may bring in a suitable indictment, although the charge is made for the first

time by their finding, and although the accused has had no preliminary hearing."

Compare United States v. Martin, 17 Fed. 150; *United States v. Harden*, 4 Hughes 455, 10 Fed. 802.

21. See *Ex parte Simpson*, 3 Ala. App. 222, 57 So. 518, and generally 19 STANDARD PROC. 215.

[a] **Enforcement of duty by state**, see *State v. Brunot*, 104 La. 237, 28 So. 996.

22. *State v. Pigg*, 80 Kan. 481, 103 Pac. 121, 18 Ann. Cas. 521.

23. See the following: **Ariz.**—*Fertig v. State*, 14 Ariz. 540, 133 Pac. 99. **Cal.**—*People v. Bawden*, 90 Cal. 195, 27 Pac. 204. **Fla.**—*Benjamin v. State*, 25 Fla. 675, 6 So. 433. **Idaho.** *State v. Andrus*, 29 Idaho 1, 156 Pac. 421; *State v. Larkins*, 5 Idaho 200, 47 Pac. 945. **Ill.**—*Schoonover v. Myers*, 28 Ill. 308. **Ind.**—*Davis v. Bible*, 134 Ind. 108, 33 N. E. 910. **Kan.**—*State v. Pigg*, 80 Kan. 481, 103 Pac. 121, 18 Ann. Cas. 521; *State v. Fields*, 70 Kan. 391, 78 Pac. 833; *State v. Myers*, 54 Kan. 206, 38 Pac. 296; *State v. Geer*, 48 Kan. 752, 30 Pac. 236; *State v. Lewis*, 19 Kan. 260, 27 Am. Rep. 113. **Me.**—*State v. Cobb*, 71 Me. 198. **Mich.** *People v. Sartori*, 168 Mich. 308, 134 N. W. 200; *People v. Harris*, 103 Mich. 473, 61 N. W. 871; *People v. Wright*, 89 Mich. 70, 50 N. W. 792; *Stuart v. People*, 42 Mich. 255, 3 N. W. 863. **Mo.**—*State v. Green*, 229 Mo. 642, 129 S. W. 700; *State v. Sassaman*, 214 Mo. 695, 114 S. W. 590; *Ex parte McLaughlin*, 210 Mo. 657, 109 S. W. 626. **Mont.** *State v. Byrd*, 41 Mont. 585, 111 Pac. 407. **Neb.**—*Clawson v. State*, 96 Neb. 499, 148 N. W. 524; *Reinoehl v. State*, 62 Neb. 619, 87 N. W. 355; *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403. **Nev.**—*State v.*

there are authorities to the effect that a waiver should not be permitted, especially in felony cases.²⁴ And the right of the state to a preliminary examination²⁵ cannot be defeated by the action of the accused in waiving such examination.²⁶ The examining magistrate may proceed notwithstanding a waiver of the preliminary examination,²⁷ and take the testimony of the state's witnesses.²⁸

Only a voluntary waiver will estop the accused from later claiming that he did not have a preliminary examination.²⁹

Wells, 39 Nev. 432, 159 Pac. 520. **N. D.** State *v.* Wisniewski, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907; State *v.* Rozum, 8 N. D. 548, 80 N. W. 477. **Ohio.**—State *v.* Ritty, 23 Ohio St. 562. **Okla.**—Williams *v.* State, 6 Okla. Crim. 373, 118 Pac. 1006. **Ore.**—Hess *v.* Oregon G. Baking Co., 31 Ore. 503, 49 Pac. 803. **P. I.**—United States *v.* Lete, 17 Phil. Isl. 79; United States *v.* Ago-Chi, 6 Phil. Isl. 227. **S. D.**—State *v.* Wright, 15 S. D. 628, 91 N. W. 311. **Tex.**—*Ex parte* Villareal (Tex. Crim.), 187 S. W. 214; Bishop *v.* Lucy, 21 Tex. Civ. App. 326, 50 S. W. 1029. **Utah.** State *v.* Pay, 45 Utah 411, 146 Pac. 300, Ann. Cas. 1917E, 173; State *v.* Norman, 16 Utah 457, 52 Pac. 986; State *v.* Spencer, 15 Utah 149, 49 Pac. 302. **Va.**—Butler *v.* Com., 81 Va. 159. **W. Va.**—State *v.* Stewart, 7 W. Va. 731, 23 Am. Rep. 623. **Wis.**—State *v.* Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; Brown *v.* State, 91 Wis. 245, 64 N. W. 749. **Wyo.**—Nicholson *v.* State, 18 Wyo. 298, 106 Pac. 929; Hollibaugh *v.* Hehn, 13 Wyo. 269, 275, 79 Pac. 1044.

[a] "The statute awarding one accused of crime the right to a preliminary examination was enacted for the benefit of the accused. The preliminary examination is a right accorded—a personal privilege granted by law to every one accused of crime—but it is a privilege which the accused may waive." Latimer *v.* State, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403.

[b] **When Accused Should Not Waive.**—Where the offense charged in the warrant includes other offenses of less degree and the accused desires the magistrate to specifically designate the offense committed, he should not waive the preliminary examination. Stuart *v.* People, 42 Mich. 255, 3 N. W. 863.

24. See the following: Kalloch *v.* Superior Court, 56 Cal. 229; *Ex parte* Walsh, 39 Cal. 705 (both holding com-

plete waiver not authorized); *Ex parte* Ah Bau, 10 Nev. 264.

[a] **Waiver of Time To Prepare For Examination Permitted.**—People *v.* Cokahnour, 120 Cal. 253, 52 Pac. 505.

25. As to right of state, see *supra*, II, A.

26. **Kan.**—State *v.* Pigg, 80 Kan. 481, 130 Pac. 121, 18 Ann. Cas. 521. **La.**—State *v.* Brunot, 104 La. 237, 28 So. 996. **Okla.**—Quinton *v.* State, 10 Okla. Crim. 520, 139 Pac. 705; Ponosky *v.* State, 8 Okla. Crim. 116, 126 Pac. 451. **Pa.**—Com. *v.* Keck, 148 Pa. 639, 24 Atl. 161. **Utah.**—State *v.* Pay, 45 Utah 411, 146 Pac. 300.

[a] **Necessity for State's Consent.** Under Utah constitution, such an examination can only be waived by the consent of the accused and the state. State *v.* Pay, 45 Utah 411, 146 Pac. 300; State *v.* Hoben, 36 Utah 186, 201, 102 Pac. 1000; State *v.* Norman, 16 Utah 457, 52 Pac. 986; State *v.* Spencer, 15 Utah 149, 49 Pac. 302.

27. Porch *v.* State, 51 Tex. Crim. 7, 99 S. W. 1122.

[a] **Where the examining magistrate is convinced that the public interest will be better subserved by an investigation, and especially if the district attorney request it, he may and should proceed to a full hearing.** Ordinarily, however, an offer of the accused to waive an examination should be accepted. Van Buren *v.* United States, 36 Fed. 77.

28. **Kan.**—State *v.* Pigg, 80 Kan. 481, 103 Pac. 121, 18 Ann. Cas. 521. **La.**—State *v.* Brunot, 104 La. 237, 28 So. 996. **Okla.**—Quinton *v.* State, 10 Okla. Crim. 520, 139 Pac. 705.

As to conduct of examination, see *infra*, V.

29. In *re* Malison, 36 Kan. 725, 14 Pac. 144, waiver under fear of violence not voluntary.

[a] **Waiver is not made under duress** (1) because accused is under

2. What Constitutes.—In addition to an express waiver made before the examining magistrate at the time set for the preliminary examination, such examination will be deemed to have been waived by the accused under certain circumstances.³⁰

3. Effect of.—A voluntary waiver of a preliminary examination has the same legal effect as though an examination was held.³¹ It is tantamount to a finding by the magistrate that there is probable cause to believe the accused guilty of the offense charged,³² and the accused may be held to answer without the introduction of any evidence in support of the charge.³³ He cannot thereafter plead that he had no

arrest (*Bishop v. Lucy*, 21 Tex. Civ. App. 326, 50 S. W. 1029), or (2) handcuffed (*State v. Lewis*, 19 Kan. 260, 27 Am. Rep. 113) at the time of such waiver.

Effect of waiver of right, see *infra*, II, B, 3.

30. See *infra*, this note.

[a] **By failure of accused to appear** at time and place set for such examination. **Kan.**—*State v. Justus*, 86 Kan. 848, 122 Pac. 877. **N. D.**—*State v. McLain*, 13 N. D. 368, 102 N. W. 407. **S. C.**—*State v. Rabens*, 79 S. C. 542, 60 S. E. 442, 1110.

[b] **By Furnishing Bail For Appearance in the Trial Court.**—**Ga.**—*Lowry v. State*, 5 Ga. App. 701, 63 S. E. 719; *Hopkins v. State*, 5 Ga. App. 700, 63 S. E. 719. **Ind.**—*Cunningham v. State*, 116 Ind. 433, 17 N. E. 904. **N. D.**—*State v. McLain*, 13 N. D. 368, 102 N. W. 407. **Tex.**—*Ex parte Villareal* (Tex. Crim.), 187 S. W. 214.

[c] **By entry of a plea of guilty** at the preliminary examination. *State v. Kornstett*, 62 Kan. 221, 61 Pac. 805; *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403.

[d] **By failure (1) to raise any objection** that such examination has not been had when called upon to plead to the information. See 12 STANDARD PROC. 116; also *infra*, VIII, A. (2) It is too late after verdict of guilty and judgment passed thereon for the prisoner to claim in the appellate court, for the first time, the right to such an examination. *State v. Stewart*, 7 W. Va. 731, 23 Am. Rep. 623.

[e] **By Plea of Not Guilty Upon Arraignment.**—**Colo.**—*Laffey v. People*, 55 Colo. 575, 136 Pac. 1031. **La.** *State v. Le Blanc*, 116 La. 822, 41 So. 105; *State v. Caulfield*, 23 La. Ann. 148. **Mich.**—*People v. Harris*, 144 Mich. 12, 107 N. W. 715; *People v. Williams*, 93 Mich. 623, 53 N. W. 779.

Mo.—*Ex parte McLoughlin*, 210 Mo. 657, 109 S. W. 626. **Neb.**—*Dinsmore v. State*, 61 Neb. 418, 85 N. W. 445. **N. Y.** *Devine v. People*, 20 Hun 98. **Ohio.** *State v. Ritty*, 23 Ohio St. 562. **Utah.** *State v. Gustaldi*, 41 Utah 63, 123 Pac. 897; *State v. Norman*, 16 Utah 457, 52 Pac. 986; *State v. Spencer*, 15 Utah 149, 49 Pac. 302. **Wis.**—*In re Weaver*, 162 Wis. 499, 156 N. W. 459. See also 12 STANDARD PROC. 115, note 17 [a]; and *infra*, VIII.

[f] **Waiver of examination before magistrate other than one issuing warrant** waives right to examination before the magistrate who issued the warrant. *State v. Andrus*, 29 Idaho 1, 156 Pac. 421.

31. *State v. Byrd*, 41 Mont. 585, 111 Pac. 407.

32. Ia.—*Cowell v. Patterson*, 49 Iowa 514. **Me.**—*State v. Cobb*, 71 Me. 198. **Mass.**—*Hannan v. Doherty*, 136 Mass. 567. **Mich.**—*People v. Slight*, 48 Mich. 54, 11 N. W. 782. **Mont.**—*State v. Byrd*, 41 Mont. 585, 111 Pac. 407. **Ohio.**—*State v. Ritty*, 23 Ohio St. 562. **Ore.**—*Hess v. Oregon Co. Baking Co.*, 31 Ore. 503, 49 Pac. 803. **S. D.**—*State v. Wright*, 15 S. D. 628, 91 N. W. 311.

As to determination and finding upon preliminary examination, see *infra*, VI, A.

33. *Vincent v. State*, 16 Ariz. 297, 145 Pac. 241. See also *State v. Pay*, 45 Utah 411, 146 Pac. 300.

[a] **No witnesses need be examined** on the part of the prosecution. *Stuart v. People*, 42 Mich. 255, 3 N. W. 863; *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403.

[b] **But the state may proceed** to the introduction of testimony if it so elects. See *supra*, II, B, 1.

[c] **If the offense is not bailable**, magistrate must issue warrant of commitment. *State v. Sassaman*, 214 Mo.

such examination.³⁴

By waiving the preliminary examination, the accused also waives any insufficiency which may have existed in the complaint or warrant of arrest issued thereon.³⁵ But such waiver does not operate to cure a complaint which upon its face discloses no facts indicating the commission of a crime.³⁶ After such a waiver, an information may be filed against the accused charging him with any crime embraced in the preliminary complaint or warrant.³⁷

III. TIME FOR.—There is no precise length of time after the arrest of an accused within which the preliminary examination must take place; but a hearing must be given him as promptly as the nature and circumstances of the case will permit,³⁸ unless the accused

695, 114 N. W. 590. See also *infra*, VT. A.

34. See the following: Fla.—Benjamin v. State, 25 Fla. 675, 6 So. 433. Idaho.—State v. Larkins, 5 Idaho 139, 47 Pac. 945. Kan.—State v. Shaw, 72 Kan. 81, 82 Pac. 587; State v. Kornstett, 62 Kan. 221, 61 Pac. 805; State v. Myers, 54 Kan. 206, 38 Pac. 296. Mich.—People v. Sutherland, 104 Mich. 468, 62 N. W. 566. Neb.—Clawson v. State, 96 Neb. 499, 148 N. W. 524; Korth v. State, 46 Neb. 631, 65 N. W. 792. N. Y.—People v. Johnson, 46 Hun 667, 7 N. Y. Crim. 398, 13 N. Y. St. 48. Ohio.—State v. Ritty, 23 Ohio St. 562.

See also United States v. Ruroede, 220 Fed. 210.

[a] **Right to Discharge on Habeas Corpus.**—One held to answer after such a waiver cannot be discharged upon habeas corpus or other proceeding upon the ground that he has been committed on a criminal charge without probable cause. Vincent v. State, 16 Ariz. 297, 145 Pac. 241. As to discharge on habeas corpus, see *infra*, VIII, B, 2; also 10 STANDARD PROC. 922.

[b] **Information cannot be set aside** upon the ground that the magistrate did not pass upon the truth of the complaint. State v. Ritty, 23 Ohio St. 562. Grounds for setting aside information generally, see 12 STANDARD PROC. 612 et seq.

35. U. S.—United States v. Ruroede, 220 Fed. 210. Ala.—Laney v. State, 109 Ala. 34, 19 So. 531. Idaho.—State v. Andrus, 29 Idaho 1, 156 Pac. 421. N. D.—State v. Hart, 30 N. D. 368, 152 N. W. 672.

36. United States v. Ruroede, 220 Fed. 210. See also People *ex rel.* Perkins v. Moss, 187 N. Y. 410, 80 N.

E. 383, 11 L. R. A. (N. S.) 528.

37. See the following: Kan.—State v. King, 92 Kan. 989, 142 Pac. 296; State v. Shaw, 72 Kan. 81, 82 Pac. 587. Mich.—Stuart v. People, 42 Mich. 255, 3 N. W. 863. N. D.—State v. Kisnewski, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907. Okla.—Wines v. State, 7 Okla. Crim. 450, 124 Pac. 466.

See also 12 STANDARD PROC. 115, et seq.

[a] But a new offense cannot be added after the defendant has waived an examination. State v. Pigg, 80 Kan. 481, 103 Pac. 121, 18 Ann. Cas. 521; State v. Trinkle, 70 Kan. 396, 78 Pac. 854.

38. See the following: U. S.—United States v. Worms, 4 Blatchf. 332, 28 Fed. Cas. No. 16,765. Cal.—*Ex parte* Chambers, 32 Cal. App. 476, 163 Pac. 223. Ga.—Wiggins v. Norton, 83 Ga. 148, 9 S. E. 607; Johnson v. Americus, 46 Ga. 80. Ia.—State v. Freeman, 8 Iowa 428, 74 Am. Dec. 317. La.—State *ex rel.* Milliet v. Aucoin, 47 La. Ann. 1677, 18 So. 709. Mich.—Matter of Peoples, 47 Mich. 626, 14 N. W. 112. Nev.—*Ex parte* Ah Kee, 22 Nev. 374, 40 Pac. 879. N. J.—State v. Kruse, 32 N. J. L. 313. N. Y.—Nowak v. Waller, 56 Hun 647, 10 N. Y. Supp. 199, 31 N. Y. St. 458. N. C.—State v. Freeman, 86 N. C. 683. Pa.—Com. v. Sweetlick, 19 Pa. Dist. 397, 36 Pa. Co. Ct. 305. Tex.—Bishop v. Lucy, 21 Tex. Civ. App. 326, 50 S. W. 1029. Va.—Morrisett v. Com., 6 Gratt. (47 Va.) 673.

See also State v. Keyes, 75 Wis. 288, 44 N. W. 13.

[a] **Accused entitled to discharge** if hearing not had promptly. See U. S.—United States v. Worms, 4 Blatchf. 332, 28 Fed. Cas. No. 16,765.

waives his right to an immediate hearing, pending an investigation of the matter by the police authorities.³⁹

Adjournment.—As a rule, the preliminary examination may be continued or adjourned within the discretion of the magistrate.⁴⁰ Statutes, however, sometimes provide that the preliminary examination must be completed at one session, a postponement being allowed only for good cause shown, and only for a specific length of time without the prisoner's consent.⁴¹ A continuance should be permitted to enable the accused to procure counsel.⁴² So, also, an adjournment should be permitted for the purpose of enabling the prosecution or the accused to obtain necessary witnesses.⁴³ The examination should

Cal.—*Ex parte* Chambers, 32 Cal. App. 476, 163 Pac. 223. Nev.—*Ex parte* Ah Kee, 22 Nev. 374, 40 Pac. 879.

39. Bishop v. Lucy, 21 Tex. Civ. App. 326, 50 S. W. 1029.

[a] An immediate examination will be waived by accused making a stipulation to appear at a future date for his own convenience, and receiving a parol based thereon. Newak v. Waller, 56 Hun 647, 10 N. Y. Supp. 199, 31 N. Y. St. 458.

[b] But the accused cannot defeat the proceeding by neglecting to appear before the magistrate at the proper time. State v. Justus, 86 Kan. 848, 122 Pac. 877; State v. McLain, 13 N. D. 368, 102 N. W. 407.

As to waiver of preliminary examination, see *supra*, II, B.

40. See the following: U. S.—*In re* Ludwig, 32 Fed. 774. Ala.—State v. Allen, 33 Ala. 422. Cal.—People v. Flannelly, 128 Cal. 83, 60 Pac. 670. Conn.—Potter v. Kingsbury, 4 Day 98. Ill.—Ogden v. People, 62 Ill. 63. Kan.—Tilson v. State, 29 Kan. 452. Ky.—Pepper v. Mayes, 81 Ky. 673, 5 Ky. L. Rep. 708, account of intoxication of accused. La.—State *ex rel.* Milliet v. Aucoin, 47 La. Ann. 1677, 18 So. 709; State v. Recorder, 42 La. Ann. 1091, 8 So. 279, 10 L. R. A. 137. Mich.—Matter of Peoples, 47 Mich. 626, 14 N. W. 112; Hamilton v. People, 29 Mich. 173. Minn.—State v. Nerbovig, 33 Minn. 480, 24 N. W. 321. N. J.—State v. Kruise, 32 N. J. L. 313. N. Y.—Matter of Blair, 32 Misc. 175, 65 N. Y. Supp. 640, 8 N. Y. Ann. Cas. 54, 15 N. Y. Crim. 87. Pa.—Com. v. Sweetlick, 19 Pa. Dist. 397, 36 Pa. Co. Ct. 395.

41. See the statutes, and Cal.—People v. Van Horn, 119 Cal. 323, 51 Pac. 538. Nev.—*Ex parte* Ah Kee, 22 Nev.

374, 40 Pac. 879. N. Y.—People v. Lecesse, 148 N. Y. Supp. 929. N. D.—State v. Foster, 14 N. D. 561, 105 N. W. 938.

[a] In Virginia, if cause is shown by the commonwealth, the hearing may be postponed for a reasonable time, not exceeding ten days at one time, without the consent of the accused. Hill v. Smith, 107 Va. 848, 59 S. E. 475.

[b] Purpose of Statute.—“The statutes and constitutional provisions giving the right to a speedy examination or trial are intended to guard against the abuse of delay on the part of the prosecution, but not to shield a prisoner from the consequences of delays for which the prosecution is not in anywise responsible.” Matter of Blair, 32 Misc. 175, 65 N. Y. Supp. 640.

[c] An adjournment for a longer period does not invalidate the proceedings, except where it is shown that substantial rights of the accused were prejudiced thereby. People v. Boren, 139 Cal. 210, 72 Pac. 899; State v. Foster, 14 N. D. 561, 105 N. W. 938.

42. People v. Napthaly, 105 Cal. 641, 39 Pac. 29, refusal of continuance renders the proceeding illegal and an information based thereon must be set aside. See also *Ex parte* Ah Kee, 22 Nev. 374, 40 Pac. 879.

[a] Accused is not entitled to an unreasonable delay for such purpose. People v. Figueroa, 134 Cal. 159, 68 Pac. 202.

That accused entitled to aid of counsel, see *infra*, V, B.

43. Potter v. Kingsbury, 4 Day (Conn.) 98; State *ex rel.* Milliet v. Aucoin, 47 La. Ann. 1677, 18 So. 709.

[a] Adjournments To Procure Attendance of Foreign Prosecuting Witnesses.—Matter of Blair, 32 Misc. 175,

not be delayed to suit the convenience or personal accommodation of the officers of the law.⁴⁴

IV. JURISDICTION AND VENUE.⁴⁵ — A. **JURISDICTION AND AUTHORITY TO CONDUCT.** — The power to conduct preliminary examinations of persons charged with crimes beyond the cognizance of justices to try is usually entrusted to justices of the peace in common with various judges, judicial officers, and city officials.⁴⁶ This power is not exercised by those officers as courts, and it is not in the proper sense of the term judicial power.⁴⁷ It may be vested in other persons than courts, as well as in courts.⁴⁸ Such authority is sometimes conferred upon judges of courts of record.⁴⁹

65 N. Y. Supp. 640, 8 N. Y. Ann. Cas. 54, 15 N. Y. Crim. 87. See also *People v. Lecece*, 148 N. Y. Supp. 929.

44. *Matter of Peoples*, 47 Mich. 626, 14 N. W. 112; *Ex parte Ah Kee*, 22 Nev. 374, 40 Pac. 879.

45. See generally the titles "Jurisdiction;" "Venue."

46. See the statutes, and the cases cited *infra*, this note.

[a] **Justices of the Peace.**—See the following: **Cal.**—*People v. Creeks*, 170 Cal. 368, 149 Pac. 821. **Idaho.**—*State v. Andrus*, 29 Idaho 1, 156 Pac. 421; *Fox v. Flynn*, 27 Idaho 580, 150 Pac. 44. **Ky.**—*Murphy v. Com.*, 11 Bush 217. **Me.**—*Osborn v. Sargent*, 23 Me. 527. **Mass.**—*Com. v. McNeill*, 19 Pick. 127. **Mich.**—*Allor v. Wayne*, 43 Mich. 76, 4 N. W. 492. **N. C.**—*State v. Bridgers*, 87 N. C. 562. **Ohio.**—*Harper v. State*, 7 Ohio St. 73. **Pa.**—*Com. v. Brower*, 7 Pa. Dist. 254. See also, **Mo.**—*State v. Jeffries*, 210 Mo. 302, 320, 109 S. W. 614, 14 Ann. Cas. 524. **Neb.**—*Stetter v. State*, 77 Neb. 777, 110 N. W. 761. **Utah.**—*State v. Pierpont*, 16 Utah 476, 52 Pac. 992.

[b] **Judges (1) of municipal** (*Ryan v. State*, 83 Wis. 486, 53 N. W. 836. See *State ex rel. Moose v. Woodruff*, 120 Ark. 406, 179 S. W. 813) or (2) police court. **Cal.**—*People v. Crespi*, 115 Cal. 50, 46 Pac. 863. **Ill.**—*People v. Richardson*, 187 Ill. App. 634. **Kan.**—*State v. Davis*, 26 Kan. 205. **Mich.**—*Allor v. Wayne*, 43 Mich. 76, 4 N. W. 492. **S. D.**—*State v. Wright*, 15 S. D. 628, 91 N. W. 311. **Tex.**—*Holmes v. State*, 44 Tex. 631.

[c] **Probate Judges.**—*Fox v. Flynn*, 27 Idaho 580, 150 Pac. 44.

[d] **County Judge.**—*Stetter v. State*, 77 Neb. 777, 110 N. W. 761.

[e] **Recorder.**—*Lowe v. State*, 86 Ala. 47, 5 So. 435.

[f] **Court Commissioner.**—*Wieden v. State*, 141 Wis. 585, 124 N. W. 509.

[g] **Notary Public.**—*Matthews v. State*, 96 Ala. 62, 11 So. 203.

[h] **Mayor of city as examining magistrate**, see *Holmes v. State*, 44 Tex. 631; *Butler v. Com.*, 81 Va. 159.

[i] **Where coroner is not a magistrate**, he has no authority to hold a preliminary examination. *In re L. P. Sly*, 9 Idaho 779, 76 Pac. 766.

[j] **Commitment by the coroner upon an inquisition** has the force and effect of a commitment by a magistrate. *Ex parte Anderson*, 55 Ark. 527, 18 S. W. 856. But see *In re L. P. Sly*, 9 Idaho 779, 76 Pac. 766.

47. *Allor v. Wayne*, 43 Mich. 76, 100, 4 N. W. 492. See also *Ocampo v. United States*, 234 U. S. 91, 100, 34 Sup. Ct. 712, 58 L. ed. 1231, and the cases cited *supra*, I, note 7.

[a] **A county judge**, when sitting as an examining magistrate, is not sitting as a county court. *State v. Sonnenschein*, 37 S. D. 139, 156 N. W. 906. See also *People v. Crespi*, 115 Cal. 50, 46 Pac. 863.

48. *Ocampo v. United States*, 234 U. S. 91, 100, 34 Sup. Ct. 712, 58 L. ed. 1231; *Allor v. Wayne*, 43 Mich. 76, 4 N. W. 492. See also the cases cited *supra*, note 46.

49. See the statutes, and the following: **Ala.**—*Wray v. State*, 147 Ala. 162, 41 So. 878; *Pierson v. State*, 129 Ala. 120, 29 So. 843. **Cal.**—*People v. Cohen*, 118 Cal. 74, 50 Pac. 20. **Ind.**—*Ex parte State*, 7 Ind. 347. **Ky.**—*Com. v. Cummins*, 18 B. Mon. 26. **Miss.**—*State v. Wofford*, 10 Smed. & M. 626. **Pa.**—*In re Election Court*, 204 Pa. 92, 53 Atl. 784.

[a] "It belongs to the duties of conservators of the peace; and the constitution has made supreme and circuit

In the federal courts, the preliminary examination is conducted by the United States commissioner.⁵⁰

While the examination should be before the magistrate who issued the warrant of arrest,⁵¹ it may be conducted by another.⁵² Statutes providing for a preliminary examination contemplate that the examining magistrate shall be some one else than the court trying the offense.⁵³ It is sometimes provided that one magistrate alone cannot act as committing magistrate where a felony is charged.⁵⁴

B. VENUE.—The preliminary examination of one charged with crime must be had in the county where the crime was committed.⁵⁵

Change of Venue.⁵⁶—The accused is entitled to a change of venue upon a proper showing without costs.⁵⁷

court judges, as well as justices of the peace, such conservators." Allor v. Wayne, 43 Mich. 76, 100, 4 N. W. 492.

[b] **Extent of Powers.**—A superior judge, when sitting as a magistrate, possesses no other or greater powers than are possessed by any other officer exercising the functions of a magistrate. People v. Cohen, 118 Cal. 74, 50 Pac. 20; People v. Crespi, 115 Cal. 50, 46 Pac. 863.

50. Pereles v. Weil, 157 Fed. 419; United States v. Yarborough, 122 Fed. 293; United States v. Greene, 100 Fed. 941; Ex parte Jones, 96 Fed. 200; In re Wahll, 42 Fed. 822. See also *infra*, IX.

Duties of United States commissioners, see generally 16 STANDARD PROC. 708.

[a] **The powers of a United States district judge** in conducting a preliminary examination are simply and only those of a United States commissioner. United States v. Hughes, 70 Fed. 972.

51. See the following: Cal.—Ex parte Moan, 65 Cal. 216, 3 Pac. 644; Ex parte Branigan, 19 Cal. 133. Idaho. State v. Andrus, 29 Idaho 1, 156 Pac. 421. S. C.—State v. Rabens, 79 S. C. 542, 60 S. E. 442, 1110.

[a] **Unless the magistrate has jurisdiction to issue a warrant,** he has no jurisdiction to hold one for examination and to commit him to custody. People ex rel. Brown v. Tighe, 146 App. Div. 491, 131 N. Y. Supp. 693.

[b] **Jurisdiction of Magistrate Extends Throughout the County.**—State v. Andrus, 29 Idaho 1, 156 Pac. 421.

[c] **Where warrant is sent to another county,** indorsing magistrate cannot hold the preliminary examination. State v. Rabens, 79 S. C. 542, 60 S. E. 442, 1110.

52. Ex parte Moan, 65 Cal. 216, 3 Pac. 644; Ex parte Branigan, 19 Cal. 133; Van Buren v. State, 65 Neb. 223, 91 N. W. 201. See also Rex v. Daigle, 23 Can. Crim. Cas. 92.

[a] **Jurisdiction of magistrate issuing warrant cannot be ousted** by the officer who makes the arrest. State v. Andrus, 29 Idaho 1, 156 Pac. 421.

[b] **A magistrate has the power to call in another** (1) for the purpose of holding a preliminary examination. People v. Sehorn, 116 Cal. 503, 48 Pac. 495; People v. Sansome, 98 Cal. 235, 33 Pac. 202. See also Boynton v. State, 77 Ala. 29. (2) The reason for the request need not be stated in the call. People v. Sehorn, 116 Cal. 503, 48 Pac. 495.

53. State v. Solomon, 158 Wis. 146, 147 N. W. 640, 148 N. W. 1095, Ann. Cas. 1916E, 309.

Right to preliminary examination where examining magistrate has jurisdiction to try offense, see *supra*, II, A.

54. Murphy v. Com., 11 Bush (Ky.) 217; Revill v. Pettit, 3 Metc. (Ky.) 314.

55. In re Kelly, 46 Fed. 653. See also Burrow v. Southern R. Co., 139 Ga. 733, 78 S. E. 125.

[a] **But it is the province of the prosecuting officer to designate the precinct where,** and the magistrate before whom, the preliminary examination shall be had, within the county wherein the offense is alleged to have been committed, and most convenient to a majority of the witnesses for the prosecution. State v. Griflin, 4 Idaho 462, 40 Pac. 58.

56. As to generally, see the title "Change of Venue."

57. See the statutes, and Colo.—In re Dolph, 17 Colo. 35, 28 Pac. 470.

V. CONDUCT OF.—A. IN GENERAL.—A preliminary examination must be conducted in the manner prescribed by law.⁵⁸ But the law governing the procedure in such examinations does not contemplate that the defendant shall be protected with safeguards to the same extent as on trials.⁵⁹ Technicalities or defects therein will not render the examination invalid,⁶⁰ unless they actually prejudice the defendant, or tend to his prejudice in respect to some substantial right.⁶¹ The duties of the magistrate on a preliminary examination are not perfunctory,⁶² and call for the exercise of sound judgment for the protection of the public interests and the defendant's rights.⁶³ In the absence of a statute requiring the prosecuting attorney to appear at preliminary examinations, he need not do so,⁶⁴ except when requested to do so by the examining magistrate.⁶⁵ But he has a right to attend and conduct such examinations,⁶⁶ and when he does his authority is as complete as though his presence had been requested.⁶⁷ The complaining witness may be represented by private counsel in an examination before a magistrate,⁶⁸ if neither the magis-

N. D.—*State v. Weltner*, 7 N. D. 522, 75 N. W. 779, statute mandatory. **Wis.** *State v. Evans*, 88 Wis. 255, 60 N. W. 433; *State v. Sorenson*, 84 Wis. 27, 53 N. W. 1124; *Martin v. State*, 79 Wis. 165, 48 N. W. 119.

Compare, *State v. Bergman*, 37 Minn. 407, 34 N. W. 737.

[a] **The magistrate before whom the accused is brought is the proper person to determine who is the nearest qualified magistrate to whom the papers are to be transmitted; and his decision of the question is conclusive. It cannot be raised before the magistrate to whom the papers are transmitted.** *Martin v. State*, 79 Wis. 165, 48 N. W. 119. See also *State v. Evans*, 88 Wis. 255, 60 N. W. 433.

58. See the following: **Idaho.**—*State v. Clark*, 4 Idaho 7, 35 Pac. 710. **N. Y.** *People v. Hendrickson*, 8 How. Pr. 404, 1 Park. Crim. 406, or it will be deemed irregular and rejected. **Wis.**—*State v. Huegin*, 110 Wis. 189, 239, 85 N. W. 1046, 62 L. R. A. 700. **Can.**—*McDonald v. The King*, 26 Can. Crim. Cas. 175.

[a] **Practice in federal courts follows that of the state where the proceedings take place.** *United States v. Sauer*, 73 Fed. 671.

59. *State v. Wisniewski*, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907.

[a] **Technical rules of evidence are inapplicable to preliminary examination.** *Turner v. People*, 33 Mich. 363.

Rights of accused, see *infra*, V, B.

60. *State v. Clark*, 4 Idaho 7, 35 Pac. 710.

61. *State v. Clark*, 4 Idaho 7, 35 Pac. 710.

Objections, etc., see *infra*, VIII.

62. *People ex rel. Beamish v. Reynolds*, 155 N. Y. Supp. 121.

63. *People ex rel. Beamish v. Reynolds*, 155 N. Y. Supp. 121.

64. See the following: **Kan.**—*Foley v. Ham*, 102 Kan. 66, 169 Pac. 183, L. R. A. 1918C, 204. **Mich.**—*McCurdy v. New York Life Ins. Co.*, 115 Mich. 20, 72 N. W. 996; *Beecher v. Anderson*, 45 Mich. 543, 8 N. W. 539. **N. Y.**—*People ex rel. Howes v. Grady*, 66 Hun 465, 21 N. Y. Supp. 381, *affirmed*, 83 Misc. 74, 144 N. Y. Supp. 685.

65. *Foley v. Ham*, 102 Kan. 66, 169 Pac. 183, L. R. A. 1918C, 204; *McCurdy v. New York Life Ins. Co.*, 115 Mich. 20, 72 N. W. 996; *Beecher v. Anderson*, 45 Mich. 543, 8 N. W. 539.

66. *Foley v. Ham*, 102 Kan. 66, 169 Pac. 183, L. R. A. 1918C, 204; *People ex rel. Howes v. Grady*, 66 Hun 465, 21 N. Y. Supp. 381, *affirmed*, 83 Misc. 74, 144 N. Y. Supp. 685.

67. *Foley v. Ham*, 102 Kan. 66, 169 Pac. 183, L. R. A. 1918C, 204.

[a] **Magistrate Should Follow His Advice.**—*Beecher v. Anderson*, 45 Mich. 543, 8 N. W. 539. To same effect is *Foley v. Ham*, 102 Kan. 66, 169 Pac. 183, L. R. A. 1918C, 204, holding that case should be dismissed if prosecuting attorney so directs.

68. *McCurdy v. New York Life Ins. Co.*, 115 Mich. 20, 72 N. W. 996;

trate nor the prosecuting attorney object, and there is no other good reason forbidding it.

B. RIGHTS OF ACCUSED.—The accused has the right to a public examination before the committing magistrate,⁶⁹ though he may waive such right whenever he deems it to his interest to do so.⁷⁰ He also has the right to be present at the preliminary examination,⁷¹ and to be informed of the accusation against him.⁷² He is entitled to the aid of counsel;⁷³ and the examining magistrate must inform him of such

Sayles *v. Genesee Circ. Judge*, 82 Mich. 84, 46 N. W. 29; *Beecher v. Anderson*, 45 Mich. 543, 8 N. W. 539.

[a] **Reason.**—Such examination is an investigation, and no harm can be done the accused or the people by the fullest inquiry. *Sayles v. Genesee Circ. Judge*, 82 Mich. 84, 46 N. W. 29; *Beecher v. Anderson*, 45 Mich. 543, 8 N. W. 539.

69. See the statutes, and *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896.

[a] **But in New York** (1) whether the examination shall be conducted secretly or in public is within the discretion of the magistrate, except that he cannot exclude certain persons therefrom. *People ex rel. Cassidy v. Quinn*, 150 App. Div. 813, 135 N. Y. Supp. 477. (2) The magistrate may exclude the public but must admit the prosecutor and his counsel, the clerk of the court, the attorney-general, the district attorney, the defendant, his counsel, and the officer having him in custody. *People ex rel. Livingston v. Wyatt*, 113 App. Div. 111, 99 N. Y. Supp. 114, *affirmed*, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159; *People ex rel. Howes v. Grady*, 66 Hun 465, 21 N. Y. Supp. 381, *affirmed*, 83 Misc. 74, 144 N. Y. Supp. 685.

70. *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896.

71. See the following: **U. S.**—*United States v. Rundlett*, 2 Curt. 41, 27 Fed. Cas. No. 16,208. **Ala.**—*Ex parte Bryan*, 44 Ala. 402. **Cal.**—*People v. Ward*, 105 Cal. 652, 39 Pac. 33. **Colo.**—*In re Dolph*, 17 Colo. 35, 28 Pac. 470, right to be present and hear all witnesses, participate in their examination, and be heard in his own behalf. **Ky.**—*St. Clair v. Com.*, 11 Ky. L. Rep. 812, magistrate has no authority to inquire into charge in absence of accused. **N. Y.**—*People v. Collins*, 11 Abb. Pr. 406, 20 How. Prac. 111; *People v. Drury*, 2 Edm. Sel. Cas. 351. **N. D.**—*State v. McLain*, 13 N. D. 368, 102 N. W. 407; *State v. Beaverstad*, 12 N.

D. 527, 97 N. W. 548. **P. I.**—*United States v. Grant*, 18 Phil. Isl. 122. **Can.**—*King v. Traynor*, 4 Can. Crim. Cas. 410.

See also *infra*, V, D, 1.

[a] **Counsel Also Entitled To Be Present.**—*People v. Drury*, 2 Edm. Sel. Cas. (N. Y.) 351; *People v. Restell*, 3 Hill (N. Y.) 289. See also *United States v. Grant*, 18 Phil. Isl. 122, 143.

72. See the statutes, and **Cal.**—*People v. Barnes*, 66 Cal. 594, 6 Pac. 698. **Nev.**—*Ex parte Ah Kee*, 22 Nev. 374, 40 Pac. 879. **N. Y.**—*People ex rel. Steinhardt v. Fuller*, 68 N. Y. Supp. 742, 15 N. Y. Crim. 344; *People v. Drury*, 2 Edm. Sel. Cas. 351. **Tenn.**—*Touhey v. King*, 9 Lea 422. **Utah.**—*State v. Pay*, 45 Utah 411, 146 Pac. 300, Ann. Cas. 1917E, 173.

[a] **Where the statute does not require the complaint to be read to the defendant**, a statement of the magistrate in a general way of the nature of the charge will be sufficient. *People v. Stein*, 23 Cal. App. 108, 137 Pac. 271.

[b] **Duty of magistrate to exhibit complaint to accused's attorney.** *People ex rel. Steinhardt v. Fuller*, 68 N. Y. Supp. 742, 15 N. Y. Crim. 344.

73. See the statutes, and the following: **Cal.**—*People v. Naphthaly*, 105 Cal. 641, 39 Pac. 29; *People v. Elliott*, 80 Cal. 296, 22 Pac. 207; *People v. Crowley*, 13 Cal. App. 322, 109 Pac. 493. **N. Y.**—*People ex rel. Steinhardt v. Fuller*, 68 N. Y. Supp. 742, 15 N. Y. Crim. 344; *People v. Collins*, 11 Abb. Pr. 406, 20 How. Pr. 111; *People v. Drury*, 2 Edm. Sel. Cas. 351; *People v. Restell*, 3 Hill 289. **Tenn.**—*Touhey v. King*, 9 Lea 422.

Compare In re Bates, 2 Fed. Cas. No. 1,099a; *Cox v. Coleridge*, 1 B. & C. 37, 8 E. C. L. 17, 107 Eng. Reprint 15.

[a] **But the fact that the accused had no counsel at the preliminary examination of itself is not a ground to set aside the information.** *People v. Elliott*, 80 Cal. 296, 22 Pac. 207; *Sou v. People*, 12 Wend. (N. Y.) 344.

right,⁷⁴ and allow him time to procure counsel if he so desires.⁷⁵ He should also be informed of his right to make an unsworn statement in relation to the charge against him, where such statement is permitted;⁷⁶ and that any statement or confession made by him may be used against him.⁷⁷ It is likewise essential that the accused be informed by the magistrate of his right to decline to testify,⁷⁸ or to make an unsworn statement,⁷⁹ and that his refusal to testify,⁸⁰ or his waiver of the right to make an unsworn statement,⁸¹ cannot be used against him. The constitutional right of one accused to be confronted by the witnesses,⁸² as well as the right to have compulsory

74. See the statutes, and the following: **Cal.**—*People v. Barnes*, 66 Cal. 594, 6 Pac. 698; *Kalloch v. Superior Court*, 56 Cal. 229; *People v. Crowley*, 13 Cal. App. 322, 109 Pac. 493. **Nev.** *Ex parte Ah Kee*, 22 Nev. 374, 40 Pac. 879. **N. Y.**—*People v. Randazzio*, 194 N. Y. 147, 87 N. E. 112. **Tenn.** *Touhey v. King*, 9 Lea 422. **Utah.** *State v. Pay*, 45 Utah 411, 146 Pac. 300, Ann. Cas. 1917E, 173.

[a] **It will be presumed**, in the absence of a showing to the contrary, that the magistrate duly informed defendant of such right. *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202; *State v. Mewhinney*, 43 Utah 135, 134 Pac. 632, Ann. Cas. 1916C, 537, L. R. A. 1916D, 590.

[b] **Where accused is represented by counsel**, it is not necessary for the magistrate to go through the formality of advising him of his right. *People v. Stein*, 23 Cal. App. 108, 137 Pac. 271.

[c] **Waiver of Right.**—Where the transcript of the proceedings before the magistrate affirmatively shows that the accused “waived the service of an attorney,” a motion to quash the information on the ground that the magistrate did not inform or advise the accused “of his rights to the aid of counsel” is untenable. If this (transcript) means anything, it means that accused was apprised of his right to have such services. *State v. Mewhinney*, 43 Utah 135, 134 Pac. 632, Ann. Cas. 1916C, 537, L. R. A. 1916D, 590.

[d] **The magistrate is not required to appoint counsel** on the request of the defendant at the preliminary examination. *People v. Crowley*, 13 Cal. App. 322, 109 Pac. 493.

75. **Cal.**—*People v. Figueroa*, 134 Cal. 159, 66 Pac. 202 (seven days reasonable length of time for this purpose); *Peo-*

ple v. Flannelly, 128 Cal. 83, 60 Pac. 670 (six days); *People v. Barnes*, 66 Cal. 594, 6 Pac. 698. **N. Y.**—*People v. Drury*, 2 Edm. Sel. Cas. (N. Y.) 351; *People v. Restell*, 3 Hill (N. Y.) 289. **Utah.**—*State v. Pay*, 45 Utah 411, 146 Pac. 300.

Continuance for such purpose, see *supra*, III.

76. See the following: *People v. Gibbons*, 43 Cal. 557 (under Act of 1851, since repealed); *People v. Ferola*, 215 N. Y. 285, 109 N. E. 500; *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469. See also *King v. Lantz*, 22 Can. Crim. Cas. 212.

Right to make unsworn statement, see *infra*, V, E, 2, a.

77. *Coffee v. State*, 25 Fla. 501, 6 So. 493, 23 Am. St. Rep. 525; *State v. Andrews*, 35 Ore. 388, 58 Pac. 765.

78. *State v. Vaughan*, 156 N. C. 615, 71 S. E. 1089.

As to examination of accused, see *infra*, V, E.

79. *People v. Gibbons*, 43 Cal. 557, under Act of 1851, since repealed.

80. *State v. Vaughan*, 156 N. C. 615, 71 S. E. 1089.

81. *People v. Gibbons*, 43 Cal. 557 (under Act of 1851, since repealed); *People v. Ferola*, 215 N. Y. 285, 109 N. E. 500.

82. See the following: **U. S.**—*In re Bates*, 2 Fed. Cas. No. 1,099a. **N. Y.** *People ex rel. Domens v. Warden of City Prison*, 154 App. Div. 728, 139 N. Y. Supp. 828. **S. D.**—*Farnham v. Colman*, 19 S. D. 342, 103 N. W. 161, 117 Am. St. Rep. 944, 1 L. R. A. (N. S.) 1135. **Tex.**—*Kemper v. State*, 63 Tex. Crim. 1, 40, 138 S. W. 1025.

See also **U. S.**—*Goldsby v. United States*, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. ed. 343. **Ala.**—*Hussey v. State*, 87 Ala. 121, 6 So. 420. **Ore.**—*State v. Belding*, 43 Ore. 95, 71 Pac. 330. **Tex.** *Tooke v. State*, 23 Tex. App. 10, 3 S.

process for obtaining witnesses in his behalf,⁸³ does not apply to a preliminary examination.

Separate Examination.—A refusal to conduct a separate preliminary examination of one charged jointly with another does not render the commitment void.⁸⁴

C. SCOPE OF INQUIRY.—The power of the examining magistrate is not always limited to the specific offense charged in the preliminary complaint or affidavit.⁸⁵ But in some jurisdictions, it must be conceded that any number of felonies may be inquired into at one preliminary examination;⁸⁶ and if it appears from the examination that any public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the defendant may be held to answer, even though the offense was not charged in the preliminary complaint or warrant.⁸⁷ In other jurisdictions, however, the defendant cannot be held to answer for an offense not charged in the preliminary complaint or included therein; and the magistrate cannot proceed to a hearing upon a charge foreign to that contained in the complaint.⁸⁸ The magistrate is not charged with, or empowered to determine the guilt or innocence of the accused;⁸⁹ all that he is required to find is that a felony has been committed and probable cause to believe the prisoner guilty thereof.⁹⁰

W. 782, and generally the title "Witnesses."

[a] Magistrate may commit although the people fail to produce person upon whose sworn statement the warrant was issued. *People ex rel. Domens v. Warden of City Prison*, 154 App. Div. 728, 139 N. Y. Supp. 828.

83. *Farnham v. Colman*, 19 S. D. 342, 103 N. W. 161, 117 Am. St. Rep. 944, 1 L. R. A. (N. S.) 1135. *Compare United States v. Burr*, 25 Fed. Cas. No. 14,692d; also *Hussey v. State*, 87 Ala. 121, 6 So. 420.

84. *People v. Burns*, 121 Cal. 529, 53 Pac. 1096.

85. *Trimble v. Territory*, 15 Okla. 620, 86 Pac. 64. See also *Yaner v. People*, 34 Mich. 286.

86. *State v. Shaw*, 72 Kan. 81, 82 Pac. 587, regardless of what may be the rule in case of trial.

[a] Rule that party cannot be tried for two distinct offenses at one time is not applicable to preliminary examinations. *People v. Shuler*, 136 Mich. 161, 98 N. W. 986.

87. See the following: **Ariz.**—*Fertig v. State*, 14 Ariz. 540, 133 Pac. 99. **Kan.**—*State v. Pigg*, 80 Kan. 481, 103 Pac. 121, 18 Ann. Cas. 521; *State v. Shaw*, 72 Kan. 81, 82 Pac. 587; *Redmond v. State*, 12 Kan. 172. **Okla.** *Trimble v. Territory*, 15 Okla. 620, 86 Pac. 64, statute authorizes same. **Wash.**

State v. Newton, 29 Wash. 373, 70 Pac. 31.

As to determination and commitment generally, see *infra*, VI.

[a] If it appears that a higher offense than that charged in the warrant has been committed, it is the duty of the magistrate to issue a new warrant charging the accused with the higher offense and proceed thereon. *Yaner v. People*, 34 Mich. 286.

88. *State v. Pay*, 45 Utah 411, 146 Pac. 300, Ann. Cas. 1917E, 173, relying upon *People v. Christian*, 101 Cal. 471, 35 Pac. 1043, followed in *People v. Howard*, 111 Cal. 655, 44 Pac. 342. See also *Mills v. State*, 53 Neb. 263, 73 N. W. 761; *Hockenberger v. State*, 49 Neb. 706, 68 N. W. 1037; *Cowan v. State*, 22 Neb. 519, 35 N. W. 405, all holding that charge in information must be substantially same as one contained in complaint. *Compare People v. Lee Look*, 143 Cal. 216, 76 Pac. 1028; *People v. Nogiri*, 142 Cal. 596, 76 Pac. 490; *People v. Staples*, 91 Cal. 23, 27 Pac. 523 (dicta to contrary); *People v. Wheeler*, 73 Cal. 252, 14 Pac. 796; *People v. Smith*, 1 Cal. 9.

89. *State v. Jeffries*, 210 Mo. 302, 320, 109 S. W. 614; *People ex rel. Beamish v. Reynolds*, 155 N. Y. Supp. 121. See also *supra*, I, note 7.

90. *State v. Jeffries*, 210 Mo. 302, 320, 109 S. W. 614; *State v. Huegin*,

Questions properly determined upon the trial will not be inquired into upon the preliminary examination, however.⁹¹

D. EXAMINATION OF WITNESSES.⁹² — 1. **Generally.** — The complaining witness and other witnesses in support of the prosecution are usually examined upon the preliminary examination,⁹³ on oath or affirmation,⁹⁴ in the presence of the accused,⁹⁵ and the magistrate,⁹⁶ in regard to the offense charged, and any other matters connected therewith.⁹⁷ Notwithstanding a waiver of the preliminary examination by the accused,⁹⁸ the examining magistrate may proceed and take the testimony of the witnesses for the state.⁹⁹ Formerly all inquiry at preliminary examinations might be confined to the prosecution,¹ and as a matter of strict legal right, the accused was not entitled to present witnesses in his own behalf.² The magistrate might hear the witnesses produced in his behalf, however,³ though it was not obligatory upon him to do so.⁴ The practice under some statutes now re-

110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

That preliminary examination is in no sense a judicial trial in which the guilt or innocence of the accused is determined or adjudged, see *supra*, I.

As to finding and determination generally, see *infra*, VI, A.

91. *Ex parte* Charlton, 185 Fed. 880 (such an insanity of accused); *United States v. Burr*, 25 Fed. Cas. No. 14-694a.

92. Right of accused to be confronted by witnesses, see *supra*, V, B.

93. See the statutes, and *Mich. People v. Curtis*, 95 Mich. 212, 54 N. W. 767; *Yaner v. People*, 34 Mich. 286. **N. Y.**—*People v. Drury*, 2 Edm. Sel. Cas. 351; *People v. Collins*, 20 How. Pr. 111, 11 Abb. Pr. 406. **Can.** *King v. Traynor*, 4 Can. Crim. Cas. 410.

[a] Witnesses must be before the magistrate at the time of taking the examination. *King v. Traynor*, 4 Can. Crim. Cas. 410.

Extent of examination, see *infra*, V, D, 3.

94. See the following: **Mich.**—*Yaner v. People*, 34 Mich. 286. **N. Y.**—*People v. Drury*, 2 Edm. Sel. Cas. 351; *People v. Collins*, 20 How. Pr. 111, 11 Abb. Pr. 406. **Can.**—*Queen v. Lepine*, 4 Can. Crim. Cas. 145.

[a] Who May Administer Oath. The committing magistrate cannot delegate the duty of administering the oath to witnesses before him, the duty, unless otherwise provided by statute, being one required to be performed personally by the magistrate to ren-

der the examination a valid one. *People v. Cohen*, 118 Cal. 74, 50 Pac. 20. *Compare Sullivan v. State*, 6 Tex. App. 319, 32 Am. Rep. 580.

95. See the following: **Mich.**—*Yaner v. People*, 34 Mich. 286. **N. Y.**—*People v. Drury*, 2 Edm. Sel. Cas. 351; *People v. Collins*, 20 How. Pr. 111, 11 Abb. Pr. 406. **N. D.**—*State v. McLain*, 13 N. D. 368, 102 N. W. 407; *State v. Beaverstad*, 12 N. D. 527, 97 N. W. 548. **Can.**—*Queen v. Lepine*, 4 Can. Crim. Cas. 145. See also *The King v. Traynor*, 4 Can. Crim. Cas. 410.

Right of accused to be present at preliminary examination, see *supra*, V, B.

96. *King v. Traynor*, 4 Can. Crim. Cas. 410.

97. *Yaner v. People*, 34 Mich. 286; *People v. Collins*, 20 How. Pr. (N. Y.) 111, 11 Abb. Pr. 406.

As to scope of inquiry, see *supra*, V, C.

98. As to waiver, see *supra*, II, B.

99. See *supra*, II, B, 1.

1. *Farnham v. Colman*, 19 S. D. 342, 103 N. W. 161, 117 Am. St. Rep. 944, 1 L. R. A. (N. S.) 1135, 9 Ann. Cas. 314.

2. *Com. v. Chubbs*, 16 Pa. Dist. 335; *Farnham v. Colman*, 19 S. D. 345, 103 N. W. 161, 117 Am. St. Rep. 944, 1 L. R. A. (N. S.) 1135, 9 Ann. Cas. 314. See also *United States v. White*, 4 Wash. C. C. 414, 28 Fed. Cas. No. 16,686.

3. *United States v. White*, 2 Wash. C. C. 29, 28 Fed. Cas. No. 16,685.

4. *Com. v. Chubbs*, 16 Pa. Dist. 335 (discretionary with magistrate); *Brown v. McCroskey*, 10 Pa. Dist. 583.

quires the examination of witnesses produced for the accused.⁵

The accused or his counsel are entitled to cross-examine the witnesses for the prosecution.⁶

2. Separation and Exclusion of Witnesses.⁷—Statutes sometimes authorize the magistrate to exclude the witnesses during the examination,⁸ and to separate them from each other,⁹ at the request of either the prosecution or the accused.

3. Extent of Examination, Sufficiency of Evidence, etc.¹⁰—In a preliminary examination, the state is not bound to produce all of its evidence.¹¹ Nor is it necessary that the evidence upon which the accused is committed should be sufficient to support a conviction at the trial;¹² all that is necessary is that there be sufficient proof that a crime has been committed and that there is probable cause to believe that the defendant is guilty thereof.¹³ As soon as the magistrate be-

5. See the statutes, and the following: **N. Y.**—*People v. Collins*, 20 How. Pr. 111, 11 Abb. Pr. 406; *People v. Drury*, 2 Edm. Sel. Cas. 351. **Pa.** *Com. v. Hughes*, 11 Pa. Co. Ct. 470; *Com. v. Sheriff*, 10 Pa. Co. Ct. 341. *Compare Com. v. Chubbs*, 16 Pa. Dist. 335. **S. D.**—*Farnham v. Colman*, 19 S. D. 342, 103 N. W. 161, 117 Am. St. Rep. 944, 1 L. R. A. (N. S.) 1135, 9 Ann. Cas. 314. **Wis.**—*Emery v. State*, 92 Wis. 146, 65 N. W. 848.

[a] **Refusal of the committing magistrate to hear a material witness produced by defendant to contradict the testimony of the complainant violates a substantial right of the defendant.** *People v. Mulcahy*, 153 N. Y. Supp. 912.

6. See the following: **Cal.**—*Kalloch v. Superior Court*, 56 Cal. 229. **N. Y.** *People v. Restall*, 3 Hill 289. **N. D.** *State v. McLain*, 13 N. D. 368, 102 N. W. 407. **Can.**—*Queen v. Lepine*, 4 Can. Crim. Cas. 145.

Compare United States v. White, 2 Wash. C. C. 29, 16 Fed. Cas. No. 16,685; *People ex rel. Domens v. Warden of City Prison*, 154 App. Div. 728, 139 N. Y. Supp. 828.

7. See generally the title "Witnesses."

8. See the statutes, and *Johnson v. Clem*, 4 Ky. L. Rep. 860, statute mandatory.

9. See the statutes, and *Johnson v. Clem*, 4 Ky. L. Rep. 860.

10. **Scope of inquiry**, see *supra*, V, C.

11. *In re Squires*, 13 Idaho 624, 92 Pac. 754; *In re Sly*, 9 Idaho 779, 76 Pac. 766. See also *State v. Jeffries*, 210 Mo. 302, 109 S. W. 614; *Com. v.*

Chubbs, 16 Pa. Dist. 335; *Brown v. McCroskey*, 10 Pa. Dist. 583.

[a] **Complaining witness need not be called as a witness, statutes so providing being merely directory.** *Lundstrum v. State*, 140 Wis. 141, 121 N. W. 883; *Emery v. State*, 92 Wis. 146, 154, 65 N. W. 848. To same effect, *People v. Curtis*, 95 Mich. 212, 54 N. W. 767.

[b] **Burden of proof is on state.** *Ex parte Patterson*, 50 Tex. Crim. 271, 95 S. W. 1061.

12. See the following: **Cal.**—*In re Hartwell*, 28 Cal. App. 627, 153 Pac. 730; *In re Mitchell*, 1 Cal. App. 396, 82 Pac. 347. **Idaho.**—*State v. Layman*, 22 Idaho 387, 125 Pac. 1042; *In re Squires*, 13 Idaho 624, 92 Pac. 754, guilt of accused need not be established beyond a reasonable doubt. **Neb.**—*Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; *Rhea v. State*, 61 Neb. 15, 84 N. W. 414. **Nev.**—*Ex parte Molino*, 39 Nev. 360, 157 Pac. 1012; *In re Kelly*, 28 Nev. 491, 83 Pac. 223. **N. C.**—*Matter of McFarland*, 59 Hun 304, 13 N. Y. Supp. 22; *Matter of Henry*, 13 Misc. 734, 35 N. Y. Supp. 210, 11 N. Y. Crim. 466, 69 N. Y. St. 590; *People v. Shenk*, 142 N. Y. Supp. 1081. **Tex.**—*Ex parte Patterson*, 50 Tex. Crim. 271, 95 S. W. 1061.

13. See the following: **Cal.**—*In re Kawaguchi*, 12 Cal. App. 498, 107 Pac. 727; *People v. Coombs*, 9 Cal. App. 262, 98 Pac. 686; *Ex parte Heacock*, 8 Cal. App. 420, 97 Pac. 77; *In re Mitchell*, 1 Cal. App. 396, 82 Pac. 347. **Haw.** *Ex parte Higashi*, 17 Hawaii 428. **Idaho.**—*State v. Layman*, 22 Idaho 387, 125 Pac. 1042; *In re Squires*, 13 Idaho 624, 92 Pac. 754; *In re Sly*, 9 Idaho

comes satisfied of the probable guilt of the accused, he may close the examination.¹⁴

The admission of hearsay and other incompetent evidence does not invalidate the preliminary examination, if there was sufficient competent evidence to show probable cause.¹⁵ Where the statute prohibits the conviction of a person on the uncorroborated testimony of

779, 76 Pac. 766. **Kan.**—*In re Stilts*, 74 Kan. 805, 87 Pac. 1134; *State v. Tennon*, 39 Kan. 726, 18 Pac. 948; *Redmond v. State*, 12 Kan. 172. **Me.** *State v. Hartwell*, 35 Me. 129. **Mich.** *People v. Whittemore*, 102 Mich. 519, 61 N. W. 13; *People v. Harrington*, 75 Mich. 112, 42 N. W. 680; *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *Yaner v. People*, 34 Mich. 286. **Neb.** *Jahnke v. State*, 68 Neb. 154, 94 N. W. 153, 104 N. W. 154; *Rhea v. State*, 61 Neb. 15, 84 N. W. 414. **Nev.**—*In re Kelly*, 28 Nev. 491, 83 Pac. 223. **N. Y.** *People ex rel. Cassidy v. Quinn*, 150 App. Div. 813, 135 N. Y. Supp. 477; *People ex rel. Zotti v. Flynn*, 135 App. Div. 276, 120 N. Y. Supp. 511; *People v. Shenk*, 142 N. Y. Supp. 1081. **N. D.** *See State v. Beaverstad*, 12 N. D. 527, 97 N. W. 548. **Ohio.**—*Seovern v. State*, 6 Ohio St. 288. **Tex.**—*See Ex parte Patterson*, 50 Tex. Crim. 271, 95 S. W. 1061. Also *Ex parte Richards*, 44 Tex. Crim. 561, 72 S. W. 838. **Wis.**—*State v. McGinley*, 153 Wis. 5, 140 N. W. 332. **Can.**—*Rex v. Odell*, 22 Can. Crim. Cas. 39.

[a] By "reasonable or probable cause" is meant such evidence as would lead a reasonable person to believe that the accused party has probably or likely committed the offense charged. *In re Squires*, 13 Idaho 624, 92 Pac. 754, holding that the phrase is not equivalent to the phrase, "beyond a reasonable doubt." To same effect, *State v. Layman*, 22 Idaho 387, 125 Pac. 1042.

[b] Term "sufficient" cause used in a statute is equivalent to probable cause. *People v. Coombs*, 9 Cal. App. 262, 98 Pac. 686.

[c] Mere suspicion is not sufficient to authorize the magistrate to hold the accused to answer. *People v. Shenk*, 142 N. Y. Supp. 1081.

[d] Necessity For Evidence Upon Which Magistrate May Act.—The proceeding "being statutory and special, evidence tending to establish the facts justifying a commitment or holding to bail for trial, is jurisdictional the same

as any other statutory essential. The statute awarding the privilege provides that the examining magistrate shall act, in determining the facts, upon evidence; and that contemplates that there must be evidence, and competent evidence, tending to establish the facts. It is jurisdictional in the same sense that the production of some competent evidence before a quasi-judicial body, authorized by statute to act only upon evidence, is jurisdictional." *State ex rel. Durner v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

[e] **Presumption as to Sufficiency of Evidence.**—"Upon the filing of an information corresponding with the terms of the commitment as to the nature of the offense indicated in the latter, the presumption at once arises that the evidence of which said commitment is predicated was in all respects sufficient to justify the magistrate in making the order." *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 107 Pac. 712.

14. See the following: **Idaho.**—*In re Squires*, 13 Idaho 624, 92 Pac. 754; *In re Sly*, 9 Idaho 779, 76 Pac. 766. **Mich.**—*People v. Curtis*, 95 Mich. 212, 54 N. W. 767. **Pa.**—*Com. v. Chubbs*, 16 Pa. Dist. 335; *Brown v. McCroskey*, 10 Pa. Dist. 583. **Wis.**—*Emery v. State*, 92 Wis. 146, 65 N. W. 848.

[a] It is only necessary for the state to introduce sufficient evidence to satisfy the magistrate that he is justified in holding the defendant to answer and the failure of the state to produce all attainable evidence is not a ground for the release of the accused. *In re Sly*, 9 Idaho 779, 76 Pac. 766.

[b] The fact that other witnesses have been summoned before the magistrate who were not examined does not affect the finding of the magistrate as to the existence of probable cause, the magistrate being the sole judge of the sufficiency of the evidence. *State v. Jeffries*, 210 Mo. 302, 109 S. W. 614.

15. *In re Kawaguchi*, 12 Cal. App. 498, 107 Pac. 727.

an accomplice, the magistrate cannot base an order of commitment solely upon such testimony.¹⁶ A confession may be received and considered by the examining magistrate in connection with other evidence to show that there is probable cause to believe the accused guilty of the crime charged.¹⁷ The complaint cannot be used as matter of evidence at the preliminary examination; and without any evidence in support of the charge contained therein, the accused cannot be committed.¹⁸

The weight of the evidence on a preliminary examination is a matter for the magistrate to determine.¹⁹

4. Reducing Testimony to Writing.—a. *In General.*—In the absence of a statute requiring it, the magistrate conducting the preliminary examination need not take down in writing the testimony of the witnesses.²⁰ But under some statutes, the testimony of the witnesses at a preliminary examination must be reduced to writing.²¹ But where the preliminary examination is waived, the defendant cannot thereafter claim that the testimony of the witnesses was not reduced to writing as required by the statute.²² Nor is a statute requir-

16. *State v. Smith*, 138 Ala. 111, 35 So. 42, 100 Am. St. Rep. 26; *In re Oxley*, 38 Nev. 379, 149 Pac. 992. But see *In re Mitchell*, 1 Cal. App. 396, 82 Pac. 347.

17. *Lundstrum v. State*, 140 Wis. 141, 121 N. W. 883.

18. *In re Hartwell*, 28 Cal. App. 627, 153 Pac. 730.

[a] But where the complaint is verified and contains evidence of facts showing the guilt of the accused it may be treated by the magistrate as a deposition. *In re Sing*, 13 Cal. App. 736, 110 Pac. 693.

19. *Matter of McFarland*, 59 Hun 304, 13 N. Y. Supp. 22, and should not be reviewed in habeas corpus proceedings, at least. See also *Yaner v. People*, 34 Mich. 286; *State v. Beaverstad*, 12 N. D. 527, 97 N. W. 548.

20. See the following: **Kan.**—*Redmond v. State*, 12 Kan. 172. **Mich.** *People v. Hare*, 57 Mich. 505, 24 N. W. 843. **P. I.**—*United States v. Rafael*, 23 Phil. Isl. 184.

21. See the statutes, and the following: **Cal.**—*Kalloch v. Superior Court*, 56 Cal. 229. **Idaho.**—*State v. Carlson*, 23 Idaho 545, 130 Pac. 463; *State v. Braithwaite*, 3 Idaho 119, 27 Pac. 731. **Ia.**—*State v. Wise*, 83 Iowa 596, 50 N. W. 59. **Kan.**—*State v. Flowers*, 58 Kan. 702, 50 Pac. 938. **Mich.**—*People v. Brock*, 64 Mich. 691, 31 N. W. 585; *People v. Gleason*, 63 Mich. 626, 30 N. W. 210 (statute mandatory); *People v. Smith*, 25 Mich. 497, ground for

quashing information. **Mo.**—*State v. Carlisle*, 57 Mo. 102. **Nev.**—*State v. Davis*, 14 Nev. 407. **N. Y.**—*People v. Restell*, 3 Hill 289. **N. C.**—*State v. Bridgers*, 87 N. C. 562. **S. C.**—*Lake City v. Gilliland*, 101 S. C. 152, 85 S. E. 312. **Tenn.**—*State v. Miller*, 1 Lea 596. **Tex.**—*Evans v. State*, 13 Tex. App. 225. **Utah.**—*State v. Gustaldi*, 41 Utah 63, 123 Pac. 897.

[a] "The original object of requiring the magistrates to make and return in writing their examination in such cases, was to prevent them from discharging, through favoritism, or otherwise improperly, a person brought before them charged with crime, and as they were obliged . . . to return all such examinations and all recognizances to the next Oyer and Terminer, 'so that the justices of the people may proceed thereon,' their deportment in office could thus be reviewed and their errors corrected by the superior court of criminal jurisdiction in process of time. A further object was had in view and was attained; the superior court, by a perusal of such examination, could be aided in determining the question of bail." *People v. Drury*, 2 Edm. Sel. Cas. (N. Y.) 351.

[b] **Waiver.**—A plea of guilty constitutes a waiver of the statutory requirement that the testimony be reduced to writing. *People v. Carter*, 88 Hun 304, 34 N. Y. Supp. 764.

22. *State v. Miller*, 1 Lea (Tenn.)

ing minutes of the testimony to be filed with the clerk applicable where the defendant is discharged upon the preliminary examination.²³ Where the accused does not object to the omission to reduce the testimony of the witnesses to writing, the objection is waived.²⁴

b. *Form and Sufficiency.* — (I.) *In General.* — It is not essential that the testimony at the preliminary examination of a person accused of crime should be taken down by the magistrate himself.²⁵ It is sufficient if it is done under his supervision and direction.²⁶ It is the substance of the testimony that is to be taken.²⁷ If the testimony is taken down in shorthand, it is not necessary that the person appointed by the magistrate to act as reporter should be the official reporter of a court.²⁸ Nor is it necessary that the person whom the magistrate may cause to write out the testimony shall be sworn.²⁹ Where the statute authorizes the appointment of a stenographer, but does not specify the manner of making the appointment, the taking of an oath by the stenographer, followed by his taking the testimony and proceedings with the consent of all concerned, constitutes a sufficient appointment.³⁰

(II.) *Signature of Witnesses and Certification of Magistrate.* — Statutes sometimes require that the testimony, as reduced to writing, shall be signed by the witnesses,³¹ and certified to by the justice or committing

596; *State v. Mewhinney*, 43 Utah 135, 134 Pac. 632, Ann. Cas. 1916C, 537. See also *Stuart v. People*, 42 Mich. 255, 3 N. W. 863.

As to waiver of preliminary examination, see *supra*, II, B.

23. *State v. Helvin*, 65 Iowa 289, 21 N. W. 645.

24. *State v. Davis*, 14 Nev. 407; *Lake City v. Gilliland*, 101 S. C. 152, 85 S. E. 312.

25. *Haw.*—*Hawaii v. Yamane Nenchiro*, 12 Hawaii 189. *La.*—*State v. Wiggins*, 50 La. Ann. 330, 23 So. 334. *Can.*—*Rex v. Traynor*, 4 Can. Crim. Cas. 410.

26. *Hawaii v. Yamane Nenchiro*, 12 Hawaii 189; *State v. Wiggins*, 50 La. Ann. 330, 23 So. 334. See also *State v. Gustaldi*, 41 Utah 63, 123 Pac. 897; *Rex v. McKinley*, 28 Can. Crim. Cas. 294.

27. *Haw.*—*Hawaii v. Yamane Nenchiro*, 12 Hawaii 189. *Ia.*—*State v. Wise*, 83 Iowa 596, 50 N. W. 59. *N. C.* *State v. Bridgers*, 87 N. C. 562, magistrate is not required to write every word uttered by the witness.

28. *People v. Nunley*, 142 Cal. 441, 76 Pac. 45; *People v. McIntyre*, 127 Cal. 423, 59 Pac. 779; *State v. Turner*, 114 Iowa 426, 87 N. W. 287, magistrate may order whom he chooses to take the testimony.

29. *People v. Nunley*, 142 Cal. 441, 76 Pac. 45; *People v. Riley*, 75 Cal. 98, 16 Pac. 544; *State v. Wise*, 83 Iowa 596, 50 N. W. 59. Compare *Rex v. McKinley*, 28 Can. Crim. Cas. 294 (under statute requiring stenographer taking testimony in shorthand to be sworn); *Rex v. Limerick*, 27 Can. Crim. Cas. 309, failure to do so jurisdictional. [a] **Official reporter** need not be sworn. *People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88.

[b] **Presumption.**—If necessary, the presumption would be that the oath was administered. *People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88.

[c] **Proof that stenographer sworn** may be supplied by justice's certificate. *McDonald v. The King*, 26 Can. Crim. Cas. 175.

30. *State v. Gustaldi*, 41 Utah 63, 123 Pac. 897, even if appointment irregular, objection waived by not attacking information, and by entering plea of not guilty and going to trial.

31. See the statutes, and the following: *Idaho.*—*State v. Carlson*, 23 Idaho 545, 130 Pac. 463; *State v. Yturaspé*, 22 Idaho 360, 125 Pac. 802; *State v. Braithwaite*, 3 Idaho 119, 27 Pac. 731. *Mich.*—*People v. Brock*, 64 Mich. 691, 31 N. W. 585; *People v. Gleason*, 63 Mich. 626, 30 N. W. 210; *People v. Chapman*, 62 Mich. 280, 28 N. W.

magistrate.³² Such provision should be substantially complied with.³³ Under statutes in other jurisdictions, however, the testimony need not be signed by the witnesses,³⁴ it being sufficient that the testimony is reduced to writing as required thereby.³⁵ Nor is certification by the justice necessary under some statutes.³⁶

Sufficiency of Signature. — The signatures of the witnesses are to be done in the usual way.³⁷

Reading Testimony to Witness Prior to Signature. — Though the statute does not, in express terms, require that the testimony taken down by the magistrate be read over to the witness before his signing, such is the common practice,³⁸ and should be required.³⁹ It is so required by

896, 4 Am. St. Rep. 857. **Miss.**—Cunning v. State, 79 Miss. 284, 30 So. 658. **Mo.**—State v. Carlisle, 57 Mo. 102. **S. C.**—Lake City v. Gilliland, 101 S. C. 152, 85 S. E. 312.

[a] Where the testimony is taken down in shorthand, no formal adjournment is necessary to have the witnesses appear and sign their testimony. Oblaser v. Wayne Circuit Judge, 159 Mich. 665, 124 N. W. 590.

[b] **Waiver.**—Where defendant's attorney has knowledge of the fact that by oversight the witnesses did not sign their testimonies, but did not call the magistrate's attention to that fact, the irregularity will be deemed to have been waived. City of Sumter v. Hogan, 96 S. C. 302, 80 S. E. 497.

32. See the statutes, and the following: **Idaho.**—State v. Yturaspe, 22 Idaho 360, 125 Pac. 802; State v. Braithwaite, 3 Idaho 119, 27 Pac. 731. **Mich.**—People v. Dowdigan, 67 Mich. 95, 38 N. W. 920. **Miss.**—Cunning v. State, 79 Miss. 284, 30 So. 658.

[a] **Testimony of Each Witness Need Not Be Separately Certified.** **Idaho.**—State v. Yturaspe, 22 Idaho 360, 125 Pac. 802. **Tex.**—Evans v. State, 13 Tex. App. 225. **Can.**—McDonald v. King, 26 Can. Crim. Cas. 175, all may be included in one certificate.

[b] **It will be presumed** in the appellate court, in absence of anything in the record to the contrary, that the magistrate made the certificate required by the statute. State v. Yturaspe, 22 Idaho 360, 125 Pac. 802.

33. State v. Yturaspe, 22 Idaho 360, 125 Pac. 802.

[a] **Requirement jurisdictional**, (1) failure to do so annulling subsequent proceedings. People v. Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857. See also People v. Brock,

64 Mich. 691, 31 N. W. 585. (2) Compare Cunningham v. State, 79 Miss. 284, 30 So. 658, holding that unsigned writing not certified to by the justice, though purporting to be testimony of witnesses upon the preliminary examination, is a nullity, and cannot be used to contradict the witness at the trial; also United States v. McGovern, 6 Phil. Isl. 621, holding omission of signatures of witnesses mere formal defect not affecting validity of proceedings.

34. See the statutes, and State v. Wise, 83 Iowa 596, 50 N. W. 59; State v. Wiggins, 50 La. Ann. 330, 23 So. 334; State v. Allen, 37 La. Ann. 685. See also Rex v. McKinley, 28 Can. Crim. Cas. 294.

35. See *supra*, V, D, 4, a.

36. See the statutes, and State v. Wise, 83 Iowa 596, 50 N. W. 59; State v. Wiggins, 50 La. Ann. 330, 23 So. 334.

37. State v. Carlisle, 57 Mo. 102. "A manual signing by the witness himself is not an absolute requisite, when it is shown to be a physical impossibility. In case the witness does not know how to write, or his arm is disabled, or from any cause he does not possess the ability to perform the act, he may request another to do it for him, and that will be sufficient."

38. People v. Chapman, 62 Mich. 280, 289, 28 N. W. 896, 4 Am. St. Rep. 857.

39. People v. Chapman, 62 Mich. 280, 289, 28 N. W. 896, 4 Am. St. Rep. 857.

[a] **Reason.**—"If the language of the witness, as taken by the magistrate, is not read to the witness, or by him, before signing, for the purpose of correction, there can be no certainty that the deposition of the witness so written and signed is as it

express provision of statute in some jurisdictions.⁴⁰

E. EXAMINATION OF ACCUSED. — 1. **Generally.** — In the absence of statute, the practice of examining the accused at the preliminary examination is unauthorized.⁴¹ But under statutes in some jurisdictions, the accused may voluntarily become a witness at the preliminary examination.⁴²

2. **Statement of Accused.**⁴³ — a. *In General.* — Statutes sometimes provide that the accused may make an unsworn statement in relation to the charge upon which the preliminary examination is being conducted.⁴⁴ But the statutes require that before he is called upon to determine whether to exercise that right he must be given certain information.⁴⁵

b. *Manner of Taking and Preserving for Use at Trial.* — The statutes usually prescribe the manner in which the statement of the accused is to be taken by the magistrate.⁴⁶ It is sometimes required

was actually stated under oath." *People v. Chapman*, 62 Mich. 280, 289, 28 N. W. 896, 4 Am. St. Rep. 857, holding further that "without it there could scarcely be a conviction for perjury if the witness, upon the trial, should see fit to materially change his testimony."

[b] **Failure to have the testimony** of any or all of the witnesses read to or by them before signing cannot affect the status of the defendant in the trial court to which he is bound over at the examination, when the examination is in other respects legal, and in conformity to the express terms of the statute relating thereto. *People v. Gleason*, 63 Mich. 626, 30 N. W. 210, holding that if accused makes no objection at examination that he cannot be heard afterwards to complain. See to same effect, *People v. Dowdigan*, 67 Mich. 95, 38 N. W. 920.

40. See the statutes.

[a] **Reading May Be From Short-hand Notes.**—*McDonald v. The King*, 26 Can. Crim. Cas. 175.

[b] **Presumed that testimony read to witness.** *People v. Moore*, 15 Wend. (N. Y.) 419.

41. *Kelly v. State*, 72 Ala. 244 (practice unwarranted by the principles of the common law); *People v. Gibbons*, 43 Cal. 557, statute of 1866 authorizing accused persons to become witnesses in their own behalf had no application to mere preliminary examinations before committing magistrates.

[a] **Such an examination violates the constitutional provision prohibiting the compulsion of a party to give**

evidence against himself. *Kelly v. State*, 72 Ala. 244.

42. See the statutes, and Cal.—*People v. Kelley*, 47 Cal. 125, statute of 1866, under which *People v. Gibbons*, 43 Cal. 557, was decided, repealed and new provisions of penal code in force at time of preliminary examination in this case. N. Y.—*People ex rel. Beamish v. Reynolds*, 155 N. Y. Supp. 121, under Code Crim. Proc., §393. Wis. *State v. Glass*, 50 Wis. 218, 6 N. W. 500, 36 Am. Rep. 845.

See also *State v. Laffer*, 38 Iowa 422.

That magistrate should advise accused of right to decline to testify, see *supra*, V, B.

43. **Statement of accused upon the trial**, see the title "**Statement by Accused.**"

44. See the statutes, and *People v. Gibbons*, 43 Cal. 557 (under Act of 1851, since repealed); *People v. Ferola*, 215 N. Y. 285, 109 N. E. 500; *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469. See also *Farnham v. Colman*, 19 S. D. 342, 103 N. W. 161, 117 Am. St. Rep. 944, 1 L. R. A. (N. S.) 1135, 9 Ann. Cas. 314.

[a] **Fact that accused is sworn renders preliminary examination fatally irregular.** *People v. Hendrickson*, 8 How. Pr. (N. Y.) 404, 1 Park. Crim. 406.

45. See *supra*, V, B.

46. See the statutes, and *infra*, this section.

[a] **Presumption that statement regularly and properly taken.** *People v. Moore*, 15 Wend. (N. Y.) 419. To

that the statement be reduced to writing;⁴⁷ and if the defendant refuses to sign it, his reason therefor must be stated.⁴⁸ It must be signed and certified by the magistrate.⁴⁹

3. Admissibility of Statement or Confession of Accused As Evidence Against Him at Trial.—This subject is fully treated in another work.⁵⁰

VI. DETERMINATION AND COMMITMENT.—A. GENERALLY. At the conclusion of the preliminary examination, the examining magistrate must reach a conclusion as to whether a crime has been committed and as to whether there is or is not probable cause for charging the prisoner with the crime.⁵¹ If it appears from the examination that an offense has been committed, and that there is probable cause to believe the prisoner guilty thereof, the law requires that the magistrate shall bind the prisoner over to answer before the court having jurisdiction to try and determine the offense,⁵² and commit him pending the termination of the trial, if the bail set is not furnished or if the offense is not a bailable one.⁵³ But if the magistrate reaches the conclusion that no offense has been committed or that there is no prob-

same effect, see *Wright v. State*, 50 Miss. 332.

47. See the statutes, and *Cal.*—*People v. Gibbons*, 43 Cal. 557, under Act of 1851, since repealed. *Miss.*—*Wright v. State*, 50 Miss. 332. *N. Y.*—*People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469. *P. I.*—*United States v. Rafael*, 23 Phil. Isl. 184.

48. See the statutes, and *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469.

[a] But it is not necessary that accused sign statement. *People v. Johnson*, 1 Wheel. Crim. (N. Y.) 193.

49. See the statutes, and *Wright v. State*, 50 Miss. 332; *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469; *People v. Moore*, 15 Wend. (N. Y.) 419.

50. See 5 ENCY. OF EV. 327, et seq.

51. See the following: *U. S.*—*United States v. Lumsden*, 1 Bond 5, 26 Fed. Cas. No. 15,641. *Colo.*—*In re Dolph*, 17 Colo. 35, 28 Pac. 470. *Kan.*—*Redmond v. State*, 12 Kan. 172. *Mich.*—*People v. Evans*, 72 Mich. 367, 387, 40 N. W. 473; *Yanar v. People*, 34 Mich. 286. *Neb.*—*Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154. *N. Y.* *In re Gessner*, 53 How. Pr. 515; *People ex rel. Bungart v. Wells*, 57 App. Div. 140, 68 N. Y. Supp. 59. *N. D.*—*State v. Beaverstad*, 12 N. D. 527, 97 N. W. 548.

Time within which examination must be completed, see *supra*, III.

52. See the following: *U. S.*—*In re*

Van Campen, 2 Ben. 419, 28 Fed. Cas. No. 16,835. *Colo.*—*In re Dolph*, 17 Colo. 35, 28 Pac. 470. *Idaho.*—*In re Squires*, 13 Idaho 624, 92 Pac. 754. *Kan.*—*Redmond v. State*, 12 Kan. 172. *Me.*—*State v. Hartwell*, 35 Me. 129. *Mass.*—*Com. v. Ward*, 4 Mass. 497. *Mich.* *People v. Evans*, 72 Mich. 367, 387, 40 N. W. 473. *N. Y.*—*In re Gessner*, 53 How. Pr. 515; *Cohen v. Bruere*, 96 Misc. 609, 162 N. Y. Supp. 75; *People v. Shenk*, 142 N. Y. Supp. 1081. *N. D.* *State v. Beaverstad*, 12 N. D. 527, 97 N. W. 548. *Wis.*—*State v. McGinley*, 153 Wis. 5, 140 N. W. 332; *Martin v. State*, 79 Wis. 165, 48 N. W. 119.

[a] Such a finding is a judicial determination, and the basis of the right to proceed by information. *People v. Evans*, 72 Mich. 367, 387, 40 N. W. 473.

[b] A broad latitude is given to the examining magistrate and if the evidence in any reasonable view of it satisfies him that a crime within the charge presented has been committed and that there is reasonable cause to believe that the accused is the guilty party he is warranted in holding the accused to bail. *State v. McGinley*, 153 Wis. 5, 140 N. W. 332.

As to jurisdiction in criminal cases, see generally 17 STANDARD PROC. 752, et seq.

53. See the following: *U. S.*—*In re Van Campen*, 2 Ben. 419, 28 Fed. Cas. No. 16,835. *Kan.*—*Redmond v. State*, 12 Kan. 172. *Me.*—*State v. Hartwell*,

able cause for charging the prisoner with the crime, if one is found to have been committed, he must discharge the prisoner.⁵⁴

Effect of Determination, etc.—If the magistrate determines to hold the accused to answer,⁵⁵ the accused may thereafter be proceeded against for such offense by information in the same manner as if he were indicted by a grand jury.⁵⁶ A discharge by the magistrate upon the preliminary examination is not an adjudication barring a subsequent prosecution for the offense or a second preliminary examination therefor.⁵⁷

When the accused is bound over for trial, the trial court acquires jurisdiction.⁵⁸ If bail is given by the accused, the functions of the magistrate terminate thereon,⁵⁹ except for the certifying of his record to the trial court, where such is required.⁶⁰ The committing magistrate has no power to grant a rehearing thereafter.⁶¹

B. FORM AND SUFFICIENCY OF COMMITMENT.—1. In General.

35 Me. 129; *Osborn v. Sargent*, 23 Me. 527. **N. Y.**—*Cohen v. Bruere*, 96 Misc. 609, 162 N. Y. Supp. 75. **Wis.**—*Martin v. State*, 79 Wis. 165, 48 N. W. 119.

54. U. S.—*United States v. Lumsden*, 1 Bond 5, 26 Fed. Cas. No. 15,641. See *In re Van Campen*, 2 Ben. 419, 28 Fed. Cas. No. 16,835. **Ala.**—See *Ex parte Simpson*, 3 Ala. App. 222, 57 So. 518. **Cal.**—*People v. Swain*, 5 Cal. App. 421, 90 Pac. 720. **Kan.**—*State v. Tenneson*, 39 Kan. 726, 18 Pac. 948. **Me.**—*State v. Hartwell*, 35 Me. 129. **Mich.**—*People v. Evans*, 72 Mich. 367, 387, 40 N. W. 473. **Neb.**—*Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154. **N. Y.**—*In re Gessner*, 53 How. Pr. 515; *People ex rel. Bungart v. Wells*, 57 App. Div. 140, 68 N. Y. Supp. 59. **N. D.**—*State v. Beaverstad*, 12 N. D. 527, 97 N. W. 548.

55. See *supra*, this section.

56. *In re Dolph*, 17 Colo. 35, 28 Pac. 470; *People v. Evans*, 72 Mich. 367, 387, 40 N. W. 473.

[a] **Entry of an order of commitment upon the docket** of the magistrate (1) authorizes the filing of an information. *People v. Wallace*, 94 Cal. 497, 29 Pac. 950; *People v. Sacramento B. P. Assn.*, 12 Cal. App. 471, 107 Pac. 712; *State v. Clark*, 4 Idaho 7, 35 Pac. 710. (2) Prosecuting attorney is not obliged to wait until the testimony taken in shorthand is transcribed. *People v. Riley*, 65 Cal. 107, 3 Pac. 413.

[b] **Fact that defendant committed for trial in wrong county** does not invalidate the preliminary examination, nor prevent the filing of an informa-

tion in the proper county. *In re Schurman*, 40 Kan. 533, 20 Pac. 277.

Preliminary examination as prerequisite to filing of information, see 12 STANDARD PROC. 113, et seq.

Generally as to informations, see the title "Indictment and Information."

57. See the following: **Ala.**—*Ex parte Robinson*, 108 Ala. 161, 18 So. 729. **Cal.**—*Ex parte Fenton*, 77 Cal. 183, 19 Pac. 267. **Ill.**—*In re McIntyre*, 10 Ill. 422. **Ind.**—*State v. Hattabough*, 66 Ind. 223. **Mass.**—*Com. v. Sullivan*, 156 Mass. 487, 31 N. E. 647. **Mich.**—*Gaffney v. Missaukee Cir. Judge*, 85 Mich. 138, 48 N. W. 478. **Nev.**—*In re Oxley*, 38 Nev. 379, 149 Pac. 992. **N. Y.**—*People v. Dillon*, 197 N. Y. 254, 90 N. E. 820, 18 Ann. Cas. 552; *People v. Shenk*, 142 N. Y. Supp. 1081. **R. I.**—*State v. Munroe*, 26 R. I. 38, 57 Atl. 1057. **Tex.**—*Ex parte Porter*, 16 Tex. App. 321, by statute.

See also 14 STANDARD PROC. 576, et seq.

Compare Morrissey v. People, 11 Mich. 327; *McCann v. Com.*, 14 Gratt. (55 Va.) 570.

[a] **Discharge without examination** does not bar subsequent arrest for same offense. *Jambor v. State*, 75 Wis. 664, 44 N. W. 963.

58. *Nelson v. People*, 38 Mich. 618.

59. *Sandrock v. Knop*, 34 How. Pr. (N. Y.) 191. See also *Com. v. Harbeson*, 25 Pa. Dist. 109; *State v. Russell*, 24 Tex. 505.

60. See *infra*, VII.

61. *Steel v. Williams*, 13 Ind. 73; *Butler v. State*, 36 Tex. Crim. 483, 38 S. W. 46.

The order of commitment must be in writing,⁶² an oral order being insufficient to justify the detention of the accused.⁶³ It must be under seal, according to some,⁶⁴ but not all,⁶⁵ authorities; and it must be signed by the magistrate.⁶⁶

Indorsement Upon Complaint or Depositions. — Statutes sometimes provide for the indorsement of the order of commitment upon the complaint.⁶⁷ Others provide for the indorsement upon the depositions taken on the preliminary examination;⁶⁸ but the failure to do so does not deprive the order of commitment of its validity,⁶⁹ nor affect any substantial right of the defendant.⁷⁰ An order reduced to writing and entered in the official docket of the magistrate has been held sufficient notwithstanding such statutes.⁷¹

A statutory form of commitment is sometimes provided;⁷² but unless the statute so provides, such form need not be strictly followed.⁷³

[a] "If injustice has been done, complete relief can be obtained by a writ of habeas corpus from the proper court." Butler v. State, 36 Tex. Crim. 483, 38 S. W. 46. See also *infra*, VIII, B, 2, and the title "**Habeas Corpus**."

62. People v. Wilson, 93 Cal. 377, 28 Pac. 1061.

63. People v. Wilson, 93 Cal. 377, 28 Pac. 1061; State v. James, 78 N. C. 455.

64. See the following: **U. S.**—Erwin v. United States, 37 Fed. 470, 2 L. R. A. 229; Goodrich v. United States, 35 Fed. 193. **Kan.**—Jennings v. State, 13 Kan. 80. **Md.**—Somervell v. Hunt, 3 Har. & M. 113. **R. I.**—Lough v. Millard, 2 R. I. 436.

65. Gano v. Hall, 42 N. Y. 67; State v. Vaughn, Harp. (S. C.) 313.

66. People v. Wilson, 93 Cal. 377, 28 Pac. 1061.

[a] **Insufficient Order.**—An oral announcement by the justice, reduced to writing by the reporter and certified to as a part of the proceedings by the reporter, is in no sense an order signed by the magistrate within the meaning of the statute. People v. Wilson, 93 Cal. 377, 28 Pac. 1061.

67. See generally the statutes, and Cal. Penal Code, §872, as amended by St. 1905, p. 763; State v. Rozum, 8 N. D. 548, 80 N. W. 477.

68. See the statutes, and State v. Clark, 4 Idaho 7, 35 Pac. 710; State v. Crook, 16 Utah 212, 51 Pac. 1091.

[a] **Such was rule in California** previous to 1905. See People v. Price, 143 Cal. 351, 77 Pac. 73; People v. Sehorn, 116 Cal. 503, 48 Pac. 495; People v. Dolan, 96 Cal. 315, 31 Pac. 107; People v. Wilson, 93 Cal. 377, 28

Pac. 1061; People v. McCurdy, 68 Cal. 576, 10 Pac. 207; People v. Hardisson, 61 Cal. 378.

[b] **Such statutes have been regarded as directory** merely. People v. Wilson, 93 Cal. 377, 28 Pac. 1061.

69. State v. Clark, 4 Idaho 7, 35 Pac. 710; State v. Crook, 16 Utah 212, 51 Pac. 1091, statute directory.

[a] **Indorsement upon the complaint** (1) sufficient under such statutes (People v. Price, 143 Cal. 351, 77 Pac. 73; People v. Sehorn, 116 Cal. 503, 48 Pac. 495; People v. Young, 64 Cal. 212, 30 Pac. 628; People v. Bianchino, 5 Cal. App. 633, 91 Pac. 112) complaint becoming (2) part of order of commitment in such event. People v. Lapique, 10 Cal. App. 669, 103 Pac. 164.

[b] **Order Filed.**—Where an order of commitment in due form and referring to the complaint as "the within deposition" was filed with the other papers in the case, it was held sufficient to meet the requirements of the statute. People v. Dolan, 96 Cal. 315, 31 Pac. 107.

70. State v. Clark, 4 Idaho 7, 35 Pac. 710.

71. See the following: **Cal.**—People v. Wallace, 94 Cal. 497, 29 Pac. 950; People v. Sacramento Butchers' P. Assn., 12 Cal. App. 471, 107 Pac. 712. **Idaho.**—State v. Clark, 4 Idaho 7, 35 Pac. 710. **N. D.**—State v. Rozum, 8 N. D. 548, 80 N. W. 477. **Utah.**—State v. Crook, 16 Utah 212, 51 Pac. 1091.

72. See the statutes, and *Ex parte* Walpole, 85 Cal. 362, 24 Pac. 657; State v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

73. State v. Huegin, 110 Wis. 189, 233, 85 N. W. 1046, 62 L. R. A. 700.

Where the commitment is defective in form or substance, a second commitment should also show that, upon examination before the magistrate at the conclusion of the examination.⁷⁴

2. Essential Recitals, Etc.—The jurisdiction of the magistrate must affirmatively appear from the order of commitment.⁷⁵ The commitment should also show that, upon examination before the magistrate, it appeared that an offense had been committed,⁷⁶ and that there was probable cause to believe the accused guilty thereof.⁷⁷ The amount of the bail should be fixed in or indorsed upon the order of commitment, where the offense is a bailable one.⁷⁸ If the offense is not a bailable one, the order of commitment should contain an additional recital that the accused is thereby committed to the custody of the proper officer.⁷⁹ The commitment need not state that the accused is to be held "for trial," however.⁸⁰

It is not usual or necessary to insert a copy of the complaint in the commitment,⁸¹ or to state the mode of proving the fact before the magistrate.⁸²

Description of Offense.—The order of commitment must not only state the offense charged with convenient certainty,⁸³ but also such

[a] **Such a form is satisfied** by the use of language including all the material elements, though such language departs from the particular wording of the form. *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

74. *Ex parte Branigan*, 19 Cal. 133, but he cannot resort merely to his recollection of the facts of the case.

75. *Matter of Travis*, 55 How. Pr. (N. Y.) 347. But see *Boynton v. State*, 77 Ala. 29.

76. See *People v. Sutherland*, 104 Mich. 468, 62 N. W. 566; *State ex rel. Bray v. Hoolihan*, 104 Minn. 63, 115 N. W. 1037; *Collins v. Brackett*, 34 Minn. 339, 25 N. W. 708.

Description of offense, see *infra*, this section.

77. See the following: **U. S.**—*Erwin v. United States*, 37 Fed. 470, 2 L. R. A. 229. **Kan.**—*State v. Tension*, 39 Kan. 726, 18 Pac. 948. **Mich.**—*Brownell v. People*, 38 Mich. 732. See *People v. Sutherland*, 104 Mich. 468, 62 N. W. 566, using phrase "just cause to suspect" sufficient. **Minn.**—*State ex rel. Bray v. Hoolihan*, 104 Minn. 63, 115 N. W. 1037; *Collins v. Brackett*, 34 Minn. 339, 25 N. W. 708. **Neb.**—*Carson v. State*, 80 Neb. 619, 114 N. W. 938; *King v. State*, 18 Neb. 375, 25 N. W. 519. **N. Y.**—*People v. Rhoner*, 4 Park. Cr. 166.

That accused held only in such case, see *supra*, VI, A.

[a] **Where one accused of crime is ordered to recognize** for his appearance at the trial, and he neglects to do so, the commitment is sufficient if it states that he was "convicted" and ordered to recognize, instead of stating that it appeared that an offense had been committed, and that there was probable cause, etc. *Nason v. Staples*, 48 Me. 123.

78. See the following: *Bulson v. People*, 31 Ill. 409; *Solomon v. People*, 15 Ill. 291; *Yaner v. People*, 34 Mich. 286; *Turner v. People*, 33 Mich. 363; *In re Leddy*, 11 Mich. 197.

[a] **Omission to state amount of bail** does not afford a ground for defeating the jurisdiction of the trial court. *People v. Thompson*, 84 Cal. 598, 24 Pac. 384.

79. Cal. Pen. Code, §873. And see generally the statutes; also the cases cited in the preceding notes.

80. *Brownell v. People*, 38 Mich. 732, "it seems to have been quite generally taken for granted that a justice's commitment was by inference to be so understood."

81. *In re Ricker*, 32 Me. 37. But see *Com. v. Ward*, 4 Mass. 497.

82. *In re Ricker*, 32 Me. 37.

83. See the following: **Cal.**—*Ex parte Branigan*, 19 Cal. 133. **Ga.**—*Brady v. Davis*, 9 Ga. 73. **Kan.**—*State v. Bailey*, 32 Kan. 83, 3 Pac. 769. **Me.**—*In re Ricker*, 32 Me. 37. **Mich.**—*In re Leddy*, 11 Mich. 197. **Minn.**—*State ex*

facts as are essential to constitute the offense against the prisoner;⁸⁴ but it is not necessary that all the averments required in an indictment or information should be contained in the order of commitment.⁸⁵ The magistrate need not find or state in his certificate the degree of the offense of which his record shows that there is probable cause to believe the defendant guilty.⁸⁶ An incorrect description of the offense does not entitle the accused to his discharge.⁸⁷

VII. RECORD OF PROCEEDINGS AND RETURN THEREOF.

A. IN GENERAL.—Statutes sometimes require that all preliminary examinations be certified to and filed in the court having jurisdiction to try the offense.⁸⁸

rel. Bray v. Hoolihan, 104 Minn. 63, 115 N. W. 1037; *Collins v. Brackett*, 34 Minn. 339, 25 N. W. 708. **N. Y.** *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684. **S. C.**—*State v. Killet*, 2 Bailey 289. **Wis.**—*State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700; *In re Booth*, 3 Wis. 1.

[a] "The crime to answer which the accused is held must be determinable from the order committing the accused to answer." *Quayle v. State* (Ariz.), 165 Pac. 331. Where the commitment recited that from the evidence the magistrate became satisfied that the defendant was guilty "as charged," and ordered that the accused be held to answer "the same," it was held sufficient to support information for offense charged in preliminary complaint and for which preliminary examination was had.

[b] Description of offense by its generic name sufficient. *Fertig v. State*, 14 Ariz. 540, 133 Pac. 99; *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700. See also *United States v. Martin*, 17 Fed. 150, 9 Sawy. 90.

[c] Description of the crime merely as a felony is not sufficient. *Fertig v. State*, 14 Ariz. 540, 133 Pac. 99.

84. See the following: **Cal.**—*Ex parte Branigan*, 19 Cal. 133. **Ga.** *Brady v. Davis*, 9 Ga. 73. **Me.**—*In re Ricker*, 32 Me. 37. **Minn.**—*Collins v. Brackett*, 34 Minn. 339, 25 N. W. 708. **N. Y.**—*People v. Johnson*, 110 N. Y. 134, 17 N. E. 684. **Wis.**—*In re Booth*, 3 Wis. 1.

[a] Time and place of commission of offense should be stated. *Ex parte Branigan*, 19 Cal. 133.

[b] Name of person against whom offense is committed should appear in description of offense. *Ex parte Keil*, 85 Cal. 309, 24 Pac. 742.

[c] But its omission does not en-

title the accused to his discharge. *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 637; *Ex parte Keil*, 85 Cal. 309, 24 Pac. 742.

85. See the following: **U. S.**—*In re Kelly*, 46 Fed. 653; *United States v. Martin*, 17 Fed. 150, 9 Sawy. 90. **Ariz.** *Quayle v. State*, 165 Pac. 331. **Cal.** *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 637. **Ind.**—*Davis v. Bible*, 134 Ind. 108, 33 N. E. 910. **Kan.**—*State v. Bailey*, 32 Kan. 83, 3 Pac. 769. **Minn.** *Collins v. Brackett*, 34 Minn. 339, 25 N. W. 708. **Mo.**—*Lilly v. State*, 3 Mo. 10. **N. Y.**—*People v. Johnson*, 110 N. Y. 134, 17 N. E. 684. **S. C.**—*State v. Killet*, 2 Bailey 289. **Va.**—*Clore's Case*, 8 Gratt. (49 Va.) 606. **Wis.** *State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

As to charging offense in information, see the title "Indictment and Information."

86. *Cargen v. People*, 39 Mich. 549.

87. *Davis v. Bible*, 134 Ind. 108, 33 N. E. 910.

[a] Such a defect is immaterial if the offense is sufficiently described in the order indorsed on the depositions. *Ex parte Estrado*, 88 Cal. 316, 26 Pac. 209.

88. See the statutes, and **Mich.** *People v. Schick*, 75 Mich. 592, 42 N. W. 1008. **Minn.**—*State v. Dlugi*, 123 Minn. 392, 143 N. W. 971. **N. Y.** *People v. Johnson*, 46 Hun 667, 7 N. Y. Crim. 398, 13 N. Y. St. 48, holding that although the magistrate was required by statute to certify the testimony and return it and the depositions taken upon the information to the court, there was no necessity of producing them upon the trial in support of the warrant or commitment. **Pa.**—*Com. v. Sweetlick*, 19 Pa. Dist. 397. **S. D.**—*State v. Johnson*, 34 S. D. 601, 149 N. W. 730.

Time for Making.—The statutes sometimes set a time within which the return of the examining magistrate must be made.⁸⁹ Such statutes are directory merely,⁹⁰ and if the filing be within a reasonable time, it is sufficient.⁹¹ Good practice requires that the return of the examining magistrate should be made and filed before the information is filed.⁹²

Where Lost or Mislaid.—Where the transcript of the proceedings at the preliminary examination is lost or mislaid, the trial court may make an order for the substitution of another transcript.⁹³

B. FORM AND SUFFICIENCY.—Since in order to bind over the accused, it must appear to the magistrate that an offense has been committed, and that there is probable cause to believe the prisoner guilty thereof,⁹⁴ the record made by the justice should show the existence of these conditions.⁹⁵ It is the transcript or record of the examining magistrate that sets forth the facts upon which the indictment or information is drawn;⁹⁶ but it is not necessary that it should set forth the offense with the same clearness and correctness as an indictment

As to reduction of testimony to writing, etc., see *supra*, V, D, 4; V, E, 2, b.

[a] But such duty is one to be performed after such examination is completed, and failure to do so is not ground for quashing the information. *State v. Johnson*, 34 S. D. 601, 149 N. W. 730.

[b] **Successor in office** to magistrate hearing preliminary examination may certify proceedings up where examining magistrate fully completed proper entries on docket. *People v. Schick*, 75 Mich. 592, 42 N. W. 1008.

89. See the statutes, and *People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88; *Com. v. Sweetlick*, 19 Pa. Dist. 397 (under statute requiring transcript of all proceedings to be returned within five days after the conclusion of the preliminary examination); *Com. v. Sweetlick*, 36 Pa. Co. Ct. 305; *In re Returns by Magistrates*, 26 Pa. Co. Ct. 545.

[a] **Presumption** that original transcript filed within statutory time. *People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88.

90. *People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88.

91. *People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88.

92. *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896.

[a] **But failure to do so** is no more than an irregularity, not affecting any substantial right of accused. *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896.

[b] **Pennsylvania.**—“Committing magistrates should send in all transcripts and recognizances in time for action by the next grand jury. If the grand jury is in session at the time the recognizance is entered into the proceedings should be sent up at once. If there is no time to do this because the grand jury is about to adjourn, the recognizance of the defendant should be taken for his appearance at the next subsequent term of court and not at the next term of court.” *Com. v. Rice*, 6 Lack. Jurist 286, *quoted in Com. v. Judge*, 42 Pa. Co. Ct. 197. To same effect, see *Com. v. Sweetlick*, 19 Pa. Dist. 397.

93. *Korth v. State*, 46 Neb. 631, 65 N. W. 792.

94. See *supra*, VI, A.

95. *State v. Tennison*, 39 Kan. 726, 18 Pac. 948, but it is not required that the exact language of the statute should be employed in making the entry.

[a] **Record is not insufficient** which shows merely a finding that a crime has been committed (its character not being stated) of which there is probable cause to believe the defendant guilty, and an order that he be held to answer the charge as filed against him in the trial court, where the information charges the same offense as that described in the warrant. *State v. Demming*, 79 Kan. 526, 100 Pac. 285.

96. *Com. v. Kauffman*, 23 Pa. Dist. 434.

or information.⁹⁷

The record need not be certified under the magistrate's seal.⁹⁸

Correction and Amendment. — It is within the power of a magistrate after the case has been certified by him to the trial court to complete the transcript and otherwise to perform the clerical duties which he should have performed upon the preliminary hearing.⁹⁹

VIII. OBJECTIONS AND EXCEPTIONS. — A. IN GENERAL.

An objection that the accused has had no preliminary examination, he not having waived the same,¹ or an objection on account of irregularities in the proceedings before the committing magistrate,² must be made prior to the entry of a plea to the merits. An objection upon those grounds cannot be raised for the first time on appeal.³ The entry of a plea without objection is a waiver of all objections to the proceedings prior to the filing of the indictment or information.⁴

B. HOW OBJECTIONS RAISED. — 1. In General. — A defendant

97. *Com. v. Kauffman*, 23 Pa. Dist. 434.

[a] **It is sufficient** (1) if it gives the defendant fair notice of its nature and the time and place where the alleged offense was committed. *Com. v. Kauffman*, 23 Pa. Dist. 434. (2) Such record is complete if it sets out the regular and successive steps from the making of the affidavit upon which the warrant was founded to the binding over for trial. *March v. Com.*, 10 Sad. (Pa.) 479, 14 Atl. 375; *Com. v. Pole*, 11 Pa. Co. Ct. 226. (3) Transcript should show name, residence and occupation of all defendants, bail and witnesses. *Com. v. Durham*, 11 Pa. Dist. 663.

98. *State v. Pressley*, 90 N. C. 730.

99. See the following: **Cal.**—*People v. Thompson*, 84 Cal. 598, 24 Pac. 384. **Idaho.**—*State v. McGann*, 8 Idaho 40, 66 Pac. 823. **Kan.**—*State v. Geary*, 58 Kan. 502, 49 Pac. 596. **Mich.**—*People v. Wright*, 89 Mich. 70, 50 N. W. 792. **Vt.**—*State v. Grace*, 86 Vt. 470, 86 Atl. 162.

[a] **Competent for justice to amend** return or to make a new return. *Oblaser v. Wayne* Circ. Judge, 159 Mich. 665, 124 N. W. 590.

[b] **An amendment showing the waiver of preliminary examination** may properly be ordered by the trial court. *People v. Wright*, 89 Mich. 70, 50 N. W. 792.

1. **Cal.**—*Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119; *People v. Ronsse*, 26 Cal. App. 100, 146 Pac. 65. **Colo.** *Laffey v. People*, 55 Colo. 575, 136 Pac. 1031. **La.**—*State v. Caulfield*, 23 La. Ann. 148. **Mich.**—*People v. Harris*, 144

Mich. 12, 107 N. W. 715; *People v. Jones*, 24 Mich. 215. **Neb.**—*Dinsmore v. State*, 61 Neb. 418, 85 N. W. 445. **N. Y.**—*Devine v. People*, 20 Hun 98. **N. D.**—*State v. Hart*, 30 N. D. 368, 152 N. W. 672. **Utah.**—*State v. Norman*, 16 Utah 457, 52 Pac. 986; *State v. Spencer*, 15 Utah 149, 156, 49 Pac. 302. **Wis.**—*In re Weaver*, 162 Wis. 499, 156 N. W. 459. **Wyo.**—*Hollibaugh v. Hehn*, 13 Wyo. 269, 79 Pac. 1044.

[a] **Where the record of the magistrate shows that a preliminary examination was waived**, by the defendant a plea of want of such examination is unavailing. *Sayers v. State*, 10 Okla. Crim. 195, 135 Pac. 944. See also *supra*, II, B, 3, note 34.

As to waiver of preliminary examination, see *supra*, II, B.

2. **N. D.**—*State v. Hart*, 30 N. D. 368, 152 N. W. 672. **Pa.**—*March v. Com.*, 10 Sad. 479, 14 Atl. 375. **Utah.** *State v. Gustaldi*, 41 Utah 63, 123 Pac. 897.

3. **Kan.**—*State v. Woods*, 49 Kan. 237, 30 Pac. 520. **La.**—*State v. Le Blanc*, 116 La. 822, 41 So. 105. **P. I.** *United States v. Lete*, 17 Phil. Isl. 79.

4. **Cal.**—*People v. McIntyre*, 127 Cal. 423, 59 Pac. 779. **Colo.**—*Laffey v. People*, 55 Colo. 575, 136 Pac. 1031. **Kan.**—*State v. Allison*, 44 Kan. 423, 24 Pac. 964. **Mass.**—*Com. v. Lynn*, 154 Mass. 405, 28 N. E. 289. **Mich.**—*People v. Whipple*, 108 Mich. 587, 66 N. W. 490. **Nev.**—*State v. Davis*, 14 Nev. 407. **N. Y.**—*Devine v. People*, 20 Hun 98. **Utah.**—*State v. Norman*, 16 Utah 457, 52 Pac. 986. **Wis.**—*In re Weaver*, 162 Wis. 499, 156 N. W. 459.

relying upon the want of a preliminary examination may make such objection either by a motion to quash the indictment or information,⁵ or by other appropriate motion,⁶ or demurrer,⁷ or by a plea in abatement before pleading to the merits.⁸ The question may also be raised by action for false imprisonment, where defendant has been imprisoned;⁹ and it may be raised as a defense to an action on the bond given by accused.¹⁰

Irregularities in Proceedings.—A motion to quash an indictment or information is not in the nature of an appeal from the order of commitment, and mere errors alleged to have occurred at the preliminary hearing cannot be reviewed on such motion.¹¹

2. Habeas Corpus.¹²—The finding and determination made by the magistrate, if the statutory bounds and requirements have been observed and followed, is entitled to the same binding force as against collateral attack by habeas corpus as is the judgment of a court of general jurisdiction.¹³ In such a proceeding the investigation must usually be confined to jurisdictional matters.¹⁴ The jurisdictional inquiry will extend, however, to the power of the court or magistrate to make the commitment;¹⁵ and whether or not a preliminary examina-

5. Cal.—*People v. Van Horn*, 119 Cal. 323, 51 Pac. 538. **Okla.**—*Robbins v. State*, 12 Okla. Crim. 294, 155 Pac. 491. **Utah.**—*State v. Gustaldi*, 41 Utah 63, 123 Pac. 897; *State v. Spencer*, 15 Utah 149, 156, 49 Pac. 302, motion to quash most appropriate remedy.

See generally 12 STANDARD PROC. 612, et seq.

6. State v. Spencer, 15 Utah 149, 156, 49 Pac. 302.

[a] **By objection to taxation of costs** against accused for supposed preliminary examination. *State v. Bailey*, 32 Kan. 83, 3 Pac. 769.

7. State v. Spencer, 15 Utah 149, 156, 49 Pac. 302.

8. Kan.—*State v. Bailey*, 32 Kan. 83, 3 Pac. 769. **Neb.**—*Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; *Coffield v. State*, 44 Neb. 417, 62 N. W. 875. **Pa.**—*March v. Com.*, 10 Sad. 479, 14 Atl. 375. **Okla.**—*Robbins v. State*, 12 Okla. Crim. 294, 155 Pac. 491.

[a] Where accused enters such a plea, he cannot be put upon trial before the determination of the question whether or not a preliminary hearing has in fact been had. *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154.

[b] The only questions presented for consideration are, whether an attempt has been made to give the defendant a preliminary examination, and whether by such attempt reason-

able notice has been given to him with regard to the nature and character of the offense charged against him. *State v. Bailey*, 32 Kan. 83, 89, 3 Pac. 769.

Necessity for objection before pleading to merits, see *supra*, VIII, B, 1.

9. State v. Bailey, 32 Kan. 83, 3 Pac. 769.

10. State v. Bailey, 32 Kan. 83, 3 Pac. 769.

11. People v. Van Horn, 119 Cal. 323, 51 Pac. 538.

[a] **When the magistrate finds that the evidence taken before him is sufficient to bind the accused over for trial**, the superior court cannot review and overrule such finding on a motion to set aside the information. *People v. Beach*, 122 Cal. 37, 54 Pac. 369; *People v. More*, 68 Cal. 500, 6 Pac. 461; *People v. Sacramento Butchers' P. Assn.*, 12 Cal. App. 471, 107 Pac. 712.

12. See generally the title "Habeas Corpus."

13. State v. Beaverstad, 12 N. D. 527, 97 N. W. 548, holding function exercised by magistrate in such examination is a judicial one.

Collateral attack on judgments generally, see the title "Judgments."

14. State v. Beaverstad, 12 N. D. 527, 97 N. W. 548.

15. State v. Beaverstad, 12 N. D. 527, 97 N. W. 548.

[a] **Legality of commitment** will be inquired into on habeas corpus. *Ex parte Simpson*, 3 Ala. App. 222, 57 So.

tion has ever been had will be inquired into.¹⁶

C. BILL OF EXCEPTIONS. — A magistrate is not authorized to sign a bill of exceptions.¹⁷

IX. ARREST AND REMOVAL OF OFFENDERS AGAINST UNITED STATES. — A. IN GENERAL. — Provision is made in the federal statutes for the arrest and commitment of one accused of an offense against the United States, and for his subsequent removal, if necessary, to the district where the trial is to be had.¹⁸ The proceedings, except as otherwise regulated by federal statute,¹⁹ are conducted in accordance with the laws of the state wherein they take place.²⁰

B. ARREST, EXAMINATION AND COMMITMENT. — 1. In General. The statute does not require that the accused be indicted prior to his arrest and commitment;²¹ nor that any proceedings be instituted against him in the district where the offense was committed.²² On the other hand, there can be no removal of the offender until he has been arrested and committed,²³ and a preliminary hearing had to establish his identity and probable guilt.²⁴

In bailable cases, the prisoner, where his identity is established

518; *Ex parte* Beville, 6 Okla. Crim. 145, 117 Pac. 725.

[b] Want of reasonable or probable cause may be inquired into. Cal.—*Ex parte* Vice, 5 Cal. App. 153, 89 Pac. 983. N. D.—*State v. Beaverstad*, 12 N. D. 527, 97 N. W. 548. Wis.—*State v. Huegin*, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700. Compare *State v. Banks*, 24 Neb. 322, 38 N. W. 830, also *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154.

[c] Objections to irregularities in the preliminary hearing before the committing magistrate may be raised by habeas corpus proceedings in some jurisdictions. See Ga.—*Boatright v. State*, 10 Ga. App. 29, 72 S. E. 599. Ia.—*Cowell v. Patterson*, 49 Iowa 514. Neb.—*State v. Banks*, 24 Neb. 322, 38 N. W. 830. N. Y.—*People ex rel. Farley v. Crane*, 94 App. Div. 397, 88 N. Y. Supp. 343. Wis.—*Lundstrum v. State*, 140 Wis. 141, 121 N. W. 883.

16. *State v. Bailey*, 32 Kan. 83, 3 Pac. 769.

17. *Souther v. Com.*, 7 Gratt. (48 Va.) 673, if signed, it would not be a proper part of record.

18. Rev. St., §1014 [U. S. Comp. St., 1916, §1674]; *Haas v. Henkel*, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. ed. 569.

[a] The District of Columbia is a district of the United States within the meaning of the statute. *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. ed. 90; *Beavers v. Haubert*, 198

U. S. 77, 25 Sup. Ct. 573, 49 L. ed. 950; *Benson v. Henkel*, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. ed. 919.

[b] For an offense against the territory of Alaska no removal can be had to the district of Alaska. *Ex parte* Krause, 228 Fed. 547.

19. *Turner v. United States*, 19 Ct. Cl. 629; *United States v. Sauer*, 73 Fed. 671.

20. *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. ed. 90; *United States v. Patterson*, 150 U. S. 65, 14 Sup. Ct. 20, 37 L. ed. 999, 29 Ct. Cl. 561; *United States v. Greene*, 100 Fed. 941; *United States v. Dana*, 68 Fed. 886.

21. *Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. ed. 177; *Price v. McCarty*, 89 Fed. 84, 32 C. C. A. 162; *Benson v. Palmer*, 31 App. Cas. (D. C.) 561.

22. *Burr's Case*, 25 Fed. Cas. No. 14,694.

23. *United States v. Yarborough*, 122 Fed. 293; *United States v. Lee*, 84 Fed. 626; *In re Price*, 83 Fed. 830; *In re Burkhardt*, 33 Fed. 25; *United States v. Jacobi*, 1 Flip. 108, 26 Fed. Cas. No. 15,460.

24. *Haas v. Henkel*, 166 Fed. 621; *United States v. Yarborough*, 122 Fed. 293; *In re Price*, 83 Fed. 830; *In re Burkhardt*, 33 Fed. 25; *In re Bailey*, 1 Woolw. 422, 2 Fed. Cas. No. 730.

As to preliminary hearing, see *infra*, IX, B, 2.

should be admitted to bail pending the hearing;²⁵ if he is charged with a nonbailable offense, or cannot give bail, or refuses to give it, he should be committed to await the removal on warrant.²⁶

2. Preliminary Hearing.²⁷ — a. *Jurisdiction and Venue.* — The preliminary examination should be had in the district where the prisoner is arrested,²⁸ and before one of the officers given authority by the act to hold it,²⁹ although it is preferable that, after arrest, the accused should be taken before the nearest United States commissioner.³⁰

b. *Purpose and Scope.* — The preliminary examination is limited to ascertaining whether there is probable cause to believe the accused guilty.³¹ To that end, resort may be had to any proper and relevant evidence³² on behalf of the prosecution,³³ or of the accused.³⁴

c. *Discharge or Commitment.*³⁵ — If no probable cause appears, the defendant is discharged;³⁶ but where probable cause is shown, the commissioner must issue a warrant committing the accused to the custody of the marshal until his removal is ordered by the district judge.³⁷

C. RETURN OF JUDGE OR COMMISSIONER.³⁸ — Upon committing the accused, the commissioner must transmit to the district judge a statement of the proceedings before him, including the evidence heard and

25. *United States v. Yarborough*, 122 Fed. 293; *United States v. Dunbar*, 83 Fed. 151, 27 C. C. A. 488; *United States v. Shepard*, 27 Fed. Cas. No. 16,273; *United States v. Jacobi*, 1 Flip. 108, 26 Fed. Cas. No. 15,460.

[a] The sufficiency of bail bond is to be determined by the law of the state. *United States v. Zarafonitis*, 150 Fed. 97, 80 C. C. A. 51.

[b] The district judge may reduce the bail fixed by the commissioner. *United States v. Brawner*, 7 Fed. 86.

26. *United States v. Yarborough*, 122 Fed. 293.

27. As to preliminary examination generally, see *supra*, this article.

28. *United States v. Greene*, 100 Fed. 941; *United States v. Karlin*, 85 Fed. 963; *United States v. Dana*, 68 Fed. 886; *United States v. Shepard*, 27 Fed. Cas. No. 16,273.

29. *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. ed. 905; *In re Acker*, 66 Fed. 290.

[a] The supreme court of the District of Columbia is a "court of the United States" within the statute. *Benson v. Henkel*, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. ed. 919.

[b] Territorial courts are courts of the United States within the act. *United States v. Haskins*, 3 Sawy. 262, 26 Fed. Cas. No. 15,322; *Douglass v. Stahl*, 71 Ark. 236, 72 S. W. 568.

30. *United States v. Yarborough*, 122 Fed. 293.

As to the powers of such commissioners generally, see 16 STANDARD PROC. 706.

31. Necessity for, see *supra*, IX, B, 1.

[a] Establishing beyond question, the guilt or innocence of prisoner is not its aim. *In re Burkhardt*, 33 Fed. 25; *United States v. Lantry*, 30 Fed. 232.

[b] Jurisdiction of the tribunal to which the removal of the accused is sought is not a matter for consideration. *United States v. Yarborough*, 122 Fed. 293.

32. Technical rules of evidence are not observed. *United States v. Greene*, 108 Fed. 816.

33. *In re Richter*, 100 Fed. 295.

34. *United States v. Greene*, 108 Fed. 816.

35. Discharge on bail, see *supra*, IX, B, 1.

As to discharge or commitment generally on preliminary examination, see *supra*, VI.

36. *In re Wood*, 95 Fed. 288; *United States v. Shepard*, 27 Fed. Cas. No. 16,273.

37. *Price v. McCarty*, 89 Fed. 84, 32 C. C. A. 162.

38. As to return of proceedings upon preliminary examination generally, see *supra*, VII.

the decision reached thereon.³⁹

D. REMOVAL PROCEEDINGS.⁴⁰ — **1. Application for Removal.** — The warrant for removal of accused to the district where the crime was committed issues upon proper application therefor,⁴¹ made to the judge of the district where the accused is held,⁴² upon reasonable notice to accused of the time and place when and where the application for removal will be made.⁴³

2. Hearing of Application. — It is the duty of the district judge to inquire into the existence of probable cause justifying a removal,⁴⁴ and upon this point there must be some competent evidence.⁴⁵ The order of commitment,⁴⁶ or a bench warrant,⁴⁷ or indictment,⁴⁸ or a

39. *United States v. Yarborough*, 122 Fed. 293.

[a] **If prisoner admits his identity**, that fact should be certified to. *United States v. Yarborough*, 122 Fed. 293.

[b] **Evidence Reduced to Narrative Form.**—*United States v. Yarborough*, 122 Fed. 293.

40. Act of congress respecting, see *supra*, IX, A.

Necessity for preliminary examination see *supra*, IX, B, 1.

41. *In re Beshears*, 79 Fed. 70.

42. *United States v. Jacobi*, 1 Flip. 108, 26 Fed. Cas. No. 15,460; *In re Bailey*, 1 Woolw. 422, 2 Fed. Cas. No. 730.

[a] **Commissioner** has no authority to issue warrant for removal. *Hastings v. Murchie*, 219 Fed. 83, 134 C. C. A. 1.

43. *United States v. Yarborough*, 122 Fed. 293; *In re Beshears*, 79 Fed. 70.

44. *In re Quinn*, 176 Fed. 1020; *United States v. Greene*, 108 Fed. 816; *In re Belknap*, 96 Fed. 614.

45. *Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. ed. 177.

[a] **The degree of proof required** is not that necessary upon the trial of the offense. *Beavers v. Haubert*, 198 U. S. 77, 25 Sup. Ct. 573, 49 L. ed. 950.

[b] **Upon a mere affidavit** charging him with the commission of a crime, the defendant cannot be removed. *United States v. Karlin*, 85 Fed. 963.

46. *In re Quinn*, 176 Fed. 1020; *Price v. McCarty*, 89 Fed. 84, 32 C. C. A. 162; *United States v. Brawner*, 7 Fed. 86.

47. *United States v. Yarborough*, 122 Fed. 293.

48. *Tinsley v. Treat*, 205 U. S. 20, 27

Sup. Ct. 430, 51 L. ed. 689; *Beavers v. Henkel*, 194 U. S. 73, 24 Sup. Ct. 605, 48 Fed. 882; *Hastings v. Murchie*, 219 Fed. 83, 134 C. C. A. 1; *United States v. Campbell*, 179 Fed. 762; *Ex parte Black*, 147 Fed. 832; *In re Benson*, 130 Fed. 486; *In re Runkle*, 125 Fed. 996; *United States v. Greene*, 100 Fed. 941; *In re Richter*, 100 Fed. 295; *In re Doig*, 4 Fed. 193; *United States v. Haskins*, 3 Sawy. 262, 26 Fed. Cas. No. 15,322.

[a] **A certified copy of an indictment is not conclusive evidence** of the existence of probable cause to warrant a removal. *In re Wood*, 95 Fed. 288.

[b] **Where no offense** (1) against the United States is charged in the indictment, no order of removal can be made (*Ex parte Krause*, 228 Fed. 547; *Ex parte Black*, 147 Fed. 832; *In re Corning*, 51 Fed. 205) even though (2) the accused consents to such removal. *United States v. Conners*, 111 Fed. 734.

[c] **Technical objections** to indictment will not be entertained. *Benson v. Henkel*, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. ed. 919; *Beavers v. Henkel*, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. ed. 882; *Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. ed. 177; *United States v. Reddin*, 193 Fed. 798; *United States v. Lyman*, 190 Fed. 414; *Ex parte Black*, 147 Fed. 832.

[d] **That an indictment may be defective** in designating the time or place of the commission of the offense does not prevent the removal, if the evidence given upon the hearing supplies such defects. *Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. ed. 177.

[e] **Collateral impeachment of the indictment** not allowed. *Beavers v. Henkel*, 194 U. S. 73, 24 Sup. Ct.

verified complaint⁴⁹ against the accused are receivable in evidence; but they are not conclusive and the district judge may pass fully upon the facts to ascertain for himself the probable guilt of accused.⁵⁰ The fact that an indictment for another offense is pending in the district of his residence is not a sufficient reason for refusing to issue an order for his removal,⁵¹ even though the trial of the cause on the indictment found in the place of residence of the accused will be thereby delayed.⁵²

3. Warrant for Removal. — If the identity of accused is shown and a case of probable guilt is made out, the judge should issue a warrant for the removal of the accused to the proper district for trial.⁵³

E. CONCLUSIVENESS OF PROCEEDINGS ON HABEAS CORPUS.⁵⁴ Neither the conclusions reached by the judge or officer upon preliminary examination nor those of the district judge upon application for removal will be reviewed on habeas corpus,⁵⁵ unless there is a lack of

605, 48 L. ed. 882; *United States v. Reddin*, 193 Fed. 798; *Ex parte Black*, 147 Fed. 832; *United States v. Yarborough*, 122 Fed. 293; *United States v. Powkes*, 49 Fed. 50.

[f] **If fatally defective on its face**, the indictment affords no ground to hold the prisoner for removal. *United States v. Pope*, 27 Fed. Cas. No. 16, 069.

[g] **A decision granting a removal** does not adjudicate the sufficiency of the indictment upon which it is based so as to conclude the court to which removal is had. *Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. ed. 177; *Benson v. Palmer*, 31 App. Cas. (D. C.) 561.

49. *United States v. Yarborough*, 122 Fed. 293.

50. *United States v. Reddin*, 193 Fed. 798; *In re Richter*, 100 Fed. 295; *In re Wood*, 95 Fed. 288; *Price v. McCarty*, 89 Fed. 84, 32 C. C. A. 162. See also *Haas v. Henkel*, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. ed. 569.

[a] **Accused may adduce evidence** or advance any legal reasons he may have to contest the removal. *Kessler v. Treat*, 205 U. S. 33, 27 Sup. Ct. 434, 51 L. ed. 695; *Tinsley v. Treat*, 205 U. S. 20, 27 Sup. Ct. 430, 51 L. ed. 689; *Hastings v. Murchie*, 219 Fed. 83, 134 C. C. A. 1.

51. *In re Tillinghast*, 233 Fed. 712.

[a] **Fact that accused is under bond on a prior indictment** does not prevent the issuance of an order for his removal. *Peckham v. Henkel*, 216

U. S. 483, 30 Sup. Ct. 255, 54 L. ed. 579.

[b] **Sureties on the bond of accused, upon his removal to another district**, may set up in defense to an action on such bond the removal as an act of the law for which no liability can be incurred by them. *In re James*, 18 Fed. 853.

52. *Price v. Henkel*, 216 U. S. 488, 30 Sup. Ct. 257, 54 L. ed. 581; *Haas v. Henkel*, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. ed. 569.

53. *Price v. Henkel*, 216 U. S. 488, 30 Sup. Ct. 257, 54 L. ed. 581; *Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. ed. 177; *Price v. McCarty*, 89 Fed. 84, 32 C. C. A. 162; *United States v. Price*, 84 Fed. 636; *In re Burkhardt*, 33 Fed. 25.

54. **Conclusiveness of preliminary examination proceedings generally on habeas corpus**, see *supra*, VIII, B, 2.

55. *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. ed. 90; *Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. ed. 177; *In re Quinn*, 176 Fed. 1020; *Price v. McCarty*, 89 Fed. 84, 32 C. C. A. 162; *Ex parte Rickelt*, 61 Fed. 203; *United States v. Lantry*, 30 Fed. 232; *In re Byron*, 18 Fed. 722; *Benson v. Palmer*, 31 App. Cas. (D. C.) 561.

[a] **The identity of the accused is a question of fact** which the United States commissioner has full jurisdiction to decide for the purpose of removal and his decision will not be received on habeas corpus. *Horner v. United States*, 143 U. S. 207, 12 Sup. Ct. 407, 36 L. ed. 126.

jurisdiction,⁵⁶ or an entire want of evidence showing probable cause.⁵⁷

<p>56. See <i>Horner v. United States</i>, 143 U. S. 570, 12 Sup. Ct. 522, 36 L. ed. 266.</p>	<p>57. See <i>Hyde v. Shine</i>, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. ed. 90; <i>In re Byron</i>, 18 Fed. 722.</p>
---	--

PREMATURE ACTIONS. — See **Suits and Actions.**

PRESCRIPTION. — See **Easements; Limitation of Actions; Title.**

PRESENTMENT. — See **Indictment and Information.**

PRESUMPTION. — See **Encyclopaedia of Evidence.** See also the index to this work.

PRETENSE. — See **Obtaining Property by False Pretenses.**

PREVIOUS JUDGMENT. — See **Judgments; Res Judicata.**

PRIMARIES. — See **Elections.**

PRINCIPAL AND AGENT

By the Editorial Staff.

I. REMEDIES AND FORM OF ACTIONS, 532

- A. *Principal Against Agent*, 532
 - 1. *Assumpsit*, 532
 - 2. *Action of Account*, 534
 - 3. *Accounting*, 534
 - 4. *Tort Actions Generally*, 535
 - 5. *Trover and Conversion*, 535
 - 6. *Replevin*, 536
- B. *Agent Against Principal*, 536
 - 1. *Assumpsit*, 536
 - 2. *Accounting*, 536
 - 3. *For Wrongful Discharge*, 537
- C. *Principal Against Third Persons*, 538
- D. *Agent Against Third Person*, 538
- E. *Third Person Against Agent*, 539

II. PARTIES, 540

- A. *Principal and Agent as Parties Plaintiff*, 540
 - 1. *General Rule*, 540
 - 2. *Where Contract Made Expressly With Agent*, 541
 - a. *Generally*, 541
 - b. *Under Code Practice*, 542
 - c. *Where Agent Does Not Disclose His Principal*, 542
 - (I.) *General Rule*, 542
 - (II.) *Negotiable Instruments*, 544
 - (III.) *Contracts of Guaranty or Indemnity*, 544
 - (IV.) *One of Several Undisclosed Principals*, 544
 - d. *Contracts Under Seal*, 545
 - 3. *Custom or Usage of Trade*, 545
 - 4. *Money Paid by Mistake*, 546
 - 5. *Actions Affecting Real Estate*, 546

6. *Where Agent Has Special Interest*, 546
7. *Actions for Tort of Third Person*, 547
8. *After Termination of Agency*, 547
9. *Control of Agent's Action by Principal*, 547
- B. *Principal and Agent as Parties Defendant*, 548
 1. *General Rule*, 548
 2. *Agency Coupled With Interest*, 549
 3. *Agents of Corporations*, 549
 4. *Where Agency Undisclosed*, 549
 5. *To Recover Money Paid to Agent*, 552
 6. *In Actions Ex Delicto*, 553
 - a. *Torts Generally*, 553
 - b. *Action Based on Fraud*, 554
- C. *Amendments as to Parties*, 554

III. PLEADING, 555

- A. *Declaration or Complaint*, 555
 1. *Declaring on Contract or Act of Agent*, 555
 - a. *Generally*, 555
 - b. *On Tort Committed by Agent*, 556
 - c. *Where Agent Ostensible Principal*, 557
 - d. *Contract Containing Words Descriptio Personae*, 557
 2. *Actions by Principal Against Agent*, 558
 - a. *Generally*, 558
 - b. *Allegation of Demand*, 558
 - c. *To Recover Money Received on Sale of Land*, 558
 - d. *For Negligent or Unauthorized Conduct*, 558
 - e. *Tort Actions*, 559
 - f. *Suits for Accounting*, 559
 - (I.) *Allegations Generally*, 559
 - (II.) *Allegation of Demand*, 559
 3. *Actions by Agent Against Principal*, 559
 4. *Amendment*, 560
- B. *Plea, Answer, and Cross-Bill*, 560
 1. *Plea or Answer, Generally*, 560
 2. *Issue of Agent's Authority To Execute Contract*, 561
 - a. *Generally*, 561
 - b. *Denial Under Oath Where Written Instrument Sued on*, 561
 3. *Cross-Bill or Cross-Complaint*, 562

C. *Pleading Ratification*, 562

IV. TRIAL, 562

- A. *Variance*, 562
- B. *Province of Judge and Jury*, 563
 - 1. *Generally*, 563
 - 2. *Existence of Agency*, 564
 - 3. *Ratification*, 566
 - 4. *Scope and Extent of Agent's Authority*, 566
 - 5. *Whether Party Acted as Agent or Principal*, 569
 - 6. *Exercise of Requisite Care and Diligence*, 569
 - 7. *Trade Usage or Custom*, 570
 - 8. *Who Agent Acted for*, 570
 - 9. *Right of Agent to Compensation*, 570
 - 10. *To Whom Credit Was Given*, 570
 - 11. *Whether Election Made To Hold Principal or Agent*, 570
 - 12. *Revocation or Termination of Relation*, 571

CROSS-REFERENCES:

Attorneys;	Lawyer and Client;
Embezzlement;	Master and Servant;
Factors and Brokers;	Officers;
Larceny;	Partnership;
Trusts and Trustees.	

For forms, see 9 STANDARD PROC. 994.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. REMEDIES AND FORM OF ACTION. — A. PRINCIPAL AGAINST AGENT. — 1. Assumpsit. — Assumpsit is a proper remedy of the principal where the agent has received the former's money and fails to deliver it.¹ And where the agent has converted the goods or money

1. **Ala.**—*Strickland v. Burns*, 14 Ala. 511. **Colo.**—*Estate of Brown v. Stair*, 25 Colo. App. 140, 136 Pac. 1003, where agent in satisfaction of principal's claim takes conveyance of lands, principal may sue agent for value of his claim, or for the lands. **Conn.**—*Pettibone v. Pettibone*, 4 Day 175; *Wetmore v. Woodbridge*, Kirby 164. **Del.**—*Guthrie v. Hyatt*, 1 Harr. 446. **D. C.**—*Harr v. Roome*, 28 App. Cas. 214. **Ill.**—*Larrabee v. Badger*, 45 Ill. 440, here the agent having been given money with which to buy certain stock for his principal purchased the stock in his own name and afterwards sold it, refusing on demand to deliver stock or proceeds of stock to the principal. **Ind.**—*Ferguson v. Ramsey*, 41 Ind. 511; *English v. Devarro*, 5 Blackf. 588. **Ky.**—*Ellis v. Henry's Admr.*, 5 J. J. Marsh. 247; *Coleman v. Cason*, 3 J. J. Marsh. 234; *Atcherson's Admr. v. Talbot*, 5 Dana 324. **Mass.**—*Colt v. Clapp*, 127 Mass. 476; *Clark v. Moody*, 17 Mass. 145; *Floyd v. Day*, 3 Mass. 403, 3 Am. Dec. 171. **Mich.**—*Tanner v. Page*, 106 Mich. 155, 63

of the principal the latter may waive the tort and sue in assumpsit.² Where a principal is betrayed by his agent into paying him a larger price for property than the agent paid for it, the principal may recover the excess in assumpsit without basing an action on fraud and deceit,³ and where an agent contrary to instructions sells goods on credit and the purchasers are insolvent the value of such goods may be recovered in assumpsit.⁴ However, where an agent receives money from his principal which he is to disburse and account for, assumpsit on an implied promise to repay will not lie,⁵ unless the agent has con-

N. W. 993; *Schmemmann v. Rothfuss*, 46 Mich. 453, 9 N. W. 489. **Minn.** *Schick v. Suttle*, 94 Minn. 135, 102 N. W. 217. **Mo.**—*Houx v. Russell*, 10 Mo. 246, if the agent being indebted to the debtor of the principal, cancels his own debt by allowing a credit on the debtor of his principal, the principal may sue the agent for money had and received. **N. J.**—*Seidel v. Peschkaw*, 27 N. J. L. 427. **N. Y.** *Allen v. Brown*, 44 N. Y. 228, where agent without authority from the principal sells notes for less than their face he is liable to principal for full amount. **N. C.**—*McNair v. McKay*, 33 N. C. 602. **Pa.**—*Paul v. Grimm*, 165 Pa. 139, 30 Atl. 721, 44 Am. St. Rep. 648; *Paton v. Clark*, 156 Pa. 49, 27 Atl. 116; *Wagner v. Peterson*, 83 Pa. 238; *Reeside's Exr. v. Reeside*, 49 Pa. 322, 88 Am. Dec. 503; *Campbell's Admr. v. Boggs*, 48 Pa. 524; *Glenn v. Cuttle*, 2 Grant Cas. 273; *Smith v. Austin*, 4 Brewst. 89. **Vt.** *Kellogg v. Griswold*, 12 Vt. 291. **Eng.** *Poulter v. Cornwall*, 1 Salk. 9, 91 Eng. Reprint 9.

See generally "Assumpsit;" "Money Counts."

2. Ala.—*Strickland v. Burns*, 14 Ala. 511. **Fla.**—See *Gordon v. Camp*, 2 Fla. 422. **Ga.**—*Merchants' Bank v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394. **Ind.**—*Jones v. Gregg*, 17 Ind. 84. **Kan.** *Challiss v. Wylie*, 35 Kan. 506, 11 Pac. 438. **N. J.**—*Seidel v. Peschkaw*, 27 N. J. L. 427. **N. Y.**—*Coit v. Stewart*, 50 N. Y. 17; *Ridder v. Whitlock*, 12 How. Pr. 208. **N. D.**—See *Anderson v. First Nat. Bank*, 5 N. D. 80, 64 N. W. 114. **Ohio.**—*Isaac Harter Co. v. Pearson*, 26 Ohio Cir. Ct. 601. **Pa.** *Reeside's Exr. v. Reeside*, 49 Pa. 322, 88 Am. Dec. 503.

[a] Money need not actually come into defendant's hands, where property, either real or personal is received as money, or as money's worth, the plain-

tiff may elect so to treat it, and recover accordingly. *Strickland v. Burns*, 14 Ala. 511.

3. U. S.—*Sandoval v. Randolph*, 222 U. S. 161, 32 Sup. Ct. 48, 56 L. ed. 142. **Minn.**—*Schick v. Suttle*, 94 Minn. 135, 102 N. W. 217. **Eng.**—*Morison v. Thompson*, L. R. 9 Q. B. 480, 43 L. J. Q. B. 215, 30 L. T. N. S. 869, 22 Wkly. Rep. 859.

4. Maloney v. Barr, 27 W. Va. 381, where an agent instructed not to sell goods on credit sells them on credit to insolvent purchasers the principal may recover the value of the goods in assumpsit against the agent.

Form of complaint for carelessly selling to insolvent, see 9 STANDARD PROC. 997.

Form of denial of negligence in giving credit, see 9 STANDARD PROC. 997.

5. Conn.—*Avery v. Kinsman*, Kirby 354. **Pa.**—*Reeside's Exr. v. Reeside*, 49 Pa. 322, 88 Am. Dec. 503 (remedy is by bill in equity or account render); *Gallagher v. Gallagher*, 6 Phila. 528. **Eng.**—*Hartup v. Wardlove*, 2 Show. 301, 89 Eng. Reprint 952, holding that "indebitatus assumpsit lies not against a man where he has received money of the plaintiff to lay out to a particular use, and he has laid out part thereof accordingly; for then he ought to be called to account for the same by action of account; but if none were laid out, there an indebitatus assumpsit lies to recover back the money again; so if it were expended to another purpose, for there the sum is certain, and may be demanded as a debt."

[a] The nature of the duty to be performed by the agent determines the form of the action against him on the part of the principal; if the trust be to pay to him directly, then assumpsit is the proper action; but where it is one of out lay, requiring an exhibit of the sums expended, as-

verted the money to his own use.⁶

2. Action of Account.—The common law action of account would lie against an agent by the principal for the failure to pay over money where the amount due was uncertain,⁷ but this action is not now in general use though it is still recognized in several states in a modified form.⁸

3. Accounting.—The relation of principal and agent is not sufficient of itself to authorize a bill for an accounting by the former against the latter;⁹ the relation must be such that the failure to account amounts to a breach of trust,¹⁰ or the account must be so complicated that the remedy at law is inadequate.¹¹ Where a court of equity takes jurisdiction on other grounds an accounting may be

sumpsit will not lie, until it be ascertained in an action of account render that a balance is due. *Reeside's Exr. v. Reeside*, 49 Pa. 322, 88 Am. Dec. 503.

6. Kan.—See *Guernsey v. Davis*, 67 Kan. 378, 73 Pac. 101. **N. J.**—*Seidel v. Peschkaw*, 27 N. J. L. 427. **N. Y.** *McNeilly v. Richardson*, 4 Cow. 607. **Pa.**—See *Millingar v. Hartupee*, 53 Pa. 362; *Reeside's Exr. v. Reeside*, 49 Pa. 322, 88 Am. Dec. 503.

7. See *Wetmore v. Woodbridge*, Kirby (Conn.) 164; *Pettibone v. Pettibone*, 4 Day (Conn.) 175; *McCaskill v. McBryde*, 17 N. C. 265. See also 1 STANDARD PROC. 213, et seq.

8. See 1 STANDARD PROC. 215.

9. U. S.—*American Spirits Mfg. Co. v. Easton*, 120 Fed. 440. **Ala.** *Crothers v. Lee*, 29 Ala. 337; *Knotts v. Tarver*, 8 Ala. 743. **Cal.**—*Garr v. Redman*, 6 Cal. 574. **Ga.**—*Powers v. Gray*, 7 Ga. 206. **Ill.**—*Starrett v. Brosseau*, 208 Ill. 408, 70 N. E. 354. **Ind.**—*Coquillard v. Suydam*, 8 Blackf. 24. **Ky.**—*Macauley v. Elrod*, 16 Ky. L. Rep. 549, 28 S. W. 782, 29 S. W. 734. **Me.**—*Webb v. Fuller*, 77 Me. 568, 1 Atl. 737. **Mass.**—*Campbell v. Cook*, 193 Mass. 251, 79 N. E. 261. **N. Y.**—*Marvin v. Brooks*, 94 N. Y. 71. **Pa.**—*Graham v. Cummings*, 208 Pa. 516, 57 Atl. 943. **Tenn.**—*Taylor v. Tompkins*, 2 Heisk. 89, 92. **Va.**—*Zetelle v. Myers*, 19 Gratt. (60 Va.) 62, 68. **Eng.**—*Barry v. Stevens*, 31 Beav. 258, 31 L. J. Ch. 785, 6 L. T. N. S. 568, 9 Jur. (N. S.) 143, 10 Wkly. Rep. 822, 54 Eng. Reprint 1137; *King v. Rossett*, 2 Y. & J. 33; *Hemings v. Pugh*, 9 Jur. (N. S.) 1124, 9 L. T. N. S. 283.

Right of agent to sue principal for accounting, see *infra*, I, B, 2.

10. U. S.—*Colonial & U. S. Mtg.*

Co. v. Hutchinson Mtg. Co., 44 Fed. 219; *Brewer v. Caldwell*, 13 Blatchf. 361, 4 Fed. Cas. No. 1,849. **Ill.**—*Weaver v. Fisher*, 110 Ill. 146; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; *Clapp v. Emery*, 98 Ill. 523. **N. Y.** *Marvin v. Brooks*, 94 N. Y. 71; *West v. Brewster*, 1 Duer 647. **Va.**—*Vilwig v. Baltimore & O. R. Co.*, 79 Va. 449; *Thornton v. Thornton*, 31 Gratt. (72 Va.) 212. **Wis.**—*Rippe v. Stodgill*, 61 Wis. 38, 20 N. W. 645; *Merrill v. Merrill*, 53 Wis. 522, 10 N. W. 684. **Eng.**—*Pearse v. Green*, 1 Jac. & W. 135, 37 Eng. Reprint 327; *Attorney-General v. Edmunds*, 37 L. J. Ch. 706, L. R. 6 Eq. 381, 18 L. T. N. S. 505.

[a] Where agent has made profit with property of principal, he may be required to account. **Pa.**—*In re Coursin's Appeal*, 79 Pa. 220. **Wash.** *Neis v. Farquharson*, 9 Wash. 508, 37 Pac. 697. **Eng.**—*Hardwicke v. Vernon*, 4 Ves. Jr. 411, 31 Eng. Reprint 209; *Massey v. Davis*, 2 Ves. Jr. 317, 30 Eng. Reprint 651.

11. Ala.—*Givens v. Tidmore*, 8 Ala. 745; *Halsted v. Rabb*, 8 Port. 63. **Cal.** *San Pedro Lumb. Co. v. Reynolds*, 111 Cal. 588, 44 Pac. 309. **Ga.**—*Powers v. Cray*, 7 Ga. 206. **Ill.**—*Craig v. McKinney*, 72 Ill. 305. **Ind.**—*Coquillard v. Suydam*, 8 Blackf. 24. **Ky.**—*Dunwidie v. Kerley*, 6 J. J. Marsh. 501. **N. Y.**—*Durant v. Einstein*, 5 Robt. 423, 35 How. Pr. 223; *Walker v. Spencer*, 13 Jones & S. 71. **S. C.**—*Kerr v. Camden Steamboat Co.*, 1 Cheves Eq. 189. **Tenn.**—*Taylor v. Tompkins*, 2 Heisk. 89. **Va.**—*Vilwig v. Baltimore & O. R. Co.*, 79 Va. 449; *Thornton v. Thornton*, 31 Gratt. (72 Va.) 212. **Eng.**—*Makepeace v. Rogers*, 4 DeG. J. & S. 649, 34 L. J. Ch. 396, 11 Jur. N. S. 314, 12 L. T. N. S. 221, 13 Wkly. Rep. 566, 46 Eng. Reprint 1070; *Navulshaw*

decreed if necessary to afford full relief,¹² as where a discovery is necessary.¹³

4. Tort Actions Generally.—The existence of the relation of principal and agent does not preclude the principal from suing his agent in tort.¹⁴

5. Trover and Conversion.—The principal may maintain trover against his agent when the latter has wrongfully converted the property of the principal to his own use,¹⁵ but generally on the failure of the agent to account for the proceeds of his sales the remedy of the principal is an action on the contract, not trover,¹⁶ and the same is true where the agent sells on credit when authorized to sell only for cash.¹⁷

v. Brownrigg, 2 DeG. M. & G. 441, 21 L. J. Ch. 908, 16 Jur. 979.

[a] Though the items are all on one side, a bill in equity to account for goods sold on commission if transaction be complicated, or there be embarrassment in making proof. *Taylor v. Tompkins*, 2 Heisk. (Tenn.) 89.

12. *Brewer v. Caldwell*, 4 Fed. Cas. No. 1,849; *Clark v. Lee*, 21 Iowa 274.

13. Tenn.—*Taylor v. Tompkins*, 2 Heisk. 89; *Hale v. Hale*, 4 Humph. 183. **Va.**—*Vilwig v. Baltimore & O. R. Co.*, 79 Va. 449; *Segar v. Parrish*, 20 Gratt. (61 Va.) 672. **Wis.**—*Schwickerath v. Lohen*, 48 Wis. 599, 4 N. W. 805. **Eng.**—*Mackenzie v. Johnston*, 4 Madd. 373, 56 Eng. Reprint 742.

14. *Miller v. John*, 111 Ill. App. 56. See the following section.

15. Cal.—*Allsopp v. Joshua Hendy Mach. Works*, 5 Cal. App. 228, 90 Pac. 39.

Ind.—*Rosenzweig v. Frazer*, 82 Ind. 342; *Lindley v. Downing*, 2 Ind. 418; *Nading v. Howe*, 23 Ind. App. 690, 55 N. E. 1032. **Ia.**—*Haas v. Damon*, 9 Iowa 589. **Me.**—*White v. Wall*, 40 Me. 574; *McNear v. Atwood*, 17 Me. 434. **Md.**—*Barton v. White's Admr.*, 1 Har. & J. 579. **Mass.**—*Brown v. Cushman*, 173 Mass. 368, 53 N. E. 860; *Ashley v. Root*, 4 Allen 504. **Mich.**—*Hogue v. Wells*, 180 Mich. 19, 146 N. W. 369. **Minn.**—*Coleman v. Pearce*, 26 Minn. 123, 1 N. W. 846. **N. Y.**—*McMorris v. Simpson*, 21 Wend. 610; *Lockwood v. Bull*, 1 Cow. 322, 13 Am. Dec. 539; *Murray v. Burling*, 10 Johns. 172; *Michigan Carbon Works v. Schad*, 49 Hun 605, 1 N. Y. Supp. 490, 17 N. Y. St. 505. **N. C.**—*Rowland v. Barnes*, 81 N. C. 234. **Ohio.**—*Isaac Harter Co. v. Pearson*, 26 Ohio Cir. Ct. 601. **Ore.**—*Salem Traction Co. v. Anson*, 41 Ore. 562, 67 Pac. 1015, 69

Pac. 675. **Pa.**—*Etter v. Bailey*, 8 Pa. 442. **Vt.**—*McCrillis v. Allen*, 57 Vt. 505. **Wis.**—*Wells v. Collins*, 74 Wis. 341, 43 N. W. 160, 5 L. R. A. 531 (and note); *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774.

[a] "The most usual remedies of a principal against his agent are the action of assumpsit, and a special action on the case; but there can be no doubt that trover will sometimes be an appropriate remedy. That action may be maintained whenever the agent has wrongfully converted the property of his principal to his own use; and the fact of conversion may be made out, by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tortfeasor. But there must be some act on the part of the agent—a mere omission of duty is not enough, although the property may be lost in consequence of the neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. There must, I think, be an entire departure from his authority before this action for a conversion of the goods can be maintained." *McMorris v. Simpson*, 21 Wend. (N. Y.) 610, 614.

16. *Walter v. Bennett*, 16 N. Y. 250; *Wright v. Duffie*, 23 Misc. 338, 51 N. Y. Supp. 255; *Bogatchka v. Walker*, 1 City Ct. (N. Y.) 447. See *supra*, I, A, 1.

17. *Loveless v. Fowler*, 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407.

6. Replevin. — Ownership of property entrusted to the agent being in the principal he may bring replevin to recover possession thereof,¹⁸ but if the agent has a lien on the goods the principal cannot bring replevin until that lien is extinguished.¹⁹

B. AGENT AGAINST PRINCIPAL. — 1. Assumpsit. — An agent entitled to compensation for services performed may generally sue in assumpsit for quantum meruit where there is no express agreement as to compensation,²⁰ but where he has made sales for his principal under a contract allowing him commissions, and the principal has collected certain sums of money as the proceeds of such sales, the agent cannot recover his commissions in an action for money had and received.²¹

Reimbursement. — An agent being entitled to be reimbursed by his principal for advances made by him in the execution of his duties, may sue in assumpsit on the implied promise to repay.²²

Indemnity. — Where an agent is employed by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, the law implies a promise of indemnity by his principal for such damages as flow directly from the execution of the agency, and on this promise either case or assumpsit may be brought.²³

2. Accounting. — The mere relation of principal and agent is not sufficient to entitle the agent to maintain a bill for an accounting

18. *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403; *Hormann v. Sherin*, 6 S. D. 82, 60 N. W. 145, claim and delivery.

19. *Terwilliger v. Beals*, 6 Lans. (N. Y.) 403; *Newhall v. Dunlap*, 14 Me. 180, 31 Am. Dec. 45.

20. *Ark.*—*Spearman v. Texarkana*, 58 Ark. 348, 24 S. W. 883, 22 L. R. A. 855. *N. J.*—*Ruckman v. Bergholz*, 38 N. J. L. 531. *Eng.*—*Bower v. Jones*, 8 Bing. 65, 21 E. C. L. 447, 1 Moo. & Sc. 140, 1 L. J. C. P. 31, 131 Eng. Reprint 325.

See the title "Master and Servant;" and also "Assumpsit;" "Work and Labor."

21. *Park v. Mighell*, 3 Wash. 737, 29 Pac. 556.

22. *U. S.*—*Bartlett v. Smith*, 13 Fed. 263, 4 McCrary 388. *Ark.*—*Clifton v. Ross*, 60 Ark. 97, 28 S. W. 1085. *Del.* *Massey v. Greenabaum Bros.*, 5 Penne. 20, 58 Atl. 804. *Ga.*—*Armstrong, Cator & Co. v. Pease*, 66 Ga. 70; *Warren, Lane & Co. v. Hewitt*, 45 Ga. 501. *Ill.*—*Selz v. Guthman*, 62 Ill. App. 624. *La.*—*Adam Bros. v. Oteri*, 36 La. Ann. 386; *Erwin's Succession*, 16 La. Ann. 132, 133. *Md.*—*Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125. *Mass.* *Beckwith v. Sibley*, 11 Pick. 482. *Mich.* *Lyon v. Sweeney*, 91 Mich. 478, 51

N. W. 1106; *Hatch v. McBrien*, 83 Mich. 159, 47 N. W. 214. *Mo.*—*Harms v. Wolf*, 114 Mo. App. 387, 89 S. W. 1037. *N. Y.*—*Bang v. Dovey*, 11 Misc. 350, 32 N. Y. Supp. 154, 65 N. Y. St. 301; *Moore v. Remington*, 34 Barb. 427; *Mohawk & H. R. Co. v. Costigan*, 2 Sandf. Ch. 306. *N. C.*—*Irons v. Cook*, 33 N. C. 203. *Ore.*—*Bartholomew v. Aumack*, 25 Ore. 78, 34 Pac. 817. *Pa.* *Bingaman v. Hickman*, 115 Pa. 420, 8 Atl. 644; *Wynkoop v. Seal*, 64 Pa. 361. *S. D.*—*Bush v. Froelich*, 14 S. D. 62, 84 N. W. 230. *Tex.*—*Whitmore v. Nelson*, 29 S. W. 521. *Vt.*—*Allen v. Gates*, 73 Vt. 222, 50 Atl. 1092. *Wash.* *Johnston v. Gerry*, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503. *W. Va.*—*Ruffner, Donnally & Co. v. Hewitt, Kerchival & Co.*, 7 W. Va. 585. *Eng.* *Sentence v. Hawley*, 13 E. C. L. (N. S.) 458, 106 E. C. L. 458.

23. *Ala.*—*Moore v. Appleton*, 26 Ala. 633 (as to take personal property which, although claimed adversely by another, he has reasonable ground to believe belongs to his principal); *Myers v. Gilbert*, 18 Ala. 467. *Me.*—*Gower v. Emery*, 18 Me. 79, assumpsit. *Eng.*—*Adamson v. Jarvis*, 4 Bing. 66, 12 Moore 241, 13 E. C. L. 403, 130 Eng. Reprint 693, declaration in case held good.

against the principal.²⁴ But an accounting may be compelled by an agent where it is only ancillary to the main purpose of an action,²⁵ where the relation between the parties is of a fiduciary character,²⁶ or the transactions between the parties are too complicated for action by a court of law.²⁷

3. For Wrongful Discharge.—An agent who has been wrongfully discharged may recover on a quantum meruit;²⁸ and where the agent has been employed for a definite period of time at a stipulated salary, on his wrongful discharge before the expiration of such time he has the choice of three remedies: To wait until the expiration of the time, and sue for the whole amount, to bring a quantum meruit for the time he worked, or bring his action at once, for damages for a breach of the contract.²⁹

24. Cal.—California Raisin Growers' Assn. *v.* Abbott, 160 Cal. 601, 117 Pac. 767. **N. Y.**—McCullough *v.* Pence, 85 Hun 271, 32 N. Y. Supp. 986, 66 N. Y. St. 470; Johnston *v.* Berlin, 35 Misc. 146, 71 N. Y. Supp. 454. **Va.**—Davis *v.* Marshall, 114 Va. 193, 76 S. E. 316, Ann. Cas. 1914B, 1025. **Eng.**—Padwick *v.* Hurst, 18 Beav. 575, 23 L. J. Ch. 657, 18 Jur. 763, 52 Eng. Reprint 225; Dinwiddie *v.* Bailey, 6 Ves. Jr. 136, 31 Eng. Reprint 979. **Can.**—James *v.* Snarr, 15 Grant Ch. (U. C.) 229.

[a] **Reason for Rule.**—"There is no duty on the part of the principal as there is on the part of the agent to keep an account of the dealings between them, and there is no confidence reposed by the agent in the principal, as there is by the principal in the agent." James *v.* Snarr, 15 Grant Ch. (U. C.) 229.

Right of principal to sue agent for accounting, see *supra*, I, A, 3.

25. California Raisin Growers' Assn. v. Abbott, 160 Cal. 601, 177 Pac. 767, here it was necessary to have an accounting in order to equitably distribute certain funds in the hands of the agent.

26. Underhill v. Jordan, 72 App. Div. (N. Y.) 71, 76 N. Y. Supp. 266, in which event the agent would be entitled to same equitable remedies as the principal.

27. U. S.—Hapgood *v.* Berry, 157 Fed. 807, 85 C. C. A. 171; Fenno *v.* Primrose, 116 Fed. 49, where dealings between parties were numerous and many matters in dispute. **Ill.**—Miller *v.* Russell, 224 Ill. 68, 79 N. E. 434; Buel *v.* Selz, 5 Ill. App. 116. **Mass.**—Badger *v.* McNamara, 123 Mass. 117.

N. J.—Hargrave *v.* Conroy, 19 N. J. Eq. 281. **S. C.**—Kerr *v.* Camden Steamboat Co., Cheves Eq. 189, that equity has jurisdiction where an agent is entrusted with funds of his principal, and having received other funds in the course of the agency, for which he is accountable, and who comes to render his account and have it allowed and himself discharged from his trust, and if any balance be due him, that in the administration of complete justice, it be decreed him, though it appear that the agent is not without a remedy at law. **Eng.**—Harrington *v.* Churchward, 6 Jur. (N. S.) 576, 29 L. J. Ch. 521, 2 L. T. N. S. 114, 8 Wkly. Rep. 302.

28. Ala.—Beck *v.* West, 91 Ala. 312, 9 So. 199. **Cal.**—Brown *v.* Crown Gold Milling Co., 150 Cal. 376, 89 Pac. 86. **La.**—Lanusse's Syndics *v.* Pimpie-nella, 4 Mart. (N. S.) 439. **Pa.**—Jaekel *v.* Caldwell, 156 Pa. 266, 26 Atl. 1063. **Can.**—Aldous *v.* Swanson, 14 West. L. Rep. 186.

[a] "To maintain such an action it is necessary that the complaint should show either that the agency was wrongfully terminated by the defendant, or that the defendant has in some respect violated the agency contract." Newcomb *v.* Imperial Life Ins. Co., 51 Fed. 725.

29. Ga.—Britt *v.* Hays, 21 Ga. 157; Rogers *v.* Parham, 8 Ga. 190. **Ill.**—William Butcher Steel Works *v.* Atkinson, 68 Ill. 421, 18 Am. Rep. 560. **Kan.**—George O. Richardson Mach. Co. *v.* Swartzel, 70 Kan. 773, 79 Pac. 660. **Mo.**—Glover *v.* Henderson, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695; Ehrlich *v.* Aetna Life Ins. Co., 88 Mo. 249; Booge *v.* Pacific R. R.,

C. PRINCIPAL AGAINST THIRD PERSONS.—The owner of goods which have been intrusted to an agent for a special purpose, and have been sold by him wrongfully, cannot maintain an action against the purchase for goods sold and delivered,³⁰ replevin, however, is a proper remedy to recover the goods under such circumstances.³¹ And where the agent has wrongfully assigned or otherwise disposed of his principal's goods, the latter may, in equity, follow them into the hands of third persons and recover the goods or their value.³² The principal may sue in trover for the value of goods converted by one to whom the agent entrusted them,³³ and the agent too may sue under such circumstances.³⁴ An action on the case may be maintained in the name of the principal for false representations made to the agent.³⁵

D. AGENT AGAINST THIRD PERSON.—An agent to whom the principal has entrusted goods may maintain trover for the conversion of such goods by a stranger;³⁶ where the agent buys property for his

33 Mo. 212, 82 Am. Dec. 160. **N. Y.** Moody v. Leverich, 4 Daly 401, 14 Abb. Pr. (N. S.) 145; Baker v. Angell, 12 N. Y. St. 406, 46 Hun 679. **S. C.** Brinkley v. Swicegood, 65 N. C. 626. **Vt.**—Derby v. Johnson, 21 Vt. 17.

See the title "**Master and Servant.**"

30. Berkshire Glass Co. v. Wolcott, 2 Allen (Mass.) 227, 79 Am. Dec. 781; McCormick Harvesting Mach. Co. v. Waldo, 128 Mich. 135, 87 N. W. 55.

31. Nickerson v. Darrow, 5 Allen (Mass.) 419.

32. **U. S.**—German Sav. Inst. v. Adae, 8 Fed. 106, 1 McCrary 501; Yates v. Curtis, 5 Mason 80, 30 Fed. Cas. No. 18,127. **Ky.**—Fahnestock & Co. v. Bailey, 3 Mete. 48, 77 Am. Dec. 161. **N. Y.**—Keutgen v. Parks, 2 Sandf. 60; New York & B. Ferry Co. v. Moore, 18 Abb. N. C. 106; Roca v. Byrne, 68 Hun 502, 22 N. Y. Supp. 1039, 52 N. Y. St. 477.

[a] If agent becomes insolvent or bankrupt, the principal may follow his property into the hands of the agent's legal representatives or assignees. Fahnestock & Co. v. Bailey, 3 Mete. (Ky.) 48, 77 Am. Dec. 161.

[b] **Where Relation of Creditor and Debtor Exists.**—If by the terms of a contract goods are consigned by one person to another to sell as agent upon commission, the latter to guarantee all sales, and to make a report at the end of each sixty days of the amount of sales, and to pay for the same, less commissions, with his sixty day note, the proceeds of sales vest in the consignee, and the relation of debtor and creditor arises as to the proceeds of the goods sold, whether the notes

stipulated for be executed or not, and upon the insolvency of the consignee the consignor is not entitled to follow such proceeds as a trust fund, but can only proceed as a common creditor. Aetna Powder Co. v. Hildebrand, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194.

33. **Ga.**—Southern Express Co. v. Palmer & Co., 48 Ga. 85. **Ill.**—Loomis v. Barker, 69 Ill. 360; Bertholf v. Quinlan Bros. & Co., 68 Ill. 297. **Ky.** Lowry v. Beckner, 5 B. Mon. 41. **Md.** Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332. **Mass.**—Kingman v. Pierce, 17 Mass. 247. **Mo.**—White Sewing Machine Co. v. Betting, 46 Mo. App. 417. **N. Y.**—Mechanics' & Traders' Bank v. Farmers' & Mechanics' Nat. Bank, 60 N. Y. 40; Faulkner v. Brown, 13 Wend. 63; Gorum v. Carey, 1 Abb. Pr. 285. **Tenn.**—Foster v. Smith, 2 Coldw. 474, 88 Am. Dec. 604, 608. **Tex.**—Triplet v. Morris, 18 Tex. Civ. App. 50, 44 S. W. 684. **Vt.**—Waldo v. Peck, 7 Vt. 434.

See "**Trover and Conversion.**"

34. See *infra*, I, D.

[a] A judgment obtained by either principal or agent will bar an action by the other. Green v. Clarke, 12 N. Y. 343; Faulkner v. Brown, 13 Wend. (N. Y.) 63.

35. Raymond v. Howland, 12 Wend. (N. Y.) 176.

36. **Ga.**—Mitchell v. Georgia & A. Ry. Co., 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622; Southern Exp. Co. v. Palmer & Co., 48 Ga. 85. **Ill.**—Owens v. Weedman, 82 Ill. 409. **Ky.**—See Donahoe v. McDonald, 92 Ky. 123, 17 S. W. 195. **Md.**—Dungan v. Mutual

principal in his own name he may sue in replevin to recover the possession thereof;³⁷ and an agent may bring trespass for injury to the principal's goods while in his possession.³⁸ An agent may sue for money had and received to recover moneys of his principal paid by him to a third person by mistake.³⁹

E. THIRD PERSON AGAINST AGENT.—Where an agent, or one assuming to act as agent, makes an unauthorized contract, the general rule is that he cannot be held liable as a principal in an action on the contract itself,⁴⁰ the remedy of the third person being an action

Ben. Life Ins. Co., 38 Md. 242. **Me.** See *Hazelton v. Locke*, 104 Me. 164, 71 Atl. 661, 20 L. R. A. (N. S.) 35, 15 Ann. Cas. 1009, that a state manager for an insurance company had a special interest in premiums collected so as to enable him to bring trover for their conversion. **Mass.** *White v. Dolliver*, 113 Mass. 400, 18 Am. Rep. 502. **Mich.**—*Stephenson v. Little*, 10 Mich. 433. **N. Y.**—*Faulkner v. Brown*, 13 Wend. 63; *Ladd v. Arkell*, 5 Jones & S. 35; *Gorum v. Carey*, 1 Abb. Pr. 285. **Pa.**—*Gunzburger v. Rosenthal*, 226 Pa. 300, 75 Atl. 418, 26 L. R. A. (N. S.) 840, "in the present case the plaintiff as agent was intrusted with the possession of the goods by his principals, for the purpose of sale, and this gave him a special interest in them which entitles him to maintain this action for their conversion." **Tex.**—*Triplett v. Morris*, 18 Tex. Civ. App. 50, 44 S. W. 684. **Vt.**—*Edwards v. Edwards*, 11 Vt. 587, 34 Am. Dec. 711. **Eng.**—*De La Chaumette v. Bank of England*, 9 B. & C. 208, 17 E. C. L. 100, 7 L. J. K. B. O. S. 179, 109 Eng. Reprint 78. **Can.** *Sanford v. Bowles*, 9 Nova Scotia 304.

[a] *Contra*, *Mitchell v. Georgia & A. Ry. Co.*, 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622, where it is held that the mere fact that personalty was intrusted to the possession of an agent did not give the agent such a special property in the personalty as to enable him to maintain trover even against one having no right or title to the property.

[b] **Mere servant in possession of property** as a person employed to take charge of and navigate a boat, cannot maintain trover. *Tuthill v. Wheeler*, 6 Barb. (N. Y.) 362.

Right of bailee to sue for conversion, see the title "Personal Property."

37. *Douglas v. Wolf*, 6 Kan. 88.

Suit by agent in his own name, see *infra*, II.

38. *Robinson v. Webb*, 11 Bush (Ky.) 464.

39. See *infra*, II, A, 4.

40. **U. S.**—*Kent v. Addicks*, 126 Fed. 112, 60 C. C. A. 660. **Cal.**—*Wallace v. Bentley*, 77 Cal. 19, 18 Pac. 788, 11 Am. St. Rep. 231. **Conn.**—See *Taylor v. Shelton*, 30 Conn. 122; *Johnson v. Smith*, 21 Conn. 627. **Ill.**—See *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340; *Frankland v. Johnson*, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234; *Neufeld v. Beidler*, 37 Ill. App. 34. **Ia.**—*Doolittle v. Murray & Co.*, 134 Iowa 536, 111 N. W. 999; *Groeltz v. Armstrong*, 125 Iowa 39, 99 N. W. 128. **Me.**—*Simpson v. Garland*, 76 Me. 203; *Stetson v. Patten*, 2 Greenl. 358, 11 Am. Dec. 111. **Mass.** *Chipman v. Foster*, 119 Mass. 189; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240. **Minn.**—*Skaaraas v. Finnegan*, 32 Minn. 107, 19 N. W. 729; *Sheffield v. Ladue*, 16 Minn. 388, 10 Am. Rep. 145. **Neb.**—*Brong v. Spence*, 56 Neb. 638, 77 N. W. 54; *Cole v. O'Brien*, 34 Neb. 68, 51 N. W. 316, 33 Am. St. Rep. 616. **N. Y.**—*Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. 246. **N. C.**—*Russell v. Koonce*, 104 N. C. 237, 10 S. E. 256. **Ohio.** *Farmers' Co-Op. Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. Rep. 846, 12 L. R. A. 346. **Ore.** *Anderson v. Adams*, 43 Ore. 621, 74 Pac. 215. **Wis.**—*Oliver v. Morawetz*, 97 Wis. 332, 72 N. W. 877.

[a] *Contra*.—In a few states it is held that the agent binds himself as principal under such a contract and an action on the contract, as though he were the principal, will lie against him. **Ala.**—*Lazarus v. Shearer*, 2 Ala. 718. **Ind.**—*Terwilliger v. Murphy*, 104 Ind. 32, 3 N. E. 404. **La.**—*Hewitt v. Roubeshush*, 24 La. Ann. 254. **Mich.** *Hallett v. Gordon*, 128 Mich. 364, 87 N. W. 261; *Holland v. Stewart*, 2 Mich. N. P. 39. **N. D.**—*Kennedy v. Stonehouse*, 13 N. D. 232, 100 N. W. 258,

for breach of the express or implied warranty of authority,⁴¹ or, where there has been fraud, an action on the case for deceit.⁴² Where an agent retains possession of a third person's goods, replevin will lie against him.⁴³

II. PARTIES.⁴⁴ — A. PRINCIPAL AND AGENT AS PARTIES PLAINTIFF.

1. General Rule. — Where an agent has acted within the scope of his employment and for a disclosed principal, all actions on contract concerning the business transacted must be brought in the name of the principal and not in the name of the agent,⁴⁵ for to enable an agent

3 Ann. Cas. 217. **N. J.**—Bay *v.* Cook, 22 N. J. L. 343. **S. C.**—Hamburg Bank *v.* Wray, 4 Strobb. 87, 51 Am. Dec. 659. **Vt.**—Royce *v.* Allen, 28 Vt. 234.

41. Ark.—Dale *v.* Donaldson Lumb. Co., 48 Ark. 188, 2 S. W. 703, 3 Am. St. Rep. 224. **Ia.**—Groeltz *v.* Armstrong, 125 Iowa 39, 99 N. W. 128. **N. Y.**—White *v.* Madison, 26 N. Y. 117, 26 How. Pr. 481. **N. C.**—Le Roy *v.* Jacobosky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977. **Ohio.**—Farmers' Co-Op. Trust Co. *v.* Floyd, 47 Ohio St. 525, 26 N. E. 110, 21 Am. St. Rep. 846, 12 L. R. A. 346. **Ore.**—Anderson *v.* Adams, 43 Ore. 621, 74 Pac. 215. **W. Va.**—Haupt *v.* Vint, 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518. **Wis.**—Oliver *v.* Morawetz, 97 Wis. 332, 72 N. W. 877. **Eng.**—Simons *v.* Patchett, 7 El. & Bl. 568, 26 L. J. Q. B. (N. S.) 195, 90 E. C. L. 568, 3 Jur. (N. S.) 742, 5 Wkly. Rep. 500, 119 Eng. Reprint 1357.

42. Ia.—Doolittle *v.* Murray & Co., 134 Iowa 536, 111 N. W. 999. **Me.**—Noyes *v.* Loring, 55 Me. 408. **Minn.**—Skaaraas *v.* Finnegan, 32 Minn. 107, 19 N. W. 729. **Neb.**—Cole *v.* O'Brien, 34 Neb. 68, 51 N. W. 316, 33 Am. St. Rep. 616. **N. Y.**—Dung *v.* Parker, 52 N. Y. 494. **N. C.**—Le Roy *v.* Jacobosky, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977. **Vt.**—Clark *v.* Foster, 8 Vt. 98. **W. Va.**—Haupt *v.* Vint, 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518. **Wis.**—Oliver *v.* Morawetz, 97 Wis. 332, 72 N. W. 877.

[a] In Massachusetts, no actual intent to defraud is necessary to bring this form of action. Conant *v.* Alvord, 166 Mass. 311, 44 N. E. 250; Long *v.* Colburn, 11 Mass. 97, 6 Am. Dec. 160.

[b] Where one falsely represents himself to be the agent of another causing injury to a third person the latter may sue in case for the deceit. **Ill.**—Duncan *v.* Niles, 32 Ill. 532,

83 Am. Dec. 293. **Me.**—Harper *v.* Little, 2 Greenl. 14, 11 Am. Dec. 25. **Mass.**—Jefts *v.* York, 4 Cush. 371, 50 Am. Dec. 791.

43. Kimble *v.* McDermott, 154 Mo. App. 209, 134 S. W. 72, suggesting that if the agent retained possession in good faith believing the property to be in his principal, the action should be against the latter.

44. See "Parties."

45. U. S.—Whitney *v.* Wyman, 101 U. S. 392, 25 L. ed. 1050; Monticello Bank *v.* Bostwick, 71 Fed. 641; The Ship St. Lawrence, 1 Gall. 467, 21 Fed. Cas. No. 12,232. **Ala.**—Newbold's Exr. *v.* Wilson, Minor 12; Nabors *v.* Shippey, 15 Ala. 293. **Cal.**—Preston *v.* Knapp, 85 Cal. 559, 24 Pac. 811; Chin Kem You *v.* Ah Joan, 75 Cal. 124, 16 Pac. 705; Lineker *v.* Ayeshford, 1 Cal. 75. **Conn.**—Sullivan *v.* Shailor, 70 Conn. 733, 40 Atl. 1054; Sutton *v.* Mansfield, 47 Conn. 388; Potter *v.* Yale College, 8 Conn. 52. **D. C.**—Hamburg-Bremen Fire Ins. Co. *v.* Lewis, 4 App. Cas. 66. **Ga.**—Cunningham *v.* Elliott, 92 Ga. 159, 18 S. E. 365. **Ind.**—Sharp *v.* Jones, 18 Ind. 314, 81 Am. Dec. 359; Peirce *v.* Ruley, 5 Ind. 69; Harper *v.* Ragan, 2 Blackf. 39. **Kan.**—Ward *v.* Ryba, 58 Kan. 741, 51 Pac. 223. **Ky.**—Tharp *v.* Farquar, 6 B. Mon. 3. **Md.**—Noel Const. Co. *v.* Atlas Portland Cement Co., 103 Md. 209, 63 Atl. 384. **Mass.**—Terry *v.* Brightman, 132 Mass. 318; Eastern R. Co. *v.* Benedict, 5 Gray 561, 66 Am. Dec. 384; Taunton & S. B. Turnpike Corp. *v.* Whiting, 10 Mass. 327, 6 Am. Dec. 124. **Mich.**—Bleau *v.* Wright, 110 Mich. 183, 68 N. W. 115; Weston *v.* Card, 96 Mich. 373, 56 N. W. 26. **Minn.**—Moran Mfg. Co. *v.* Clarke, 59 Minn. 456, 61 N. W. 556. **Miss.**—Denven Produce & Com. Co. *v.* Taylor, 73 Miss. 702, 19 So. 489. **Mo.**—Huston *v.* Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795; Coggburn *v.* Simpson, 22 Mo. 351.

to maintain an action in his own name there must be something more than the bare relation of principal and agent.⁴⁶ To this general rule there are four exceptions generally recognized by the courts and text writers: First, where the agent contracts in his own name;⁴⁷ second, where the agent does not disclose his principal, who is unknown;⁴⁸ third, where by the usages of trade the agent is authorized to act as owner of the property;⁴⁹ fourth, where the agent has an interest in the subject matter of the contract, and in this case whether he professed to act as agent or not.⁵⁰

2. Where Contract Made Expressly With Agent.—a. *Generally.* Where the contract is made in writing, expressly with the agent, and purports to be a contract personally with him, he may sue in his own name whether or not he was known to act as an agent.⁵¹

N. J.—Kinsey v. Hollinshead, 2 N. J. L. 380; Todd v. Phifer, 1 N. J. L. 414; Brackney v. Shreve, 1 N. J. L. 33. **N. Y.**—Bonynge v. Field, 81 N. Y. 159; Hall v. Lauderdale, 46 N. Y. 70; Buckbee v. Brown, 21 Wend. 110. **N. C.** Hayes Woolen Co. v. McKinnon, 114 N. C. 661, 19 S. E. 761; Whitehead v. Reddick, 34 N. C. 95; Whitehead v. Potter, 26 N. C. 257. **Okla.**—Rankin v. Blaine County Bank, 20 Okla. 68, 93 Pac. 536, 18 L. R. A. (N. S.) 512. **Ore.**—Simon v. Trummer, 57 Ore. 153, 110 Pac. 786. **Pa.**—Powell v. Roderick, 1 Pa. Dist. 120, 6 Kulp 400; Root v. Muhr, 19 W. N. C. 403; Gillett v. Ball, 9 Pa. 13. **S. C.**—Coggeshall v. Coggeshall, 2 Strob. Law 51. **Tex.** Tinsley v. Dowell, 87 Tex. 23, 26 S. W. 946; San Jacinto Rice Co. v. Lockett & Co. (Tex. Civ. App.), 145 S. W. 1046; McGrew v. Norris (Tex. Civ. App.), 140 S. W. 1143. **Vt.**—Binney v. Plumley, 5 Vt. 500, 26 Am. Dec. 313. **Va.**—Jones v. Hart's Exrs., 1 Hen. & M. (11 Va.) 470. **W. Va.** Johnson v. Welch, 42 W. Va. 18, 24 S. E. 585. **Eng.**—Pigott v. Thompson, 3 Bos. & P. 147, 127 Eng. Reprint 80.

[a] "In no form of process can a mere servant or agent be permitted to enforce, in his own name, the rights of his principal or master." Bates v. Overseers of Poor, 14 Gray (Mass.) 163.

[b] In Louisiana, an agent may sue in his own name if he styles himself as agent, and discloses in his petition the name and residence of his principal. Rochereau & Co. v. Lewis, 26 La. Ann. 581; Willard v. Lugenbuhl, 24 La. Ann. 18; Lacoste v. De Armas, 2 La. 263.

[c] Where there is an assignment from the principal to the agent of the contract, the latter may sue in his own name. Weston v. Card, 96 Mich. 373, 56 N. W. 26.

46. Barkley v. Wolfskehl, 25 Misc. 420, 54 N. Y. Supp. 934. And see cases cited in the previous note.

47. See *infra*, II, A, 2.

48. See *infra*, II, A, 2, c.

49. See *infra*, II, A, 3.

50. See *infra*, II, A, 6.

51. **U. S.**—Albany & R. Iron & Steel Co. v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. ed. 982. **Ala.** Nabors v. Shippey, 15 Ala. 293; Newbold's Exr. v. Wilson, Minor (Ala.) 12. See also Bryan v. Wilson, 27 Ala. 208. **Cal.**—Tustin Fruit Assn. v. Earl Fruit Co., 6 Cal. Unrep. 37, 53 Pac. 693; Phillips v. Henshaw, 5 Cal. 509. **Colo.** Rhone v. Powell, 20 Colo. 41, 36 Pac. 899. **Ga.**—Spence v. Wilson, 102 Ga. 762, 29 S. E. 713. **Ill.**—Mills v. Jensen, 75 Ill. App. 644; Stockbarger v. Sain, 69 Ill. App. 436. **Ind.**—Rowe v. Rand, 111 Ind. 206, 12 N. E. 377; Sharp v. Jones, 18 Ind. 314, 81 Am. Dec. 359. **Ia.**—See Fear v. Jones, 6 Iowa 169. **Ky.**—See Tharp v. Farquar, 6 B. Mon. 3. **La.**—Girault v. Feucht, 120 La. 1070, 46 So. 26. **Md.** Willson v. Sands, 36 Md. 38. **Mass.** Buffington v. McNally, 192 Mass. 198, 78 N. E. 309; Pelton v. Baker, 158 Mass. 349, 33 N. E. 394; Colburn v. Phillips, 13 Gray 64; Buffon v. Chadwick, 8 Mass. 103. **Minn.**—Close v. Hodges, 44 Minn. 204, 46 N. W. 335; Cremer v. Wimmer, 40 Minn. 511, 42 N. W. 467. **N. H.** Chandler v. Coe, 51 N. H. 561; Doe v. Thompson, 22 N. H. 217. **N. Y.**—Considerant v. Brisbane, 22 N. Y. 389; Dows v. Cobb,

b. *Under Code Practice.*—Under statutes requiring actions to be brought in the name of the real party in interest and containing an exception in favor of trustees of express trusts, executors, and administrators, and persons in whose names contracts are made for the benefit of others, an agent who has made a contract in his own name for his principal may bring an action thereon without joining the principal.⁵²

c. *Where Agent Does Not Disclose His Principal.*—(I.) **General Rule.**—Where a person acting as agent for another makes a valid contract in his own name without disclosing his principal, the agent is in contemplation of law the real contracting party, and may bring an action in the contract in his own name.⁵³ The undisclosed prin-

12 Barb. 310. **N. C.**—Brown v. Morris, 83 N. C. 251. **Ohio.**—Evrit v. Bancroft, 22 Ohio St. 172; Marine Ins. Co. v. Walsh-Upstill Coal Co., 23 Ohio Cir. Ct. 191. **Ore.**—Dubois v. Perkins, 21 Ore. 189, 27 Pac. 1044. **Pa.**—See Matter of Merrick's Estate, 2 Ashm. 485. **Tex.**—Tinsley v. Dowell, 87 Tex. 23, 26 S. W. 946; Frazier v. Moore's Admr., 11 Tex. 755; Neal v. Andrews (Tex. Civ. App.), 60 S. W. 459; San Jacinto Rice Co. v. Lockett & Co. (Tex. Civ. App.), 145 S. W. 1046. **Vt.**—Hollen v. Rutland R. Co., 73 Vt. 317, 50 Atl. 1096; Culver v. Bigelow, 43 Vt. 249. See also Woodstock Bank v. Downer, 27 Vt. 482, 65 Am. Dec. 210; Johnson v. Catlin, 27 Vt. 87, 62 Am. Dec. 622. **Va.**—See Leterman v. Charlottesville Lumber Co., 110 Va. 769, 67 S. E. 281; Virginia Nat. Bank v. Nolting, 94 Va. 263, 26 S. E. 826; Porter v. Nekervis, 4 Rand. (25 Va.) 359. **W. Va.**—See Deitz v. Providence-Washington Ins. Co., 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909. **Eng.**—Burrell v. Jones, 3 B. & Ald. 47, 5 E. C. L. 37, 106 Eng. Reprint 580; Iveson v. Conington, 1 B. & C. 160, 8 E. C. L. 69, 2 D. & R. 307, 1 L. J. K. B. O. S. 71, 107 Eng. Reprint 60; Hodgens v. Keon (1894), 2 Ir. R. 657; Sims v. Bond, 5 B. & Ad. 389, 27 E. C. L. 168, 110 Eng. Reprint 834. **Can.**—Coquillard v. Hunter, 36 U. C. Q. B. 316; Ross v. Tyson, 19 U. C. C. P. 294.

52. **U. S.**—Albany & R. Iron & Steel Co. v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. ed. 982. **Cal.**—West v. Crawford, 80 Cal. 19, 21 Pac. 1123. See also Winters v. Rush, 34 Cal. 136. **Dak.**—McLaughlin v. First Nat. Bank, 6 Dak. 406, 43 N. W. 715. **Ind.**—Landwerlen v. Wheeler, 106 Ind.

523, 5 N. E. 888; Holmes v. Boyd, 90 Ind. 332; Northwestern Conference of Universalists v. Myers, 36 Ind. 375. **Ia.**—Dorr Cattle Co. v. Jewett, 116 Iowa 93, 89 N. W. 109; Brown v. Sharkey, 93 Iowa 157, 61 N. W. 364; Abel Note Brokerage & B. Co. v. Hurd, 85 Iowa 559, 52 N. W. 488. **Kan.**—West v. Western Union Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; St. Louis, K. C. & N. Ry. Co. v. Thacher, 13 Kan. 564; Scantlin v. Allison, 12 Kan. 85. **Ky.**—See Goff v. Boland, 29 Ky. L. Rep. 172, 92 S. W. 575. **Minn.**—Close v. Hodges, 44 Minn. 204, 46 N. W. 335; Cremer v. Wimmer, 40 Minn. 511, 42 N. W. 467. **Mo.**—Wolfe v. Missouri Pac. R. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539; Snider v. Adams Express Co., 77 Mo. 523; Rogers v. Gonnell, 51 Mo. 466. **Neb.**—Stoll v. Sheldon, 13 Neb. 207, 13 N. W. 201. **N. Y.**—Coffin v. Grand Rapids Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076; Pitney v. Glens Falls Ins. Co., 65 N. Y. 6; Considerant v. Brisbane, 22 N. Y. 389. **N. C.**—Winders v. Hill, 141 N. C. 694, 54 S. E. 440. **Ohio.**—Davis v. Harness, 38 Ohio St. 397; Marine Ins. Co. v. Walsh-Upstill Coal Co., 23 Ohio Cir. Ct. 191; Arcade Hotel Co. v. Wiatt, 1 Ohio Cir. Ct. 55, 1 Ohio Cir. Dec. 34. **S. D.**—Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099.

[a] Such an agent is a "trustee of an express trust" within the meaning of statute. Snider v. Adams Express Co., 77 Mo. 523; Rogers v. Gonnell, 51 Mo. 466.

53. **Ala.**—Nabors v. Shippey, 15 Ala. 293. **Ark.**—Shelby v. Burrow, 76 Ark. 558, 89 S. W. 464, 1 L. R. A. (N. S.) 303, 6 Ann. Cas. 554. **Cal.**—Tustin Fruit Assn. v. Earl Fruit Co.,

principal may also sue on such contract in his own name.⁵⁴

121 Cal. xviii, 53 Pac. 693. **Ga.**—Georgia S. & F. R. Co. v. Marchman, 121 Ga. 235, 48 S. E. 901; Richmond & D. R. Co. v. Bedell, 93 Ga. 591, 15 S. E. 676. **Ill.**—Saladin v. Mitchell, 45 Ill. 79; Hewitt v. Torson, 124 Ill. App. 375; Stockbarger v. Sain, 69 Ill. App. 436, agent selling principal's goods as his own may recover the purchase price. **Ind.**—Rowe v. Rand, 111 Ind. 206, 12 N. E. 377; Beard v. Sloan, 38 Ind. 128 (agent contracting for purchase of goods in his own name may sue for damages for breach of the contract); Sharp v. Jones, 18 Ind. 314, 81 Am. Dec. 359. **Ky.**—Atcher-son's Admr. v. Talbot, 5 Dana 324. **La.**—Girault v. Feucht, 120 La. 1070, 46 So. 26. **Md.**—Anderson v. Stewart, 108 Md. 340, 70 Atl. 228; United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519. **Mass.**—Buffington v. McNally, 192 Mass. 198, 78 N. E. 309; Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332; Colburn v. Phillips, 13 Gray 64; Tyler v. Freeman, 3 Cush. 261. **Mo.**—Coggburn v. Simpson, 22 Mo. 351; Keown & Co. v. Vogel, 25 Mo. App. 35. **Minn.**—Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415; Close v. Hodges, 44 Minn. 204, 46 N. W. 335. **N. J.**—Hughes v. Young, 31 N. J. Eq. 60. **N. Y.**—Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. 835, 1 Silv. 399; Alsop v. Caines, 10 Johns. 396. **N. C.**—Barham v. Bell, 112 N. C. 131, 16 S. E. 903. **N. D.**—Stewart v. Gregory, Carter & Co., 9 N. D. 618, 84 N. W. 553. **Okla.**—Stack v. Gudgel, 158 Pac. 1144. **Tex.**—San Jacinto Rice Co. v. Lockett & Co. (Tex. Civ. App.), 145 S. W. 1046; Neal v. Andrews (Tex. Civ. App.), 60 S. W. 459; Edwards v. Ezell, 2 Wils. Civ. Cas., §276. **Vt.**—Camp v. Barber, 87 Vt. 235, 88 Atl. 812, Ann. Cas. 1917A, 451; Lapham v. Green, 9 Vt. 407. **Va.**—Oliver Refining Co. v. Portsmouth Cotton, etc. Corp., 109 Va. 513, 61 S. E. 56, 132 Am. St. Rep. 924. **W. Va.**—Coulter v. Blatchley, 51 W. Va. 163, 41 S. E. 133. **Eng.**—Sims v. Bond, 5 B. & Ad. 389, 27 E. C. L. 168, 110 Eng. Reprint 834; Gardiner v. Davis, 2 Car. & P. 444, 12 E. C. L. 22.

[a] Fact that consideration moves from undisclosed principal rather than from the agent to the other contract-

ing party is immaterial. Colburn v. Phillips, 13 Gray (Mass.) 64.

54. **Dak.**—Lloyd v. Powers, 4 Dak. 62, 22 N. W. 492. **Ga.**—Woodruff v. McGehee, 30 Ga. 158. **Ill.**—Saladin v. Mitchell, 45 Ill. 79; Stockbarger v. Sain, 69 Ill. App. 436. **Ia.**—Darling v. Noyes, 32 Iowa 96. **Ky.**—Atcher-son's Admr. v. Talbot, 5 Dana 324; Davies' Exr. v. Graham's Trustee, 2 A. K. Marsh. 540. **La.**—Braden v. Louisiana State Ins. Co., 1 La. 220, 20 Am. Dec. 277. **Me.**—Pitts v. Mower, 18 Me. 361, 36 Am. Dec. 727. **Md.**—Anderson v. Stewart, 108 Md. 340, 70 Atl. 228 (the court saying: "It is too well settled to be disputed, that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or his principal may sue upon it, the only limitation upon this doctrine being, that if the principal sues upon a contract thus made with an agent in the name of the latter, the defendant is entitled to be placed in the same position at the time of the disclosure of the principal, as if the agent had been the real contracting party"); Baltimore Coal Tar & Mfg. Co. v. Fletcher, 61 Md. 288; Oelrichs v. Ford, 21 Md. 489. **Mass.**—Buffington v. McNally, 192 Mass. 198, 78 N. E. 309; National Life Ins. Co. v. Allen, 116 Mass. 398; Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332; Borrowscale v. Bosworth, 99 Mass. 378; Lerner v. Johns, 9 Allen 419. **Mo.**—Kelly v. Thuey, 143 Mo. 422, 45 S. W. 300, overruling Kelly v. Thuey, 102 Mo. 522, 15 S. W. 62 (which held that agent alone could maintain the action); Clubb v. St. Louis, etc. R. Co., 136 Mo. App. 1, 117 S. W. 110; Odessa Bank v. Jennings, 18 Mo. App. 651. **N. H.**—Chandler v. Coe, 54 N. H. 561. **N. Y.**—Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co., 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256; Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. 835, 1 Silv. 399; Nicoll v. Burke, 78 N. Y. 580, 8 Abb. N. C. 213; Schaefer v. Henkel, 75 N. Y. 378, 7 Abb. N. C. 1, 57 How. Pr. 97; Beebe v. Robert, 12 Wend. 413, 27 Am. Dec. 132. **N. C.**—Nicholson v. Dover, 145 N. C. 18, 58 S. E. 444, 13 L. R. A. (N. S.) 167; Barham v. Bell, 112 N. C. 131, 16 S. E. 903. **Ore.**

(II.) **Negotiable Instruments.** — Following the general rule that an action of a negotiable instrument may be brought in the name of the holder of the legal title,⁵⁵ the agent in whose name the legal title of a negotiable instrument is may sue thereon in his own name.⁵⁶ While it has been held that an undisclosed principal cannot merely by virtue of the agency sue upon a negotiable instrument which the agent has received in his own name,⁵⁷ other authorities are to the contrary,⁵⁸ in accordance with the general rule permitting the beneficial or equitable owner to sue in his own name.⁵⁹

(III.) **Contracts of Guaranty or Indemnity.** — Contracts of guaranty or indemnity being personal in their nature, the general rule does not apply, and an undisclosed principal cannot sue on such a contract entered into by his agent.⁶⁰

(IV.) **One of Several Undisclosed Principals.** — One of several undisclosed principals cannot sue on an entire contract made by the agent without joining the other parties in interest.⁶¹

Kitchen v. Holmes, 42 Ore. 252, 70 Pac. 830. **Tenn.**—*Brice v. King*, 1 Head 152; *Darden v. Oneal*, 35 S. W. 1095. **Tex.**—*Hunter v. Adoue*, 38 Tex. Civ. App. 542, 86 S. W. 622. **Wash.**—*First Nat. Life Assur. Soc. v. Farquhar*, 75 Wash. 67, 135 Pac. 619. **W. Va.**—*Coulter v. Blatchley*, 51 W. Va. 163, 41 S. E. 133. **Eng.**—*Sims v. Bond*, 5 B. & Ad. 389, 27 E. C. L. 168, 110 Eng. Reprint 834; *Bickerton v. Burrell*, 5 M. & S. 383, 105 Eng. Reprint 1091.

[a] The fact that the identity of the principal has been concealed because of the belief that, if it were disclosed, the contract would not be made, does not authorize an exception to the rule. *Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 211 N. Y. 68, 105 N. E. 88, L. R. A. 1915C, 256.

[b] Fact that the principal is a resident of another state, does not prevent undisclosed principal from suing. *Barham v. Bell*, 112 N. C. 131, 16 S. E. 903.

Right of principal to control action of agent, see *infra*, II, A, 9.

55. See 4 STANDARD PROC. 229.

56. **U. S.**—*Pacific Guano Co. v. Holleman*, 12 Fed. 61, 4 Woods 462. **Ala.**—*Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134. **Ga.**—*Austell v. Rice*, 5 Ga. 472. **Ia.**—*Cottle v. Cole*, 20 Iowa 481. **La.**—*Zapata v. Cifreo*, 26 La. Ann. 87. **Mass.**—*Buffum v. Chadwick*, 8 Mass. 103. **Neb.**—*Stoll v. Sheldon*, 13 Neb. 207, 13 N. W. 201. **N. Y.**—*Fish v. Jacobsohn*, 5 Bosw. 514. **Pa.**

Pearce v. Austin, 4 Whart. 489, 34 Am. Dec. 523. **Tenn.**—*Coecke v. Dickens*, 4 Yerg. 29, 26 Am. Dec. 214. **Can.**—*McDonald v. Smail*, 25 Nova Scotia 440.

[a] Mere depositary of a note cannot sue on it. *Woodsum v. Cole*, 69 Cal. 142, 10 Pac. 331.

57. **U. S.**—*Van Ness v. Forrest*, 8 Cranch 30, 3 L. ed. 478. **N. H.**—*Chandler v. Coe*, 54 N. H. 561. **N. Y.**—*Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558. **Vt.**—*Bank of United States v. Lyman*, 1 Blatchf. 297, 2 Fed. Cas. No. 924, 20 Vt. 666, *affirmed* in 12 How. 225, 13 L. ed. 965. **Eng.**—*Fenn v. Harrison*, 3 T. R. 757, 100 Eng. Reprint 842.

58. **Ind.**—*Nave v. Hadley*, 74 Ind. 155. **Mass.**—*National Life Ins. Co. v. Allen*, 116 Mass. 398 (promissory note, non-negotiable in form); *Fairfield v. Adams*, 16 Pick. 381. See also *Fuller v. Hooper*, 3 Gray 334, 341. **Wash.**—*First Nat. Life Assur. Soc. v. Farquhar*, 75 Wash. 667, 135 Pac. 619; *Stinson v. Sachs*, 8 Wash. 391, 36 Pac. 287.

59. See 4 STANDARD PROC. 23.

60. **Ill.**—*Second Nat. Bank v. Dieffendorf*, 90 Ill. 396. **Mo.**—*Mitchell & Bro. v. Railton*, 45 Mo. App. 273. **R. I.**—*King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13.

61. **Ill.**—*Delaware, L. & W. R. Co. v. Thayer*, 41 Ill. App. 192. **Mass.**—*Roosevelt v. Doherty*, 129 Mass. 301, 37 Am. Rep. 356. **N. H.**—*Bryant v. Wells*, 56 N. H. 152, here a house was rented by the agent of two owners

d. *Contracts Under Seal*.—In those jurisdictions where the distinction between sealed and unsealed instruments is still observed, a principal cannot sue on a contract under seal entered into by the agent in his own name;⁶² the agent making the contract under his own name and seal is the only one who can sue thereon.⁶³ This rule applies though the contract is not required to be under seal to be valid.⁶⁴ If, however, the contract appears on its face to have been intended as the contract of a designated principal the principal may sue thereon.⁶⁵

3. Custom or Usage of Trade.—Where by the usage of trade, or

who were tenants in common and whose names were undisclosed. Held that one of owners having a two-thirds interest could not bring action for the use and occupation of the property, but both must sue jointly. **R. I.**—*H. Midwood's Sons Co. v. Alaska-Portland Packers' Assn.*, 28 R. I. 303, 13 Am. & Eng. Ann. Cas. 954, the court saying: "We find that in cases of suit by an undisclosed principal upon a contract made by his agent for his benefit, a plain distinction is drawn between cases where the undisclosed principal is the sole party in interest . . . and cases where there are several undisclosed principals under the contract and their orders have been 'lumped' by the factor or agent in making the contract."

But see *St. Louis, K. C. & N. Ry. Co. v. Thacher*, 13 Kan. 564.

62. U. S.—*Clarke v. Courtney*, 5 Pet. 319, 8 L. ed. 140; *Moline Mal-leable Iron Co. v. York Iron Co.*, 83 Fed. 66, 27 C. C. A. 442, 53 U. S. App. 580. **Ark.**—*Hearshy v. Hichox*, 12 Ark. 125. **D. C.**—*Nichols v. Beal-mear*, 36 App. Cas. 352. **Ill.**—*Walsh v. Murphy*, 167 Ill. 228, 47 N. E. 354; *Harms v. McCormick*, 132 Ill. 104, 22 N. E. 511; *Moore v. House*, 64 Ill. 162; *Stockbarger v. Sain*, 69 Ill. App. 436. **Ky.**—See *Violett v. Powell's Admr.*, 10 B. Mon. 347, 52 Am. Dec. 548; *Neff v. Baden*, 3 B. Mon. 468. **Md.**—*Balti-more Coal Tar & Mfg. Co. v. Fletcher*, 61 Md. 288. **Mass.**—*New England Marine Ins. Co. v. De Wolf*, 8 Pick. 56. **N. J.**—*Sheldon v. Dunlap*, 16 N. J. L. 245. **N. Y.**—*Elliott v. Brady*, 192 N. Y. 221, 85 N. E. 69, 127 Am. St. Rep. 898, 18 L. R. A. (N. S.) 600; *Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 250; *Nicoll v. Burke*, 78 N. Y. 580, 8 Abb. N. C. 213; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *An-*

derson v. Conner, 43 Misc. 384, 87 N. Y. Supp. 449. **N. C.**—*Barham v. Bell*, 112 N. C. 131, 16 S. E. 903. See also *United States v. Blount*, 4 N. C. 181. **Pa.**—*Hopkins v. Mehaffy*, 11 Serg. & R. 126; *Cocke v. Dickens*, 4 Yerg. 29, 35, 26 Am. Dec. 214. See also *Seyfert v. Bean*, 83 Pa. 450. **R. I.**—*Providence v. Miller*, 11 R. I. 272, 23 Am. Rep. 453. **Tex.**—*Kempner v. Dillard*, 100 Tex. 505, 101 S. W. 437, 123 Am. St. Rep. 822.

63. Ark.—*Hearshy v. Hichox*, 12 Ark. 125. **Ill.**—*Equitable L. Assur. Soc. v. Smith*, 25 Ill. App. 471. **N. J.**—*Loeb v. Barris*, 50 N. J. L. 382, 13 Atl. 602. **N. Y.**—*Schaefer v. Henkel*, 75 N. Y. 378, 7 Abb. N. C. 1, 57 How. Pr. 97; *Melcher v. Kreiser*, 28 App. Div. 362, 51 N. Y. Supp. 249; *Cleary v. Heyward*, 123 N. Y. Supp. 334. **Pa.**—*Lancaster v. Knickerbocker Ice Co.*, 153 Pa. 427, 26 Atl. 251. See also *Hopkins v. Mehaffy*, 11 Serg. & R. 126. **Tenn.**—*Cocke v. Dickens*, 4 Yerg. 29, 26 Am. Dec. 214. **Va.**—*Oliver Re-fining Co. v. Portsmouth Cotton Oil Ref. Corp.*, 109 Va. 513, 64 S. E. 56, 132 Am. St. Rep. 924. **Eng.**—*Sims v. Bond*, 5 B. & Ad. 389, 27 E. C. L. 168, 110 Eng. Reprint 834; *Berkeley v. Hardy*, 5 B. & C. 355, 11 E. C. L. 495, 108 Eng. Reprint 132, 2 Eng. Rul. Cas. 274.

64. Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; *Smith v. Pierce*, 45 App. Div. 628, 60 N. Y. Supp. 1011; *Anderson v. Connor*, 43 Misc. 384, 87 N. Y. Supp. 449. See *Lancaster v. Knickerbocker Ice Co.*, 153 Pa. 427, 26 Atl. 251, that an unauthorized and unnecessary addition of a seal to a simple contract will be treated as sur-plusage and will not affect the rule permitting an undisclosed principal to sue.

65. Providence v. Miller, 11 R. I. 272, 23 Am. Rep. 453.

the general course of business the agent is authorized to act as the owner or as a principal contracting party, although his character as agent is known, he may sue on the contract in his own name.⁶⁶

4. Money Paid by Mistake. — An agent who by mistake pays money of his principal to a third person, may sue in his own name for money had and received,⁶⁷ or the principal may sue therefor.⁶⁸

5. Actions Affecting Real Estate. — A mere agent or caretaker for the owner of lands cannot maintain an action in his own name affecting the property; the action must be by the principal.⁶⁹ However, if the agent hold the property in trust he may maintain an action without joining the person for whose benefit the action is brought.⁷⁰

6. Where Agent Has Special Interest. — Where the agent has made a contract, in the subject matter of which he has a special interest or property, whether he professed at the time to be acting for himself or not, he may bring an action thereon in his own name.⁷¹

66. **Ala.**—*Nabors v. Shippey*, 15 Ala. 293. **Ind.**—*Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377. **Md.**—*Willson v. Sands*, 36 Md. 38. **N. Y.**—*Meyer v. Fiegel*, 7 Robt. 122, 34 How. Pr. 434; *Alsop v. Caines*, 10 Johns. 396. **Tex.**—*Tinsley v. Dowell*, 87 Tex. 23, 26 S. W. 946; *San Jacinto Rice Co. v. Lockett & Co.* (Tex. Civ. App.), 145 S. W. 1046. **Eng.**—*Provincial Ins. Co. v. Ledue*, L. R. 6 P. C. 224, 43 L. J. P. C. 49, 31 L. T. N. S. 142, 22 Wkly. Rep. 929; *Drinkwater v. Goodwin*, 1 Cowp. 251, 98 Eng. Reprint 1070.

67. *Parks v. Fogleman*, 97 Minn. 157, 105 N. W. 560, 114 Am. St. Rep. 703, 4 L. R. A. (N. S.) 363; *Stevenson v. Mortimer*, 2 Cowp. 805, 98 Eng. Reprint 1372; *Holt v. Ely*, 1 El. & Bl. 795, 72 E. C. L. 795, 17 Jur. 892, 118 Eng. Reprint 634.

68. *Stevenson v. Mortimer*, 2 Cowp. 805, 98 Eng. Reprint 1372; *Ancher v. Bank of England*, 2 Dougl. 638, 99 Eng. Reprint 404.

69. **Fla.**—*King v. Gwynn*, 14 Fla. 32, cannot maintain in his own name an action to enjoin the collection of taxes alleged to be illegally imposed on the land. **Ga.**—*Chatfield v. Clark*, 123 Ga. 867, 51 S. E. 743; *Cunningham v. Elliott*, 92 Ga. 159, 18 S. E. 365, while under statute agent may sue in principal's name to remove obstructions he cannot institute such a proceeding in his own name either individually or as agent. **Pa.**—*Com. ex rel. Laning v. Wilkes-Barre Gas Co.*, 6 Kulp 328, agency for management of property gives agent no right to sue. **Tex.**—*Holloway v. Holloway*, 30 Tex. 164.

[a] **Under a power of attorney to sell lands**, and to pay debts, and to do all and singular such acts as his principal could do and perform in person, an attorney in fact cannot maintain an action in his own name, to disembarass the title of his principal of clouds or incumbrances which may have supervened to impair their value or prevent their sale. *Robson v. Tait*, 13 Tex. 272.

70. *Goff v. Boland*, 29 Ky. L. Rep. 172, 92 S. W. 575; *Johnston v. O'Shea*, 118 Mo. App. 287, 94 S. W. 783.

71. **Ala.**—*Beyer & Co. v. Bush & Sons*, 50 Ala. 19; *Bryan v. Wilson*, 27 Ala. 208. **Ark.**—*Beller v. Block*, 19 Ark. 566; *Hearshy v. Hichox*, 12 Ark. 125. **Conn.**—*Treat v. Stanton*, 14 Conn. 445; *Potter v. Yale College*, 8 Conn. 52. **Ga.**—*Richmond & D. R. Co. v. Bedell*, 88 Ga. 591, 15 S. E. 676; *Groover, Stubbs & Co. v. Warfield*, 50 Ga. 644; *Field v. Price*, 50 Ga. 135. **Ill.**—*Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963; *Warder v. White*, 14 Ill. App. 50. **Ia.**—*Fear v. Jones*, 6 Iowa 169; *Farwell v. Tyler*, 5 Iowa 535. **Ky.**—*Graham & Co. v. Duckwall, Fitch & Co.*, 8 Bush 12; *Atcherson's Admr. v. Talbot*, 5 Dana 324. **La.**—*Lacoste v. De Armas*, 2 La. 263. **Mass.**—*Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 353; *Borrowdale v. Bosworth*, 99 Mass. 378. **Mo.**—*Johnston v. O'Shea*, 118 Mo. App. 287, 94 S. W. 783; *Morrell v. Koerner-Parker Lumb. Co.*, 51 Mo. App. 592. **N. H.**—*Pinkham v. Benton*, 62 N. H. 687; *Porter v. Raymond*, 53 N. H. 519; *Barnes v. Union Mut. Fire Ins. Co.*, 45 N. H. 21. **N. Y.**—*Fitzhugh v. Wiman*, 9 N. Y. 559, Seld.

7. Actions for Tort of Third Person.—A principal may sue for an injury to his property by one to whom his agent has intrusted it.⁷² So too, a principal may recover for damages suffered because of fraud practiced on the agent.⁷³ If an agent is induced by fraud, deceit, or misrepresentation of a third person, to purchase or sell goods of his principal and thereby he sustains a personal loss, he may maintain the appropriate action.⁷⁴ As before stated either the principal,⁷⁵ or the agent,⁷⁶ may maintain trover against a third person to recover the former's goods. An agent in possession of goods may maintain trespass for any injury to the goods.⁷⁷

8. After Termination of Agency.—An agent depositing money of his principal in his own name as agent cannot maintain an action for it in his own name after his agency ceases.⁷⁸

9. Control of Agent's Action by Principal.—The agent's right to sue is subordinate to and liable to the control of the principal, where the latter has a right to sue, and the principal may supersede it by suing in his own name, or otherwise suspend or extinguish it,⁷⁹ subject to any special lien or right which the agent may have acquired.⁸⁰

Notes 250. **N. C.**—*Whitehead v. Potter*, 26 N. C. 257. **Ohio.**—*Evrit v. Bancroft*, 22 Ohio St. 172. **Ore.**—*Simon v. Trummer*, 57 Ore. 153, 110 Pac. 786. **Pa.**—*Steamboat Co. v. Atkins & Co.*, 22 Pa. 522. **Tex.**—*Tinsley v. Dowell*, 87 Tex. 23, 26 S. W. 946; *San Jacinto Rice Co. v. Lockett & Co.* (Tex. Civ. App.), 145 S. W. 1046; *Triplett v. Morris*, 18 Tex. Civ. App. 50, 44 S. W. 684. **Vt.**—*Camp v. Barber*, 87 Vt. 235, 88 Atl. 812, Ann. Cas. 1917A, 451. **Eng.**—*Hudson v. Granger*, 5 B. & Ald. 27, 7 E. C. L. 27, 106 Eng. Reprint 1103; *Davies v. Wilkinson*, 4 Bing. 573, 13 E. C. L. 642, 130 Eng. Reprint 889; *Anderson v. Martindale*, 1 East 497, 102 Eng. Reprint 191.

[a] **Illustration.**—An agent, under a contract with manufacturers providing that if he sell their machines on other than specified terms he should be charged as purchaser thereof, becomes the owner of the cause of action against a defendant for the price of one of the machines in such circumstances, and may sue in his own name. *Palmer v. Banfield*, 86 Wis. 441, 56 N. W. 1090.

72. U. S.—*New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. 344, 12 L. ed. 465. **Ala.**—*Southern R. Co. v. Jones*, 132 Ala. 437, 31 So. 501. **Ga.**—*Central of Georgia R. Co. v. James*, 117 Ga. 832, 45 S. E. 223.

73. Ind.—*Pattison v. Barnes*, 26 Ind. 209 (procuring payment by agent of alleged debt of principal); *Cramer v.*

Wright, 15 Ind. 278, representation as to land sold. **Ia.**—*Perkins v. Evans*, 61 Iowa 35, 15 N. W. 584, a public officer who knowingly makes a false entry on his books showing that certain lands have been redeemed from a tax sale is liable to one who purchases the property, his agent relying on the false entry. **Mass.**—*Tuckwell v. Lambert*, 5 Cush. 23. **Mo.**—*United States Mtg. & Trust Co. v. Crutcher*, 169 Mo. 444, 69 S. W. 380. **N. Y.**—*Raymond v. Howland*, 12 Wend. 176; *Allen v. Addington*, 7 Wend. 9; *Armstrong v. Tufts*, 1 Edm. Sel. Cas. 367. **Wis.**—*Ward v. Borkenhagen*, 50 Wis. 459, 7 N. W. 340.

74. Story on Agency, §415.

75. See *supra*, I, C.

76. See *supra*, I, D.

77. See *supra*, I, D.

78. *Miller v. State Bank*, 57 Minn. 319, 59 N. W. 309.

79. U. S.—*Walter v. Ross*, 2 Wash. C. C. 283, 29 Fed. Cas. No. 17,122.

Ill.—*Warder v. White*, 14 Ill. App.

50. **Ind.**—*Rowe v. Rand*, 111 Ind. 206,

12 N. E. 377. **Mass.**—*Rhoades v.*

Blackiston, 106 Mass. 334, 8 Am. Rep.

332. **Tex.**—*Hunter v. Adoue*, 38 Tex.

Civ. App. 542, 86 S. W. 622. **Vt.**

Edwards v. Golding, 20 Vt. 30. **Va.**

Leterman v. Charlottesville Lumb. Co.,

110 Va. 769, 67 S. E. 281. **Can.**

Wurzburg v. Webb, 19 Nova Scotia

414.

80. Ill.—*Warder v. White*, 14 Ill. App. 50. "The right of the principal

B. PRINCIPAL AND AGENT AS PARTIES DEFENDANT.—1. General Rule.—When a third person institutes an action on a contract made by the agent for his principal, the principal, and not the agent, must generally be made the defendant,⁸¹ and unless the agent has some beneficial interest in the subject matter of the agency he should not be joined as a party.⁸²

to sue is paramount to that of the agent and in cases where either may bring the action, the former, by giving notice to the other contracting party, puts an end to the agent's right of action, except in cases where the agent has a lien upon the subject-matter of the action equal to the claim of the principal." **Ind.**—Rowe v. Rand, 111 Ind. 206, 12 N. E. 377. **Mass.**—Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332. **Tex.** Hunter v. Adoue, 38 Tex. Civ. App. 542, 86 S. W. 622.

81. U. S.—Baldwin v. Black, 119 U. S. 643, 7 Sup. Ct. 326, 30 L. ed. 530; Whitney v. Wyman, 101 U. S. 292, 25 L. ed. 1050; United States v. Bevan, Crabbe 324, 24 Fed. Cas. No. 14,588. **Ala.**—Nabors v. Shippey, 15 Ala. 293. **Cal.**—Lander v. Castro, 73 Cal. 497; Shaver v. Ocean Min. Co., 21 Cal. 45; McDonald v. Bear River, etc. Water & M. Co., 13 Cal. 220. **Conn.**—Hewitt v. Wheeler, 22 Conn. 557; Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Shelton v. Darling, 2 Conn. 435. **Ga.**—Fleming v. Hill, 62 Ga. 751; Tiller v. Spradley, 39 Ga. 35. **Ill.**—Seery v. Socks, 29 Ill. 313; Brainard v. Turner, 4 Ill. App. 61; Dunton v. Chamberlain, 1 Ill. App. 361. **Ind.**—McHenry v. Duffield, 7 Blackf. 41; Pitman v. Kintner, 5 Blackf. 250, 33 Am. Dec. 469. **Ia.** Sternburg v. Callanan, 14 Iowa 251. **Ky.**—Cooper v. Ratliff, 116 S. W. 748. **La.**—Honore v. White, 1 Mart. (N. S.) 219. **Me.**—Teale v. Otis, 66 Me. 329; Batchelder v. McKenney, 36 Me. 555. **Md.**—McClernan v. Hall, 33 Md. 293. **Mass.**—Cabot v. Shaw, 148 Mass. 459, 20 N. E. 99; Goodenough v. Thayer, 132 Mass. 152; New England Marine Ins. Co. v. De Wolf, 8 Pick. 56. **Mich.** Banks v. Cramer, 109 Mich. 168, 66 N. W. 946; Bailey v. Cornell, 66 Mich. 107, 33 N. W. 50. **Mo.**—Klöstermann v. Loos, 58 Mo. 290. **N. J.**—Stephens v. Bacon, 7 N. J. L. 1; Shotwell v. McKown, 5 N. J. L. 973; Tuttle v. Avres, 3 N. J. L. 257. **N. Y.**—Whitford v. Laidler, 94 N. Y. 145, 46 Am.

Rep. 131; Langley v. Warner, 3 N. Y. 327; Meeker v. Claghorn, 44 N. Y. 349. **N. C.**—Cape Fear Bank v. Wright, 48 N. C. 376; Potts v. Lazarus, 4 N. C. 180. **Tex.**—Johnson v. Armstrong, 83 Tex. 325, 18 S. W. 594, 29 Am. St. Rep. 648. **Vt.**—Proctor v. Webber, 1 D. Chip. 371. **Va.**—Board of Public Works v. Gannt, 76 Va. 455. **Wash.**—McKinley v. Mineral Hill Consol. Min. Co., 46 Wash. 162, 89 Pac. 495; Wilson v. Wold, 21 Wash. 398, 58 Pac. 223, 75 Am. St. Rep. 846. **W. Va.**—Johnson v. Welch, 42 W. Va. 18, 24 S. E. 585. **Wis.**—Klaus v. Green Bay, 34 Wis. 628; Charboneau v. Henni, 24 Wis. 250. **Eng.**—Bamford v. Shuttleworth, 11 Ad. & El. 926, 39 E. C. L. 488, 113 Eng. Reprint 666; Stephens v. Badcock, 3 Barn. & Ad. 354, 23 E. C. L. 160, 1 L. J. K. B. 75, 110 Eng. Reprint 133; Bowen v. Morris, 2 Taunt. 374, 127 Eng. Reprint 1122. **Can.**—Williams v. Neilson, 3 Brit. Col. 613.

[a] "The rule, it is believed, is universal, that a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred upon him. The very notion of an agency proceeds upon the supposition that what a man may lawfully do by a substitute, when performed, is done by himself; and the individuality of the agent so far is merged in that of the principal." Colvin v. Holbrook, 2 N. Y. 126.

82. Ark.—Gartland v. Nunn, 11 Ark. 720. **Cal.**—West v. Crawford, 80 Cal. 19, 21 Pac. 1123; Hooper v. Flood, 54 Cal. 218; Powell v. Ross, 4 Cal. 197. **Ia.**—Paton v. Lancaster, 38 Iowa 494; Lyon v. Tevis, 8 Iowa 79. **N. Y.** Walsh v. National Broadway Bank, 13 Misc. 3, 33 N. Y. Supp. 998, 67 N. Y. St. 848; Lewis v. Greider, 49 Barb. 606; Boyd v. Vanderkemp, 1 Barb. Ch. 273. **N. C.**—Ayers v. Wright, 43 N. C. 229. **Eng.**—Le Texier v. Anspach, 15 Ves. Jr. 159, 33 Eng. Reprint 714; Tylour v. Rochfort, 2 Ves. Sen. 281, 28 Eng. Reprint 182.

2. Agency Coupled With Interest.—Where the agency is one coupled with an interest the agent may be joined with the principal as a party defendant so that full relief may be given.⁸³

3. Agents of Corporations.—Where suit is brought in equity against a corporation and discovery is sought, agents or officers of the corporations familiar with the facts may be joined as parties defendant to obtain their answers under oath.⁸⁴ A more complete discussion of this subject will be found elsewhere in this work.⁸⁵

4. Where Agency Undisclosed.—Generally one dealing with an agent of an undisclosed principal may, after disclosure, sue either⁸⁶

And see cases cited *infra*, II, B, 2.

[a] **The improper joinder of an agent will not affect the jurisdiction of United States courts** on ground of adverse citizenship, but such party may be dropped from the case. *Wood v. Davis*, 18 How. (U. S.) 467, 15 L. ed. 460; *Insurance Co. of North America v. Svendsen*, 74 Fed. 346; *Reeves v. Corniing*, 51 Fed. 774; *Brown v. Murray*, *Nelson & Co.*, 43 Fed. 614; *First Nat. Bank v. Merchants' Bank*, 37 Fed. 657, 2 L. R. A. 469.

83. U. S.—*Wilson v. Oswego*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. ed. 70; *Scoutt v. Keck*, 73 Fed. 900, 20 C. C. A. 103. **Ky.**—*Martin v. Louisville & N. R. Co.*, 95 Ky. 612, 26 S. W. 801. **La.**—*Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456; *Ledoux v. Cooper*, 2 La. Ann. 586. **Me.**—*Richardson v. Kimball*, 28 Me. 463. **Md.**—*Hambleton v. Rhind*, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216. **Mass.**—*Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 321; *Edgerly v. Whalan*, 106 Mass. 307; *Bell v. Josselyn*, 3 Gray 309, 63 Am. Dec. 741. **Mich.**—*Casarella v. National Grocer Co.*, 151 Mich. 15, 114 N. W. 857; *Chapel v. Smith*, 80 Mich. 100, 45 N. W. 69. **Minn.**—*Hedin v. Minneapolis Medical & Surgical Inst.*, 62 Minn. 146, 64 N. W. 153, 54 Am. St. Rep. 628, 35 L. R. A. 417. **Mo.**—*Oreutt v. Century Bldg. Co.*, 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929; *Harriman v. Stowe*, 57 Mo. 93. **N. H.** *Page v. Parker*, 40 N. H. 47. **N. J.** *Bocchino v. State*, 67 N. J. L. 467, 51 Atl. 487; *Horner v. Lawrence*, 37 N. J. L. 46. **N. Y.**—*Cobb v. Dows*, 10 N. Y. 335; *Schmidt v. Dietericht*, 1 Edw. Ch. 119; *Suydam v. Moore*, 8 Barb. 358; *Coon v. Froment*, 25 App. Div. 250, 49 N. Y. Supp. 305; *Williams v. Merle*, 11 Wend. 80, 25 Am. Dec. 604. **Ohio.**—*Clark v. Fry*, 8 Ohio

St. 358, 72 Am. Dec. 590; *Henshaw v. Noble*, 7 Ohio St. 226. **Pa.**—*Hindson v. Markle*, 171 Pa. 138, 33 Atl. 74; *New York & W. Printing Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338. **Tenn.**—*Erwin v. Davenport*, 9 Heisk. 44; *Roberts v. State*, 7 Coldw. 359. **Tex.**—*Texas & P. R. Co. v. Eastin*, 100 Tex. 556, 102 S. W. 105; *Labadie v. Hawley*, 61 Tex. 177, 48 Am. Rep. 278; *Triplett v. Morris*, 18 Tex. Civ. App. 50, 44 S. W. 684. **Wash.** *Lough v. John Davis & Co.*, 35 Wash. 449, 77 Pac. 733. **Wis.**—*Greenberg v. Whitecomb Lumber Co.*, 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439. **Eng.**—*Lane v. Cotton*, 12 Mod. 472, 88 Eng. Reprint 1458; *Pearson v. Graham*, 6 Ad. & El. 899, 33 E. C. L. 468, 2 N. & P. 636, W. W. & D. 691, 7 L. J. Q. B. 247, 112 Eng. Reprint 344.

84. *Many v. Beekman Iron Co.*, 9 Paige (N. Y.) 188; *Vermilyea v. Fulton Bank*, 1 Paige (N. Y.) 37; *Fulton Bank v. Sharon Canal Co.*, 1 Paige (N. Y.) 219; *Le Texier v. Anspach*, 15 Ves. Jr. 159, 33 Eng. Reprint 714; *Dummer v. Chippenham Corp.*, 14 Ves. Jr. 245, 249, 33 Eng. Reprint 515; *Fenton v. Hughes*, 7 Ves. Jr. 287, 32 Eng. Reprint 117; *Wych v. Meal*, 3 P. Wms. 311, 24 Eng. Reprint 1078.

Discovery generally, see 7 STANDARD PROC. 498.

85. See 5 STANDARD PROC. 605, et seq.

86. U. S.—*Ford v. Williams*, 21 How. 287, 16 L. ed. 36; *Prichard v. Budd*, 76 Fed. 710, 22 C. C. A. 504, 42 U. S. App. 186; *Moore v. Sun Printing & Pub. Assn.*, 101 Fed. 591, 41 C. C. A. 506; *Pope v. Meadow Spring Distilling Co.*, 20 Fed. 35. **Ark.**—*Bryant Lumber Co. v. Crist*, 87 Ark. 434, 112 S. W. 965. **Cal.**—*Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681, 46 Pac. 738; *Dashaway Assn. v. Rogers*, 79 Cal. 211, 21

the principal or the agent, or may join them both;⁸⁷ if both be sued the plaintiff will be required, before judgment, to elect which he will

- Pac. 742; *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260. **Colo.** *McIntosh-Huntington Co. v. Rice*, 13 Colo. App. 393, 58 Pac. 358. **Conn.** *J. B. Owens Pottery Co. v. Turnbull Co.*, 75 Conn. 628, 54 Atl. 1122; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Jones v. Aetna Ins. Co.*, 14 Conn. 501. **Ga.**—*Baldwin v. Garrett*, 111 Ga. 876, 36 S. E. 966; *Allison v. Sutlive*, 99 Ga. 151, 25 S. E. 11; *Simpson v. Patapasco Guano Co.*, 99 Ga. 168, 25 S. E. 94. **Haw.**—*Matter of Levinho*, 11 Hawaii 110. **Ill.**—*Walsh v. Murphy*, 167 Ill. 228, 47 N. E. 354; *West Chicago St. R. Co. v. Morrison*, *Adams & Allen Co.*, 160 Ill. 288, 43 N. E. 393; *Fishback v. Brown*, 16 Ill. 74; *Koch v. Willi*, 63 Ill. 144. **Ind.** *Tomlinson v. Collett*, 3 Blackf. 436. **Ia.** *Lull v. Anamosa Nat. Bank*, 110 Iowa 537, 81 N. W. 784; *Steele-Smith Grocery Co. v. Potthast*, 109 Iowa 413, 80 N. W. 517. **Kan.**—*New York Life Ins. Co. v. Martindale*, 75 Kan. 142, 88 Pac. 559, 121 Am. St. Rep. 362, 12 Ann. Cas. 677, 21 L. R. A. (N. S.) 1045; *Fowle v. Outcalt*, 64 Kan. 352, 67 Pac. 889; *Edwards v. Gildemeister*, 61 Kan. 141, 59 Pac. 259; *Freund v. Hixon*, 6 Kan. App. 919, 49 Pac. 640. **Ky.**—*Wilson v. Thompson*, 1 Mete. 123, 126; *Ware v. Long*, 24 Ky. L. Rep. 696, 69 S. W. 797; *Henry Vogt Mach. Co. v. Lingenfelter*, 23 Ky. L. Rep. 38, 62 S. W. 499. **La.**—*Brewster v. Saul*, 8 La. 296; *Hyde v. Wolf*, 4 La. 234, 23 Am. Dec. 484. **Me.**—*Upton v. Gray*, 2 Greenl. 373; *Maxey Mfg. Co. v. Burnham*, 89 Me. 538, 36 Atl. 1003, 56 Am. St. Rep. 436. **Md.**—*New York County Bank v. Stein*, 24 Md. 447; *Mayhew v. Graham*, 4 Gill 339; *Henderson v. Mayhew*, 2 Gill 393, 41 Am. Dec. 434. **Mass.**—*Raymond v. Crown & Eagle Mills*, 2 Mete. 319; *Eastern R. Co. v. Benedict*, 5 Gray 561, 66 Am. Dec. 384; *Huntington v. Knox*, 7 Cush. 371; *Lerned v. Johns*, 9 Allen 419. **Mich.**—*Schweyer v. Jones*, 152 Mich. 241, 115 N. W. 974; *Hillman v. Hulett*, 149 Mich. 289, 112 N. W. 918; *Frohlich v. Carroll*, 127 Mich. 561, 86 N. W. 1034. **Minn.**—*Lindquist v. Dickson*, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 729, 8 Ann. Cas. 1024; *J. B. Streeter, Jr., Co. v. Janu*, 90 Minn. 393, 96 N. W. 1128; *Wm. Lindeke Land Co. v. Levy*, 76 Minn. 364, 79 N. W. 314. **Miss.**—*Simmons Hardware Co. v. Todd*, 79 Miss. 163, 29 So. 851. **Mo.**—*Weber v. Collins*, 139 Mo. 501, 41 S. W. 249; *Richardson, Mellier & Co. v. Farmer*, 36 Mo. 35, 88 Am. Dec. 129; *Higgins v. Dellinger*, 22 Mo. 397. **Neb.**—*Jones v. Wattles*, 66 Neb. 533, 92 N. W. 765; *Lamb v. Thompson*, 31 Neb. 448, 48 N. W. 58. **N. H.**—*Chandler v. Coe*, 54 N. H. 561. **N. J.**—*Greenberg v. Palmieri*, 71 N. J. L. 83, 58 Atl. 297; *Yates v. Repetto*, 65 N. J. L. 294, 47 Atl. 632; *Elliott v. Bodine*, 59 N. J. L. 567, 36 Atl. 1033. **N. Y.**—*Taintor v. Prendergast*, 3 Hill 72, 38 Am. Dec. 618; *Duvall v. Wood*, 3 Lans. 489; *Spencer v. Field*, 10 Wend. 87; *Beebee v. Robert*, 12 Wend. 413, 27 Am. Dec. 132. **N. C.**—*Rounsaville v. North Carolina Home Fire Ins. Co.*, 138 N. C. 191, 50 S. E. 619. **N. D.**—*Patrick & Co. v. Grand Forks Mercantile Co.*, 13 N. D. 12, 99 N. W. 55. **Ohio.**—*Harper v. Tiffin Nat. Bank*, 54 Ohio St. 425, 44 N. E. 97. **Ore.**—*Du Bois v. Perkins*, 21 Ore. 189, 27 Pac. 1044. **Pa.**—*Hubbard v. Ten Brook*, 124 Pa. 291, 16 Atl. 817, 10 Am. St. Rep. 585, 2 L. R. A. 823; *McKinney v. Stephens*, 17 Pa. Super. 125; *Ruane v. Murray*, 26 Pa. Super. 187; *Rice v. Fidelity & Casualty Co.*, 1 Laek. Leg. N. 111. **S. C.** *Bacon v. Sondley*, 3 Strobb. L. 542, 51 Am. Dec. 646; *Macon Episcopal Church v. Wiley*, 2 Hill Ch. 584, 30 Am. Dec. 386. **S. D.**—*Garvin v. Pettee*, 15 S. D. 266, 88 N. W. 573. **Tex.** *Sessums v. Henry*, 38 Tex. 37; *Sanger v. Warren* (Tex. Civ. App.), 40 S. W. 840; *Pittsburgh Plate Glass Co. v. Roquemore* (Tex. Civ. App.), 88 S. W. 449. **Vt.**—*Coverly v. Braynard*, 28 Vt. 738. **Wash.**—*Belt v. Washington Water Power Co.*, 24 Wash. 387, 64 Pac. 525; *Harper v. Sinclair*, 7 Wash. 372, 35 Pac. 61. **W. Va.**—*Poole & Co. v. Rice*, 9 W. Va. 73. **Eng.**—*Gaskell v. Gosling*, 1 Q. B. (1896) 669, 74 L. T. N. S. 674; *Smethurst v. Mitchell*, 1 El. & El. 622, 28 L. J. Q. B. 241, 102 E. C. L. 622, 5 Jur. N. S. 978, 7 Wkly. Rep. 226, 120 Eng. Reprint 1043; *Browning v. Provincial Ins. Co.*, 28 L. T. N. S. 21, 21 Wkly. Rep. 587, L. R. 5 P. C. 263.

87. **Ill.**—*Mussenden v. Raiffe*, 131

hold.⁸⁸ The fact that the contract is required by the statute of frauds to be in writing, does not affect the general rule,⁸⁹ but where the agent has in his own name indorsed or signed a negotiable instrument,⁹⁰ or, in some states, where the contract entered into by the

Ill. App. 456. **Ky.**—Violett v. Powell's Admr., 10 B. Mon. 347, 52 Am. Dec. 548. **Mass.**—See Weil v. Raymond, 142 Mass. 206, 7 N. E. 860. **Minn.**—Gay v. Kelley, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742. **Mo.** Sessions v. Block, 40 Mo. App. 569. **N. Y.**—Tew v. Wolfsohn, 38 Misc. 54, 76 N. Y. Supp. 919 (*affirmed*, 77 App. Div. 454, 79 N. Y. Supp. 286, 33 Civ. Proc. 278); Matlage v. Poole, 15 Hun 556. See also McLean v. Sexton, 44 App. Div. 520, 60 N. Y. Supp. 871. **Pa.**—Lancaster v. Knickerbocker Ice Co., 153 Pa. 427, 26 Atl. 251. **S. C.** Yoang v. Garlington, 31 S. C. 290, 9 S. E. 960. **Tex.**—Pittsburg Plate Glass Co. v. Roquemore (Tex. Civ. App.), 88 S. W. 449; Ash v. Beck (Tex. Civ. App.), 68 S. W. 53.

But see Belt v. Washington Water Power Co., 24 Wash. 387, 64 Pac. 525.

88. **Ill.**—Mussenden v. Raiffe, 131 Ill. App. 456. **Minn.**—Gay v. Kelley, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742, will be required to elect at close of evidence, not at commencement of trial. **Mo.**—Sessions v. Block, 40 Mo. App. 569. **N. Y.** Tew v. Wolfsohn, 38 Misc. 54, 76 N. Y. Supp. 919 (*affirmed*, 77 App. Div. 454, 79 N. Y. Supp. 286, 33 Civ. Proc. 278); Matlage v. Poole, 15 Hun 556. **Tex.**—Pittsburg Plate Glass Co. v. Roquemore (Tex. Civ. App.), 88 S. W. 449.

[a] Entering judgment against agent upon his default precludes further action against the undisclosed principal, even though the judgment against the agent is subsequently set aside. Cross & Co. v. Matthews, 91 L. T. N. S. 500.

89. **U. S.**—Ford v. Williams, 21 How. 287, 16 L. ed. 36; Exchange Bank v. Hubbard, 62 Fed. 112, 10 C. C. A. 295. **Ill.**—Daugherty v. Heckard, 189 Ill. 239, 59 N. E. 569. **Kan.**—Mertz v. Hubbard, 75 Kan. 1, 88 Pac. 529, 121 Am. St. Rep. 352, 8 L. R. A. (N. S.) 733, 12 Ann. Cas. 485; Butler v. Kaulback, 8 Kan. 668. **Mass.**—Hunter v. Giddings, 97 Mass. 41, 93 Am. Dec. 54; Eastern R. Co. v. Benedict, 5 Gray 561, 66 Am. Dec. 384; Huntington v. Knox, 7 Cush. 371; Lerner v. Johns,

9 Allen 419. **Minn.**—Wm. Lindeke Land Co. v. Levy, 76 Minn. 364, 79 N. W. 314. **Mo.**—Weber v. Collins, 139 Mo. 501, 41 S. W. 249; Haubelt Bros. v. Rea & Page Mill Co., 77 Mo. App. 672. **N. H.**—Chandler v. Coe, 54 N. H. 561. **N. J.**—Borchering v. Katz, 37 N. J. Eq. 150. **N. Y.**—Coleman v. Elmira First Nat. Bank, 53 N. Y. 388, 394; Dykers v. Townsend, 24 N. Y. 57; Barry v. Ransom, 12 N. Y. 462; Gates v. Brower, 9 N. Y. 205, 59 Am. Dec. 530, Seld. Notes 181. **Pa.**—Brodhead v. Reinbold, 200 Pa. 618, 50 Atl. 229, 86 Am. St. Rep. 735; Hubbert v. Borden, 6 Whart. 79. **Va.**—Waddill v. Sebree, 88 Vt. 1012, 14 S. E. 849, 29 Am. St. Rep. 766. **Eng.**—Higgins v. Senior, 8 M. & W. 834, 11 L. J. Ex. 199; Trueman v. Loder, 11 Ad. & El. 589, 9 L. J. Q. B. 165, 39 E. C. L. 319, 3 P. & D. 567, 113 Eng. Reprint 539.

90. **U. S.**—Cragin v. Lovell, 109 U. S. 198, 3 Sup. Ct. 132, 27 L. ed. 903; Dessau v. Bours, 1 McAll. 20, 7 Fed. Cas. No. 3,825. **Colo.**—Heaton v. Myers, 4 Colo. 59. **Conn.**—Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225. **Ga.** Graham v. Campbell, 56 Ga. 258. See also Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665. **Ind.** Kenyon v. Williams, 19 Ind. 44. **Ia.** Thurston v. Moura, 1 G. Gr. 231. **Kan.**—New York Life Ins. Co. v. Martindale, 75 Kan. 142, 88 Pac. 559, 121 Am. St. Rep. 362, 21 L. R. A. (N. S.) 1045, 12 Ann. Cas. 677. **Mass.**—Slawson v. Loring, 5 Allen 340, 81 Am. Dec. 750; Bank of British North America v. Hooper, 5 Gray 567, 66 Am. Dec. 396. **Neb.**—Lewis v. First Nat. Bank, 1 Neb. (Unof.) 177, 95 N. W. 355. **N. H.**—Chandler v. Coe, 54 N. H. 561. **N. Y.**—Ranger v. Thalman, 84 App. Div. 341, 82 N. Y. Supp. 846; Manufacturers' & Traders' Bank v. Love, 13 App. Div. 561, 43 N. Y. Supp. 812; Cortland Wagon Co. v. Lynch, 82 Hun 173, 31 N. Y. Supp. 325, 63 N. Y. St. 774. **Ohio.**—Anderton v. Shoup, 17 Ohio St. 125; Collins v. Buckeye State Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612. **R. I.**—Manufacturers' & Merchants' Bank v. Follett, 11 R. I. 92, 23 Am. Rep. 418. **Tex.**

agent is under seal,⁹¹ the undisclosed principal cannot be sued upon it.

5. To Recover Money Paid to Agent.—An action by a third person to recover money paid to an agent may be brought against the agent so long as he has not paid the money to his principal or done some act equivalent thereto,⁹² but when the agent has in good faith paid the money over to his principal, or done some equivalent act, an action to recover the amount must be brought against the principal.⁹³

- Sanger v. Warren, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913; McGregor v. Hudson (Tex. Civ. App.), 30 S. W. 489. **Vt.**—Arnold v. Sprague, 34 Vt. 402. **Va.**—Early v. Wilkinson, 9 Gratt. (50 Va.) 68. **W. Va.**—Rand v. Hale, 3 W. Va. 495, 100 Am. Dec. 761. **Eng.**—Siffkin v. Walker, 3 Campb. 308, 11 R. R. 715; Nicholson v. Ricketts, 2 El. & El. 497, 105 E. C. L. 496, 29 L. J. Q. B. 55, 1 L. T. N. S. 544, 121 Eng. Reprint 187.
- 91. U. S.**—Badger Silver Min. Co. v. Drake, 88 Fed. 48, 31 C. C. A. 378, 58 U. S. App. 129. **Colo.**—McIntosh-Huntington Co. v. Rice, 13 Colo. App. 393, 58 Pac. 358. **Ga.**—Lenney v. Finley, 118 Ga. 718, 45 S. E. 593; Hayes v. Atlanta, 1 Ga. App. 25, 57 S. E. 1087. **Ill.**—Walsh v. Murphy, 167 Ill. 228, 47 N. E. 354. **Mass.**—First Baptist Church of Sharon v. Harper, 191 Mass. 196, 77 N. E. 778. **Minn.**—J. B. Streeter, Jr., Co. v. Janu, 90 Minn. 393, 96 N. W. 1128. **N. J.**—Borchering v. Katz, 37 N. J. Eq. 150; Beck v. Eagle Brewery, 30 Atl. 1100. **N. Y.**—Henrius v. Englert, 137 N. Y. 488, 33 N. E. 550. **Pa.**—See Hopkins v. Mehaffy, 11 Serg. & R. 126. **R. I.**—Providence v. Miller, 11 R. I. 272, 23 Am. Rep. 453. **Tex.**—Sanger v. Warren, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913; Sanger v. Warren (Tex. Civ. App.), 40 S. W. 840.
- 92. U. S.**—Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373; Penhallow v. Doane, 3 Dall. 87, 19 Fed. Cas. No. 10,925, 1 L. ed. 521; Wallis v. Shelly, 30 Fed. 747. **Ala.**—Eufaula Grocery Co. v. Missouri Nat. Bank, 118 Ala. 408, 24 So. 389; Upchurch v. Norsworthy, 15 Ala. 705. **Del.**—Griffith v. Johnson, 2 Harr. 177. **Ga.**—McDonald v. Napier, 14 Ga. 89; Law v. Nunn, 3 Ga. 90. **Ill.**—Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, 74 Am. St. Rep. 180; Smith v. Binder, 75 Ill. 492. **Ky.**—Pool v. Adkisson, 1 Dana 110. **Mass.**—Cabot v. Shaw, 148 Mass. 459, 20 N. E. 99; Jeffs v. York, 10 Cush. 392; Garland v. Salem Bank, 9 Mass. 408, 6 Am. Dec. 86. **Mich.**—Granger v. Hathaway, 17 Mich. 500. **Minn.**—Shepard v. Sherin, 43 Minn. 382, 45 N. W. 718. **Miss.**—O'Connor v. Clifton, 60 Miss. 349. **Mo.**—Martin v. Allen, 125 Mo. App. 636, 103 S. W. 138. **N. J.**—Hauenstein v. Ruh, 73 N. J. L. 98, 62 Atl. 184. **N. Y.**—Mowatt v. McLelan, 1 Wend. 173; La Farge v. Kneeland, 7 Cow. 456. **Tenn.**—Embry v. Galbreath, 110 Tenn. 297, 75 S. W. 1016; Metcalf v. Denson, 4 Baxt. 565; Galbraith v. Gaines, 10 Lea 568. **Vt.**—Gray v. Otis, 11 Vt. 628. **Wash.**—Wilson v. Wold, 21 Wash. 398, 58 Pac. 223, 75 Am. St. Rep. 846. **Eng.**—Cox v. Prentice, 3 M. & S. 344, 105 Eng. Reprint 641; Sadler v. Evans, 4 Burr. 1984, Bull. 133, 98 Eng. Reprint 34; Kleinwort v. Dunlop Rubber Co., 97 L. T. N. S. 263.
- 93. U. S.**—United States Bank v. Washington Bank, 6 Pet. 8, 8 L. ed. 299; United States v. Pinover, 3 Fed. 305. **Ala.**—Gulf City Const. Co. v. Louisville & N. R. Co., 121 Ala. 621, 25 So. 579. **Ga.**—Law v. Nunn, 3 Ga. 90. **Ill.**—Shipherd v. Underwood, 55 Ill. 475; Gray v. Callender, 81 Ill. App. 547. **Mass.**—Cabot v. Shaw, 148 Mass. 459, 20 N. E. 99; Appleton Bank v. McGilvray, 4 Gray 518, 64 Am. Dec. 92. **Mich.**—Miller v. Seeley, 90 Mich. 218, 51 N. W. 366; Granger v. Hathaway, 17 Mich. 500. **Mo.**—Winningham v. Fancher, 52 Mo. App. 458; Crippen, Lawrence & Co. v. American Nat. Bank, 51 Mo. App. 508. **Neb.**—Huffman v. Newman, 55 Neb. 713, 76 N. W. 409. **N. Y.**—National City Bank v. Westcott, 118 N. Y. 468, 23 N. E. 900, 16 Am. St. Rep. 771; Colvin v. Holbrook, 2 N. Y. 126. **Pa.**—Hobensack v. Hallman, 17 Pa. 154; Gable v. Crane, 27 Pa. Super. 56. **R. I.**—Phetteplace v. Bucklin, 18 R. I. 297, 27 Atl. 211. **Wash.**—Tripple v. Littlefield, 46 Wash. 156, 89 Pac. 493. **W. Va.**—Smith v. Bond, 25 W. Va. 387. **Eng.**—Stephens v. Badcock, 3 B. & Ad. 354,

6. In Actions Ex Delicto.—a. *Torts Generally.*—Where both principal and agent engage in the commission of a tort they may be sued either severally or jointly as in the case of actions against any joint tortfeasors;⁹⁴ and even where the act of the agent is not participated in by the principal, if it is done in the course of the agent's employment, generally the principal, as well as the agent, may be made a party defendant,⁹⁵ though some authorities hold that they can-

23 E. C. L. 160, 1 L. J. K. B. 75, 110 Eng. Reprint 133.

And see the cases cited under the previous note.

94. U. S.—Washington Gaslight Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. ed. 543. **Ala.**—Luling v. Shepherd, 112 Ala. 588, 21 So. 352; Perminter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177. **Colo.**—Miller v. Staples, 3 Colo. App. 93, 32 Pac. 81. **Dak.** Nichols v. Bruns, 5 Dak. 28, 37 N. W. 752. **Fla.**—Wheeler v. Baars, 33 Fla. 696, 15 So. 584. **Ga.**—Menken v. Atlanta, 78 Ga. 668, 2 S. E. 559. **Ill.** Walker v. Haughey, 25 Ill. App. 135; Dally v. Young, 3 Ill. App. 39. **Ind.** Shearer v. Evans, 89 Ind. 400; Berghoff v. McDonald, 87 Ind. 549; McNaughton v. Elkhart, 85 Ind. 384. **Ia.**—Byford v. Girtton, 90 Iowa 661, 57 N. W. 588. **Ky.**—Pool v. Adkisson, 1 Dana 110. **Md.**—Hambleton v. Rhind, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216. **Mass.**—Bell v. Josselyn, 3 Gray 309, 63 Am. Dec. 741. **Mich.**—Weber v. Weber, 47 Mich. 569, 11 N. W. 389. **N. H.**—Page v. Parker, 40 N. H. 47. **N. J.**—Horne v. Lawrence, 37 N. J. L. 46; Newman v. Fowler, 37 N. J. L. 89. **N. Y.**—Bruff v. Mali, 36 N. Y. 200, 34 How. Pr. 338; Phelps v. Wait, 30 N. Y. 78; Hecker v. De Groot, 15 How. Pr. 314. **Ohio.**—Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590. **Wis.** Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439. **Eng.**—Swift v. Winterbotham, L. R. 8 Q. B. Cases 244; Petrie v. Lamont, 1 C. & M. 93, 41 E. C. L. 57.

See the titles "Master and Servant;" "Parties."

[a] "In torts the relation of principal and agent does not exist; they are all wrongdoers and may be sued jointly or separately." Berghoff v. McDonald, 87 Ind. 549.

[b] **Forcible entry and detainer** committed by agent, though committed by him for his principal, renders agent

liable in action. Luling v. Shepherd, 112 Ala. 588, 21 So. 352.

[c] **Defense that agent's act was not authorized or ratified** to be availed of must be pleaded by the principal. Byford v. Girtton, 90 Iowa 661, 57 N. W. 588.

95. Washington Gas Light Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. ed. 543; Philadelphia & R. R. Co. v. Derby, 14 How. 468, 480, 14 L. ed. 502, 507; Harris v. Louisville, N. O. & T. R. Co., 35 Fed. 116; Heinrich v. Pullman Palace-Car Co., 20 Fed. 100. **Ala.**—Robinson & Co. v. Greene, 148 Ala. 434, 43 So. 797. **Ark.** St. Louis Southwestern R. Co. v. Furlow, 81 Ark. 496, 99 S. W. 689; St. Louis, I. M. & S. R. Co. v. Grant, 75 Ark. 579, 88 S. W. 580, 1133; Duggins v. Watson, 15 Ark. 118, 60 Am. Dec. 560. **Cal.**—Turner v. North Beach & M. R. Co., 34 Cal. 594; Castroville Co-Operative Creamery Co. v. Col, 6 Cal. App. 533, 92 Pac. 648. **Conn.** Thames Steamboat Co. v. Housatonic R. Co., 24 Conn. 40, 63 Am. Dec. 154; Church v. Mansfield, 20 Conn. 284. **D. C.**—Pickford v. Talbot, 28 App. Cas. 498. **Ga.**—Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 800, 15 S. E. 831, 17 L. R. A. 322; Crockett Bros. v. Sibley, 3 Ga. App. 554, 60 S. E. 326; Century Bldg. Co. v. Lewkowicz, 1 Ga. App. 636, 57 S. E. 1036. **Ill.** Oxford v. Peter, 28 Ill. 434; Chicago, St. P. & Fond Du Lac R. Co. v. McCarthy, 20 Ill. 385, 71 Am. Dec. 285; Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562; Moir v. Hopkins, 16 Ill. 313, 63 Am. Dec. 312; Armstrong v. Cooley, 10 Ill. 509. **Ind.** Pittsburgh, C. & St. L. Ry. Co. v. Kirk, 102 Ind. 399, 1 N. E. 849, 52 Am. Rep. 675; Grand Rapids & I. R. Co. v. King, 41 Ind. App. 701, 83 N. E. 778; Ogle v. Hudson, 30 Ind. App. 539, 66 N. E. 702. **Ia.**—Rhomberg v. Avenarius, 135 Iowa 176, 112 N. W. 548. **Kan.**—Clark v. Folcroft, 67 Kan. 446, 73 Pac. 86. **Ky.**—University of Louisville v. Hammock, 127 Ky. 564, 106

not be joined in the same action under such circumstances, the principal being liable only because of the doctrine of respondeat superior.⁹⁶

b. *Action Based on Fraud.*—If the action be based on fraud in which the agent participated, the agent is properly made a defendant where costs may be recovered against him if no other relief.⁹⁷

C. *AMENDMENTS AS TO PARTIES.*—Whether the principal may be substituted by amendment as the sole party, in place of the agent, is governed by general rules elsewhere treated;⁹⁸ some authorities⁹⁹

S. W. 219, 128 Am. St. Rep. 355, 14 L. R. A. (N. S.) 784; Singer Mfg. Co. v. Stephens, 21 Ky. L. Rep. 946, 53 S. W. 525. **La.**—Luttrell v. Forbes, 13 La. Ann. 609. **Me.**—Stickney v. Munroe, 44 Me. 195. **Md.**—Deck v. Baltimore & O. R. Co., 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399; New England Mut. Life Ins. Co. v. Swain, 100 Md. 558, 60 Atl. 469; Baltimore & Ohio R. Co. v. Blocher, 27 Md. 277. **Mass.**—White v. Apsley Rubber Co., 194 Mass. 97, 80 N. E. 500, 8 L. R. A. (N. S.) 484; Allen v. Fuller, 182 Mass. 202, 65 N. E. 31. **Mich.**—Cleveland v. Newsom, 45 Mich. 62, 7 N. W. 222. **Minn.**—Eggleston v. Advance Thresher Co., 96 Minn. 241, 104 N. W. 891; Crandall v. Boutell, 95 Minn. 114, 103 N. W. 890; Larson v. Fidelity Mut. Life Assn., 71 Minn. 101, 73 N. W. 711. **Miss.**—Rivers v. Yazoo & M. R. Co., 90 Miss. 196, 43 So. 471, 9 L. R. A. (N. S.) 931. **Mo.**—Barree v. Cape Girardeau, 197 Mo. 382, 95 S. W. 330, 114 Am. St. Rep. 763, 6 L. R. A. (N. S.) 1090; Milton v. Missouri Pac. R. Co., 193 Mo. 46, 56, 91 S. W. 949, 4 L. R. A. (N. S.) 282; Garretzen v. Duenkel, 50 Mo. 104, 11 Am. Rep. 405; Canfield v. Chicago, R. I. & P. Ry. Co., 59 Mo. App. 354. **N. Y.**—Fifth Ave. Bank v. Forty-Second St. & G. St. Ferry R. Co., 137 N. Y. 231, 33 N. E. 378, 33 Am. St. Rep. 712, 19 L. R. A. 331; Lee v. Sandy Hill, 40 N. Y. 442; Mali v. Lord, 30 N. Y. 381, 100 Am. Dec. 448; Watson v. Bennett, 12 Barb. 196; Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507. **N. C.**—Jackson v. American Tel. & T. Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; Huntley v. Mathias, 90 N. C. 101, 47 Am. Rep. 516. **Pa.**—Flower v. Pennsylvania R. Co., 69 Pa. 210, 8 Am. Rep. 251; Philadelphia, W. & B. R. Co. v. Brannen, 1 Sad. 369, 2 Atl. 429. **S. C.**—Mitchell v. Leech, 69 S. C. 413, 48 S. E. 290, 104 Am. St. Rep. 811, 66 L. R. A. 723; Hutch-

ison v. Rock Hill Real Estate & L. Co., 65 S. C. 45, 43 S. E. 295; Rucker v. Smoke, 37 S. C. 377, 16 S. E. 40, 34 Am. St. Rep. 758; Reynolds v. Witte, 13 S. C. 5, 36 Am. Rep. 678. **Tex.**—Seffel v. Western Union Tel. Co. (Tex. Civ. App.), 65 S. W. 897. **W. Va.**—McDonald v. Cole, 46 W. Va. 186, 32 S. E. 1033; Hall v. Norfolk & W. R. Co., 44 W. Va. 36, 28 S. E. 754, 67 Am. St. Rep. 757, 41 L. R. A. 669. **Eng.**—Roe v. Birkenhead, etc. R. Co., 21 L. J. Ex. 9, 7 Exch. 36, 6 Railw. Cas. 795; Citizens' Life Assur. Co. v. Brown, 90 L. T. N. S. 739. **Can.**—Graham v. British Canadian Loan, etc. Co., 12 Manitoba 244.

96. See the titles "**Master and Servant**," and "**Parties**," where this matter is more fully treated.

97. **U. S.**—Donovan v. Campion, 85 Fed. 71, 29 C. C. A. 30; Smith v. Green, 37 Fed. 424. **Ark.**—Shaver v. Lawrence, 44 Ark. 225; Gartland v. Nunn, 11 Ark. 720. **Ia.**—Stringfield v. Graff, 22 Iowa 438; Lyon v. Tevis, 8 Iowa 79. **Eng.**—Le Texier v. Anspach, 15 Ves. Jr. 159, 33 Eng. Reprint 714.

98. See the titles "**New Cause of Action or Defense**;" "**Parties**."

99. **Ind.**—Bell v. Corbin, 136 Ind. 269, 36 N. E. 23, holding that where, during the progress of an action, it is discovered that the husband, who is a party defendant to an action, was acting merely as agent for the wife, she may be substituted as defendant in his place, and answers filed by him will stand as the wife's answers without any change of the names or refileing. **N. H.**—Boudreau v. Eastman, 59 N. H. 467, the court saying: "As neither the course nor the result of the trial would have been affected by such an amendmen if it had been made before the trial, it may be made now without a new trial." **Pa.**—Adams v. Edwards, 115 Pa. 211, 8 Atl. 425. But see Campbell v. Wasserman & Bros., 9 Pa. Co. Ct. 331. **Tex.**—Craw-

permit it, but others do not.¹ If the principal was not liable, for the act of the agent sued on, at the time the action was commenced he cannot be added as a party defendant by amendment when he ratifies the act after the action is brought.²

III. PLEADING.—A. DECLARATION OR COMPLAINT.—1. **Declaring on Contract or Act of Agent.**—a. *Generally.*—In an action by or against a principal on a contract or act of the agent, the contract or act may be declared on as being made or done by the principal,³ or as by the principal through the agent.⁴ According to some decisions, where the act is alleged to have been done by the principal through a designated agent, the authority of the agent to do the act in question should be alleged,⁵ and where it is sought to hold the prin-

ford v. Crain, 19 Tex. 145. **Va.** National Bank v. Nolting, 94 Va. 263, 26 S. E. 826.

[a] Where suit by agent of undisclosed principal the pleadings may be amended to substitute the principal as plaintiff, even after trial. Boudreau v. Eastman, 59 N. H. 467.

1. Gill v. Tison, 61 Ga. 161; Tiller v. Spradley, 39 Ga. 35. See also Richmond & D. R. Co. v. Bedell, 88 Ga. 591, 15 S. E. 676; Crescent Furniture Co. v. Raddatz, 28 Mo. App. 210.

2. Burns v. Campbell, 71 Ala. 271.

3. **U. S.**—The Bank of Metropolis v. Guttchlick, 14 Pet. 19, 10 L. ed. 335; Sherman v. Comstock, 2 McLean 19, 21 Fed. Cas. No. 12,764. **Ala.**—McGeever v. Harris, 148 Ala. 503, 41 So. 930. **Ariz.**—Root v. Fay, 5 Ariz. 19, 43 Pac. 527. **Cal.**—Goetz v. Goldbaum, 103 Cal. xvii, 37 Pac. 646; Cochran v. Goodman, 3 Cal. 244. **Fla.**—St. Andrew's Bay Land Co. v. Mitchell, 4 Fla. 192, 54 Am. Dec. 340. **Ill.**—Meers v. Stevens, 106 Ill. 549; Harding v. Parshall, 56 Ill. 219. **Ind.**—Day v. Henry, 104 Ind. 324, 4 N. E. 44; Devol v. Halstead, 16 Ind. 287; Cold v. Laurencebay Lumber Co., 44 Ind. App. 122, 88 N. E. 720. **Ia.**—Call v. Hamilton County, 62 Iowa 448, 17 N. W. 667; Poole v. Hintrager, 60 Iowa 180, 14 N. W. 223. **Mich.**—Regents of Mich. University v. Detroit Young Men's Soc., 13 Mich. 138. **Minn.**—Stees v. Kranz, 32 Minn. 313, 20 N. W. 241; Weide v. Porter, 22 Minn. 429. **Mo.**—Stevin v. Reppy, 46 Mo. 606. **Neb.**—Hare v. Winterer, 1 Neb. Unof. 854, 96 N. W. 179; Johnson County v. Chamberlain Banking House, 74 Neb. 549, 104 N. W. 1061. **N. Y.**—Moore v. McClure, 8 Hun 557; Delafield v. Kinney, 24 Wend. 345. **Ore.**—Kitchen v. Holmes, 42 Ore. 252, 70

Pac. 830. **Tex.**—Lewis v. Alexander, 51 Tex. 578; Baldwin v. Polti, 45 Tex. Civ. App. 638, 101 S. W. 543. **W. Va.**—Black Lick Lumb. Co. v. Camp Const. Co., 63 W. Va. 477, 60 S. E. 409. **Wis.**—Burnham v. Milwaukee, 69 Wis. 379, 34 N. W. 389.

[a] **Fraud of agent** may be pleaded as fraud of the principal. Bennett v. Judson, 21 N. Y. 238.

4. **U. S.**—Childress v. Emory, 8 Wheat. 642, 5 L. ed. 705. **Ala.**—Western Union Tel. Co. v. Garthright, 151 Ala. 413, 44 So. 212; McGeever v. Harris, 148 Ala. 503, 41 So. 930; Montgomery & E. R. Co. v. Trebles, 44 Ala. 255. **Colo.**—Hoosac Min. & Mill. Co. v. Donat, 10 Colo. 529, 16 Pac. 157. **Fla.**—See Duval Inv. Co. v. Stockton, 54 Fla. 296, 45 So. 497. **Ga.**—See Burkhalter v. Perry, 127 Ga. 438, 56 S. E. 631, 119 Am. St. Rep. 343. **Ill.**—Insurance Co. of North America v. McDowell, 50 Ill. 120, 99 Am. Dec. 497; State Board of Education v. Greenebaum & Sons, 39 Ill. 609. **Kan.**—Maier v. Randolph, 33 Kan. 340, 6 Pac. 625. **S. C.**—Long v. Schmidt, 18 S. C. 604. **W. Va.**—Black Lick Lumb. Co. v. Camp Const. Co., 63 W. Va. 477, 60 S. E. 409. **Eng.**—Nicholson v. Croft, 2 Burr. 1188, 97 Eng. Reprint 781.

[a] **Allegation that plaintiff bought of one B. acting as defendant's agent** is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer. Cochran v. Goodman, 3 Cal. 244.

5. See the following: **Ala.**—May v. Kelly, 27 Ala. 497. Also Childress v. Miller, 4 Ala. 447. **Fla.**—Duval Inv. Co. v. Stockton, 54 Fla. 296, 45 So. 497. **Ga.**—Burkhalter v. Perry, 127 Ga. 438, 56 S. E. 631, 119 Am. St.

principal for the acts of a sub-agent, the power of the agent to make the delegation of his authority must be alleged.⁶ If agency is to be alleged it is sufficient to set forth the facts constituting the agency, without an express allegation of agency,⁷ but if the facts alleged show there was no agency a general allegation of agency will be disregarded.⁸

The name of the agent through whom it is alleged the principal acted need not be pleaded,⁹ though it seems the agent must sometimes be identified to a certain extent.¹⁰

b. *On Tort Committed by Agent.*—Following the rule heretofore stated as to the manner of declaring against the principal on contracts executed by an agent,¹¹ in a suit against a principal for a tortious act of his agent the act may generally be alleged to have been done by the principal, or by the principal through his agent.¹² But

Rep. 343. **N. Y.**—Oxford First Nat. Bank *v.* Turner, 24 N. Y. Supp. 793.

But see *Childress v. Emory*, 8 Wheat. (U. S.) 642, 5 L. ed. 705.

[a] **Averment that act done at request of agent of defendant does not amount to averment that act was done at request of defendant.** Wells *v.* Pacific R. R., 35 Mo. 164. See, however, *Slevin v. Reppy*, 46 Mo. 606, that the question of authority in such a case is one of evidence, not of pleading.

[b] **Illustration.**—In declaring against the principal, on a bill accepted by his agent, the agent's authority to accept must be averred; it is not sufficient to allege that he was the agent, and as such agent accepted for the principal. May *v.* Kelly, 27 Ala. 497.

6. **Ala.**—Johnson *v.* Cunningham, 1 Ala. 249. **Ark.**—Kellogg & Co. *v.* Norris, 10 Ark. 18. **Ind.**—Lucas *v.* Rader, 29 Ind. App. 287, 64 N. E. 488. **Tex.** McCormick & Bro. *v.* Bush, 38 Tex. 314.

7. *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189, 5 So. 500.

8. *Everett v. Drew*, 129 Mass. 150.

9. *Todd v. Minneapolis & St. L. Ry. Co.*, 37 Minn. 358, 35 N. W. 5; *Lee v. Minneapolis & St. L. Ry. Co.*, 34 Minn. 225, 25 N. W. 399; *Texas & St. L. Ry. Co. v. Ross & Co.*, 62 Tex. 447; *Fort Worth & R. G. Ry. Co. v. Lindsay*, 11 Tex. Civ. App. 244, 32 S. W. 714.

[a] **Illustration.**—If the petition alleges that the work was done at the request of a defendant railway company, it is sufficient, and need not state evidence of the fact by averring

the name of the agent or servant of the company who contracted for or directed the work. *Texas & St. L. Ry. Co. v. Ross & Co.*, 62 Tex. 447.

10. *Atlanta Ice & Coal Co. v. Reeves*, 136 Ga. 294, 71 S. E. 421, 36 L. R. A. (N. S.) 1112. "Where a corporation is sued for the tortious acts of its agents or servants, it is entitled to such notice as will serve to identify the person in connection with the transaction out of which the cause of action arises. This does not mean that the name of such agent must be given, or the particular designation of his official relation with the company, if the allegations sufficiently show the person intended. The defendant is a domestic corporation, sued in the county of its residence, and is informed that the agent alleged to have given assurance of the dismissal of the suit was that one in charge of its office. This sufficiently identifies the person referred to."

[a]. See *Schellens v. Equitable Life Assur. Soc.*, 32 Hun (N. Y.) 235, that where the plaintiff alleges that a corporation made false representations through its officers and agents, the names of such officers or agents should be indicated.

11. See *supra*, III, A, 1, a.

12. **U. S.**—The Bank of Metropolis *v.* Guttschlick, 14 Pet. 19, 10 L. ed. 335. **Ill.**—Meers *v.* Stevens, 106 Ill. 549. **Ind.**—Day *v.* Henry, 104 Ind. 324, 4 N. E. 44. **N. Y.**—King *v.* Fitch, 2 Abb. Dec. 508, 1 Keyes 432; *People v. Lewis*, 138 App. Div. 673, 122 N. Y. Supp. 1025; *Gaffney v. Colville*, 6 Hill 567. **Eng.**—Mackay *v.* Commercial Bank, 43 L. J. P. C. 31, L. R. 5 P. C.

in an action based on fraud or misrepresentations by the agent of the defendant, it must be alleged that the agent had authority to commit the fraud or make the representations.¹³

c. *Where Agent Ostensible Principal*.—A contract in writing which appears on its face to be the personal contract of the agent should be declared on as being made by the principal through his duly authorized agent.¹⁴

d. *Contract Containing Words Descriptio Personae*.—A contract containing words indicative of agency which are descriptive of the plaintiff, may be declared on in the name of the plaintiff, or if the words of description be added they will be disregarded.¹⁵

394, 30 L. T. N. S. 180; *Wheatley v. Patrick*, 6 L. J. Exch. 193; *Brucker v. Fromont*, 6 L. R. 659, 101 Eng. Reprint 758.

[a] **Names of the agents**, (1) of the corporation who did the act need not be set forth in the complaint. *Todd v. Minneapolis & St. L. Ry. Co.*, 37 Minn. 358, 35 N. W. 5. (2) So where the act is alleged to have been done by the principal through his agent, a motion to make more definite and certain, by supplying the name of the agent, will not lie. *Lee v. Minneapolis & St. L. Ry. Co.*, 34 Minn. 225, 25 N. W. 399.

[b] **Allegations That Defendant Committed Trespass Through Agent**. *Cooper v. Slaughter*, 175 Ala. 211, 57 So. 477.

13. **Ill.**—*Baker v. Williams*, 31 Ill. 499; *Golden v. Knox*, 31 Ill. 498; *Goodrich v. Reynolds, Wilder & Co.*, 31 Ill. 490, 83 Am. Dec. 240. **Minn.**—*Clark v. Lovering*, 37 Minn. 120, 33 N. W. 776; *Davies v. Lyon*, 36 Minn. 427, 31 N. W. 688. **N. J.**—*Kennedy v. McKay*, 43 N. J. L. 288, 39 Am. Rep. 581. **Pa.**—*Keefe v. Sholl*, 181 Pa. 90, 37 Atl. 116; *Pennsylvania Cent. Ins. Co. v. Kniley*, 2 Pearson 229.

[a] **The names of the agents should be disclosed** in the pleading, where a party pleads fraud and misrepresentations by the agent of the payee in obtaining the note sued upon. *American Nat. Bank v. Cruger* (Tex. Civ. App.), 44 S. W. 1057. See also *Talmadge v. Sanitary Security Co.*, 2 App. Div. 43, 37 N. Y. Supp. 177.

14. **U. S.**—*Seeber v. Commercial Nat. Bank*, 77 Fed. 957. **Ala.**—*Chapman v. Lee's Admr.*, 47 Ala. 143. **Neb.**—See *Penn Mut. Life Ins. Co. v. Conoughy*, 54 Neb. 123, 74 N. W. 422. **N. H.**—*Chandler v. Coe*, 54 N. H. 561. **N. Y.**—*Buffalo Catholic Inst. v. Bitter*,

87 N. Y. 250; *Arnold v. Bernard*, 8 Abb. Pr. (N. S.) 116. **S. C.**—*Harris v. Richmond & D. R. Co.*, 31 S. C. 87, 9 S. E. 690; *Tarver v. Garlington*, 27 S. C. 107, 2 S. E. 846, 13 Am. St. Rep. 628. **Wash.**—*Lawson v. Sprague*, 51 Wash. 286, 98 Pac. 737.

[a] **Form of Allegation**.—The plaintiff claims of the defendant three thousand dollars as damages for breach of a contract entered into by and between the plaintiff and the defendant, on or about ———, which was duly executed by the said plaintiff and the said defendant, Susan Lee, by and in the name of John Lee, who was then and there her duly appointed agent, with full and complete authority from her to execute the same for her; by which said contract, etc. *Chapman v. Lee's Admr.*, 47 Ala. 143.

[b] **In Louisiana** where an agent of an undisclosed agency sues on the contract he must, in his petition, set forth the name, surname, and place of residence of the principal. See *Willard v. Lugenbuhl*, 24 La. Ann. 18.

15. **Ala.**—*Castleberry v. Fennell*, 4 Ala. 642. **Cal.**—See *Zeigler v. Wells, Fargo & Co.*, 28 Cal. 263. **Ga.**—*McDuffie v. Irvine*, 91 Ga. 748, 17 S. E. 1028; *Owsley & Son v. Woolhopter*, 14 Ga. 124; *Davies v. Byrne*, 10 Ga. 329. **Md.**—*Graham v. Fahnestock*, 5 Gill 215. **Mass.**—*Buffum v. Chadwick*, 8 Mass. 103. **Neb.**—*Andres v. Kridler*, 47 Neb. 585, 66 N. W. 649. **N. J.**—See *Terhune v. Parrott*, 59 N. J. L. 16, 35 Atl. 4. **Tenn.**—*Whiteside v. Button*, 2 Coldw. 94; *Rutherford v. Mitchell*, Mart. & Y. 261. **Va.**—*Porter v. Nekervis*, 4 Rand. (25 Va.) 359; *McWilliams v. Willis*, 1 Wash. (1 Va.) 199.

[a] **Illustration**.—Where a bill sin-

2. **Actions by Principal Against Agent.** — a. *Generally.* — A complaint against an agent to recover the value of goods sold on credit contrary to instructions need not allege an express contract that the agent should not sell on credit.¹⁶

b. *Allegation of Demand.* — A complaint against an agent to recover money received by him for the principal should allege a demand on the agent,¹⁷ or show facts excusing demand.¹⁸ Where a demand is not necessary none need be alleged.¹⁹ The failure to allege a demand may be cured by the answer, as where it contains a denial of the relation of principal and agent between the parties.²⁰

c. *To Recover Money Received on Sale of Land.* — A complaint to recover from an agent money received from the sale of the principal's land need not allege that the agency contract was in writing, as the action is not on a contract for the sale of land.²¹

d. *For Negligent or Unauthorized Conduct.* — A complaint by a principal for the negligence of his agent should allege the agency,²²

gle is described in the declaration, as made and delivered to the plaintiff, by the name and description of J. D. F. agent for G. A. K. or bearer, the suit is properly brought, and the words agent, etc., will be considered merely as descriptio personae. *Castleberry v. Fennell*, 4 Ala. 642.

16. *Maloney v. Barr*, 27 W. Va. 381, it being sufficient to allege that the sale was made in violation of instructions whereby the goods were lost to the principal.

For form of complaint, see *STANDARD PROC.* 994.

17. *Ind.* — *Heddens v. Younglove*, 46 Ind. 212; *Black v. Hersch*, 18 Ind. 342, 81 Am. Dec. 362; *Jones v. Gregg*, 17 Ind. 84; *Philipps v. Wills*, 2 Ind. 325; *English v. Devarro*, 5 Blackf. 588. *Mont.* — *Judith Inland Transp. Co. v. Williams*, 36 Mont. 25, 91 Pac. 1061; *Anderson v. Hulmne*, 5 Mont. 295, 5 Pac. 865. *N. C.* — *Lamb v. Ward*, 114 N. C. 255, 19 S. E. 230; *Porter v. Grimsley*, 98 N. C. 550, 4 S. E. 529, allegation that defendant has refused to pay over the money "though often requested to do so," is a sufficient allegation of demand.

[a] **Demand Will Not Be Presumed.** *Anderson v. Hulmne*, 5 Mont. 295, 5 Pac. 865.

[b] **Failure to allege demand cannot be reached by general demurrer,** according to *Dever v. Branch*, 18 Tex. 615.

[c] **After verdict the failure to allege demand may be taken advantage**

of by motion in arrest of judgment. *Heddens v. Younglove*, 46 Ind. 212.

18. *Black v. Hersch*, 18 Ind. 342, 81 Am. Dec. 362.

19. *Bunger v. Roddy*, 70 Ind. 26; *Bronnenburg v. Rinker*, 2 Ind. App. 391, 28 N. E. 568.

[a] **Suit Against Administrator.**

"We waive any discussion as to whether a special demand would have been necessary before bringing suit in this case against Farquar, were he still alive. It is sufficient for the purposes of this case to say, that, in our opinion, a demand against his administrator would have been a useless ceremony. All claims against an estate, whether contingent or absolute, have to be filed against it in the proper court, and the filing of such a claim as the one before us constitutes a sufficient demand against the administrator." *Wright v. Jordan*, 71 Ind. 1.

20. *Lamb v. Ward*, 114 N. C. 255, 19 S. E. 230; *Waddell v. Swann*, 91 N. C. 108. And see *Wiley v. Logan*, 95 N. C. 358, where it is said: "A demand is not required where the agency is denied, or a claim set up exceeding the amount collected, or the agent's responsibility is disputed in the answer."

21. *Ferguson v. Ramsey*, 41 Ind. 511.

22. *Aetna Ins. Co. v. Sabine*, 6 McLean 393, 1 Fed. Cas. No. 97.

[a] **Need not be express allegation of agency,** sufficient to show facts constituting the agency. *Shaffer v. Corson*, 141 Pa. 256, 21 Atl. 647.

a negligent failure to perform the duties imposed on him,²³ and the damage to plaintiff.²⁴ Ratification by the principal of an unauthorized act need not be negatived.²⁵

e. *Tort Actions*.—Where the action is in the nature of trover against an agent, allegation of the receipt of the goods from the plaintiff by defendant takes the place of an allegation of ownership.²⁶

f. *Suits for Accounting*.—(I.) *Allegations Generally*.—The general rule that the pleading must specifically aver the grounds upon which the accounting is sought,²⁷ applies to suits for an accounting by a principal against his agent.²⁸ Thus if the ground on which the interference of equity is sought is the fiduciary relationship of the parties,²⁹ or that the account is too complicated for a court of law,³⁰ facts showing the existence of such ground must be set forth. So if the ground be that discovery is sought, the bill must show that a discovery is indispensable to complainant's recovery against defendant.³¹

(II.) *Allegation of Demand*.—Following the general rule,³² a prior demand for an accounting,³³ or facts excusing demand,³⁴ must generally be alleged.

3. *Actions by Agent Against Principal*.³⁵—The declaration or complaint, in an action by an agent against his principal for compensation, or for damages for a breach of contract on the part of the principal, should allege facts showing the contract of employment, and performance thereof on the part of plaintiff,³⁶ and should also

23. Ga.—*Forlaw v. Augusta Naval Stores Co.*, 124 Ga. 261, 52 S. E. 898. Ind.—See *Bronnenburg v. Rinker*, 2 Ind. App. 391, 28 N. E. 568. Kan.—*Maribourg v. McCormick*, 23 Kan. 38; *Welch v. Walker*, 10 Kan. App. 373, 59 Pac. 1096. Ore.—*Pennoyer v. Willis*, 32 Pac. 57. Pa.—*Shaffer v. Corson*, 141 Pa. 256, 21 Atl. 647.

[a] "Express allegation of injury to plaintiff by negligence of defendant not necessary in an action for the negligence of an agent in loaning money intrusted to him when the complaint alleges that the loan was made to an insolvent person and is utterly worthless. *Bronnenburg v. Rinker*, 2 Ind. App. 391, 28 N. E. 568.

24. *Norwich Union F. Ins. Soc. v. McAlister*, 35 New Bruns. 691.

25. *First Nat. Bank of Westhope v. Messner*, 25 N. D. 263, 141 N. W. 999.

26. *Frick v. Freudenthal*, 45 Misc. 348, 90 N. Y. Supp. 344.

27. See 1 STANDARD PROC. 289.

28. Ga.—*Hlges v. Dexter*, 73 Ga. 362. Ind.—*Barton v. Barton*, 52 Ind. App. 319, 100 N. E. 688. N. Y.—*New York Life Ins. Co. v. Hamilton*, 52 Misc. 189, 102 N. Y. Supp. 771. S. C.—*Robson & Son v. Sanders Bros.*, 25

S. C. 116. Tenn.—*Henderson v. Mathews*, 1 Lea 34. Wash.—*Runyan v. Russell*, 3 Wash. 665, 29 Pac. 348.

29. *Conger v. Judson*, 69 App. Div. 121, 74 N. Y. Supp. 504; *New York L. Ins. Co. v. Hamilton*, 52 Misc. 189, 102 N. Y. Supp. 771; *Hemings v. Pugh*, 4 Giffard 456, 9 L. T. N. S. 283, 12 Wkly. Rep. 44, 66 Eng. Reprint 785.

30. Ala.—*Halsted v. Rabb*, 8 Port. 63. Kan.—*Ross v. Noble*, 6 Kan. App. 361, 51 Pac. 792. Wis.—*Rippe v. Stodgill*, 61 Wis. 38, 20 N. W. 645.

Also 1 STANDARD PROC. 289.

31. *Coquillard v. Suydam*, 8 Blackf. (Ind.) 24.

32. See 1 STANDARD PROC. 289.

33. *Bushnell v. McCauley*, 7 Cal. 421; *Haaland v. Miller*, 67 Ore. 346, 136 Pac. 9.

34. *Haaland v. Miller*, 67 Ore. 346, 136 Pac. 9.

35. *Action by broker*, see the title "Factors and Brokers."

36. Ala.—*Union Refining Co. v. Barton*, 77 Ala. 148. Ark.—*Stift v. Sticwel*, 91 Ark. 445, 125 S. W. 1008, 18 Ann. Cas. 597. Ind.—*Wheeler & Wilson Mfg. Co. v. Worrall*, 80 Ind. 297. Ky.—*Tyler v. Woerner*, 158 Ky. 710, 166 S. W. 178. N. Y.—*Chesbrough v. New York & E. R. Co.*, 26 Barb. 9,

allege either a nonpayment of the money demanded or facts from which its nonpayment can be fairly inferred,³⁷ or should allege facts showing a breach of the contract on the part of the defendant.³⁸ Where the declaration is in case, for indemnity for damages recovered against the agent for taking property by the direction of the principal, it must allege that the taking by the agent was without knowledge that it was a trespass,³⁹ and must show a breach on the part of the plaintiff of his duty to indemnify.⁴⁰ The agent in suing for commissions or other compensation may declare on the common counts.⁴¹ Where counts for breach of contract and quantum meruit are joined, an election may be required.⁴²

4. **Amendment.**⁴³—One suing as an agent may be permitted to amend so as to sue in his own right,⁴⁴ and a complaint alleging that a contract, the breach of which is the wrong complained of, was made by the defendant as agent, may be amended by striking out the word "agent."⁴⁵ In an action of replevin, a complaint which alleges that the plaintiff was the agent for the owner of the property and as such entitled to possession, may be amended to allege that plaintiff is the owner.⁴⁶

B. PLEA, ANSWER, AND CROSS-BILL.—1. **Plea or Answer Generally.**—An act of an agent relied on as a defense may be alleged as the act of the principal without naming the agent.⁴⁷ Where an agent declares on the common counts on a promise made to him for the benefit of his principal, the plea of non-assumpsit puts in issue

13 How. Pr. 557; *Rosenthal v. Rubin*, 148 App. Div. 44, 132 N. Y. Supp. 1053; *Mitchell v. Follett Lime Recording Co.*, 142 App. Div. 687, 127 N. Y. Supp. 709; *Gee v. Pendas*, 66 App. Div. 566, 73 N. Y. Supp. 247.

Allegation of contract and performance, see the title "Implied and Express Agreements."

37. *Wheeler & Wilson Mfg. Co. v. Worrall*, 80 Ind. 297; *Gee v. Pendas*, 66 App. Div. 566, 73 N. Y. Supp. 247. See the title "Payment."

38. *Ala.*—*Union Refining Co. v. Barton*, 77 Ala. 148. *Ind.*—*Wheeler & Wilson Mfg. Co. v. Worrall*, 80 Ind. 297. *Neb.*—*Westinghouse Co. v. Tilden*, 56 Neb. 129, 76 N. W. 416.

39. *Moore v. Appleton*, 26 Ala. 633, 638; *Hoggan v. Cahoon*, 26 Utah 444, 73 Pac. 512, 99 Am. St. Rep. 837.

40. *Moore v. Appleton*, 26 Ala. 633; *Hoggan v. Cahoon*, 26 Utah 444, 73 Pac. 512, 99 Am. St. Rep. 837.

41. *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. ed. 819; *Solly v. Weiss*, 8 Taunt. 371, 4 E. C. L. 189, 2 Moore 420, 129 Eng. Reprint 426. See the title "Master and Servant"

42. *Ehrlich v. Aetna Life Ins. Co.*,

88 Mo. 249. See the title "Several Counts."

43. **Amending to substitute principal for agent as party**, see *supra*, II, C.

44. *Cirwitin v. Mills*, 2 Marv (Del.) 232, 43 Atl. 151 (amendment allowed at trial on payment of costs and a continuance to adverse party); *McDuffie v. Irvine*, 91 Ga. 748, 17 S. E. 1028, that a declaration in the name of E. D., "agent for the Georgia Music House," is amendable by striking out the descriptive terms following the plaintiff's name. See also *Hearn v. Gower*, 1 Ga. App. 265, 57 S. E. 916. See generally the title "New Cause of Action or Defense."

45. *Hearn v. Gower*, 1 Ga. App. 265, 57 S. E. 916.

46. *Messenger v. Northeutt*, 26 Colo. 527, 58 Pac. 1090, a new cause of action is not thereby set up and the same evidence might be introduced under either pleading.

47. *Ind.*—*Crowder v. Reed*, 80 Ind. 1. *Ia.*—*Higbee v. Trumbauer*, 112 Iowa 74, 83 N. W. 812. *Minn.*—*Davenport v. Ladd*, 38 Minn. 545, 38 N. W. 622.

the right of the agent to maintain the action in his own name.⁴⁸ An agent who is sued under a contract, executed on behalf of his principal, when he is not personally liable need not specially plead the facts but may rely on a general denial or general issue.⁴⁹ In an action by the agent for his compensation, a defense of gross negligence and unskillfulness on his part may be shown under the general issue.⁵⁰ The invalidity of the agency contract as against public policy need not ordinarily be pleaded.⁵¹

Affirmative defenses must be specially pleaded, thus the defenses that an agent was employed by both parties to a transaction,⁵² that the agency was undisclosed and payment under the contract was made in good faith to the agent as principal,⁵³ or that defendant acted only as agent in the contract sued on,⁵⁴ must be specially pleaded.

2. Issue of Agent's Authority To Execute Contract.—a. *Generally.*—In an action against the principal, a plea of the general issue or general denial will raise the question of the agent's authority to execute the contract sued on.⁵⁵

b. *Denial Under Oath Where Written Instrument Sued on.*—Under statutes requiring a verified denial of written instruments set out in the pleadings,⁵⁶ the authority of the agent to execute a written contract purporting to be made by him and properly pleaded, must be denied under oath.⁵⁷ This rule has been applied where the contract

48. *Nabors v. Shippey*, 15 Ala. 293.

49. *Ind.*—See *Pitman v. Kintner*, 5 Blackf. 250, 33 Am. Dec. 469. *Minn.* *Seone v. Amos*, 38 Minn. 79, 35 N. W. 575. *Mo.*—See *Turner v. Thomas*, 10 Mo. App. 338. *N. Y.*—*Merritt v. Briggs*, 57 N. Y. 651.

50. *Harvey v. Cook*, 24 Ill. App. 134.

51. *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. ed. 539; *Pape v. Standard Oil Co.*, 5 Ohio Cir. Ct. (N. S.) 252. See the title "Illegality, How Pleaded."

52. *Minn.*—*MacFee v. Horan*, 40 Minn. 30, 41 N. W. 239. *Mo.*—*Reese v. Garth*, 36 Mo. App. 641. *Mont.* *Childs v. Ptomey*, 17 Mont. 502, 43 Pac. 714. *Neb.*—*Quick v. Sachsse*, 31 Neb. 312, 47 N. W. 935. *N. Y.*—*Smith v. Soosen*, 24 Misc. 706, 53 N. Y. Supp. 806; *Bonwell v. Auld*, 9 Misc. 65, 29 N. Y. Supp. 15, 59 N. Y. St. 679. *Tex.* *Tres Palacios Rice & Irr. Co. v. Eidman*, 41 Tex. Civ. App. 542, 93 S. W. 698; *Rail v. City Nat. Bank*, 3 Tex. Civ. App. 557, 22 S. W. 865.

53. *Hutchinson Mfg. Co. v. Henry*, 44 Mo. App. 263.

54. *Ala.*—*Drake v. Flewellen & Co.*, 23 Ala. 106; *Harwood's Exrs. v. Humes*, 9 Ala. 659. *Ky.*—*Martin v. Kennedy*, 28 Ky. L. Rep. 966, 90 S. W. 975. *N. Y.*

White v. Skinner, 13 Johns. 307, 7 Am. Dec. 381.

55. *La.*—*Barriere & Co. v. Fortier*, 23 La. Ann. 274. *Mo.*—*Swearingen v. Knox*, 10 Mo. 32; *Wahrendorff v. Whitaker*, 1 Mo. 205. *N. Y.*—See *Finkelstein v. Waldo*, 21 Misc. 460, 47 N. Y. Supp. 590, holding that it may be shown under the general issue that the alleged agent was an independent contractor.

[a] **Averment of want of authority** is not new matter. *Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628.

[b] **Proof of revocation of authority of agent** may be introduced under a general denial and need not be specially pleaded. *Hier v. Grant*, 47 N. Y. 278.

56. See 7 STANDARD PROC. 57.

57. *Ala.*—*Mobile & M. Ry. Co. v. Gilmer*, 85 Ala. 422, 5 So. 138; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Bryan v. Wilson*, 27 Ala. 208. *Colo.*—*Lee v. Grimes*, 4 Colo. 185; *Barrett Min. Co. v. Tappan*, 2 Colo. 124. *Ga.*—*Habersham v. Lehman*, 63 Ga. 380. *Ill.* *Schuyler County v. Missouri Bridge & Iron Co.*, 256 Ill. 348, 100 N. E. 239; *Goodrich v. Reynolds, Wilder & Co.*, 31 Ill. 490, 83 Am. Dec. 240; *McInfire*

is alleged to have been executed by defendant through his agent, though the instrument does not purport on its face to have been so executed.⁵⁸ A denial properly verified under such statutes puts in issue not only the signatures of the agents but their authority in the premises.⁵⁹

3. Cross-Bill or Cross-Complaint.⁶⁰ — In a suit against him for an accounting, an agent may cross-complain for the agreed compensation.⁶¹

C. PLEADING RATIFICATION. — The general rule is that ratification of an act of an agent need not be specially pleaded,⁶² so a reply setting up ratification constitutes no departure from a cause of action against a principal on an act done by an agent,⁶³ and allegations in an answer that plaintiff did not ratify certain conduct of his agent, state no new matter calling for denial by replication but only traverse the general allegation of the complaint of due execution by the plaintiff.⁶⁴ Where the facts stated make an averment of ratification necessary, it may be alleged in terms without stating the facts as to the ratification.⁶⁵

IV. TRIAL. — **A. VARIANCE.** — The general rules as to variance are applied in actions involving principal and agent.⁶⁶ Where the

v. Preston, 10 Ill. 48, 48 Am. Dec. 321; *Delahay v. Clement*, 3 Ill. 575. **Ind.**—*Denny v. North Western Christian University*, 16 Ind. 220; *Nimmon v. Worthington*, 1 Ind. 376, Smith 226. **Ia.**—*Clark v. Des Moines*, 19 Iowa 199, 87 Am. Dec. 423. **La.**—See *Bayly v. Givens*, 29 La. Ann. 546. **Miss.** *Cook v. Martin*, 5 Smed. & M. 379; *Ellis's Admr. v. Planters' Bank*, 7 How. 235. **Mo.**—*Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462. **Tex.** *Brashear v. Martin*, 25 Tex. 202; *Hendon v. Ennis*, 18 Tex. 410; *Reid v. Reid*, 11 Tex. 585.

[a] Rule applies to executors and administrators, and the authority of the agent of a deceased principal can only be raised by a sworn plea as required by statute. *Ellis's Admr. v. Planters' Bank*, 7 How. (Miss.) 235.

58. *Alabama Coal Min. Co. v. Brainard*, 35 Ala. 476.

59. *Central v. Brown*, 2 Colo. 703.

60. See the titles "**Cross-Bill**;" "**Cross-Complaint**."

61. **Ia.**—*Clark v. Lee*, 21 Iowa 274. **N. J.**—*Hutchinson v. Van Voorhis*, 54 N. J. Eq. 439, 35 Atl. 371. **Vt.** *Sowles v. Hall*, 73 Vt. 55, 50 Atl. 550.

62. **Cal.**—*Blood v. La Serena Land, etc. Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Goetz v. Goldbaum*, 103 Cal. xvii, 37 Pac. 646. **Colo.**—*Hoosac Min. & Mill. Co. v. Donat*, 10 Colo. 529, 16 Pac. 157; *Smyth v. Lynch*, 7 Colo. App. 383, 43 Pac. 670. **Conn.**

Plumb v. Curtis, 66 Conn. 154, 33 Atl. 998. **Ia.**—*Higbee v. Trumbauer*, 112 Iowa 74, 83 N. W. 812; *Smith v. Des Moines Nat. Bank*, 107 Iowa 620, 78 N. W. 238; *Long v. Osborn*, 91 Iowa 160, 59 N. W. 14. **Kan.**—*Aultman Thrashing & Engine Co. v. Knoll*, 71 Kan. 109, 79 Pac. 1074. **Mo.**—*McLachlin v. Barker*, 64 Mo. App. 511. **Neb.**—*Johnston v. Milwaukee & W. Inv. Co.*, 49 Neb. 68, 68 N. W. 383 (evidence of ratification admissible under general denial); *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255. **N. Y.**—*Hoyt v. Thompson's Exr.*, 19 N. Y. 207; *Merritt v. Bissell*, 84 Hun 194, 32 N. Y. Supp. 559. **Wis.**—*Hubbard v. Williamstown*, 61 Wis. 397, 400, 21 N. W. 295.

63. *McLachlin v. Barker*, 64 Mo. App. 511. See generally the title "**Departure**."

64. *Hoosac Min. & Mill. Co. v. Donat*, 10 Colo. 529, 16 Pac. 157.

65. *Harding v. Parshall*, 56 Ill. 219.

66. See the title "**Variance and Failure of Proof**."

[a] For examples of material variance, see the following cases: **D. C.** *Hamburg-Bremen Fire Ins. Co. v. Lewis*, 4 App. Cas. 66. **Mass.**—*Parsons v. Phelan*, 134 Mass. 109. **Mich.**—*Peppeler v. Ratz*, 38 Mich. 96. **N. Y.**—*Leland v. Crane*, 1 Wend. 490.

[b] **Immaterial variance**, see the following: **Cal.**—*Sommer v. Smith*, 90

contract is directly charged as that of the principal, evidence that it was made by a duly authorized agent does not constitute variance.⁶⁷ Thus an allegation of payment in an answer is supported by proof of payment to an agent,⁶⁸ and an allegation of notice to a party, by proof of notice to an authorized agent.⁶⁹ However, an allegation that a contract was made by the defendant through an agent is not sustained by proof of a contract in person by the defendant.⁷⁰ An allegation that a contract was made by the defendant is not sustained by proof of a contract showing on its face that defendant was the mere agent of another in its execution.⁷¹

In tort actions, where an injury is alleged to have been caused by the principal, it is supported by evidence that the act was done by the agent.⁷²

B. PROVINCE OF JUDGE AND JURY.—1. Generally.—The general rules as to what questions are for the court and what are for the jury,⁷³ apply to actions affecting the relation of principal and agent. Thus where there is a conflict of the evidence,⁷⁴ or, there being no

Cal. 260, 27 Pac. 208. **Kan.**—Davis v. Lawrence, 52 Kan. 383, 34 Pac. 1051. **Mass.**—Durgin v. Somers, 117 Mass. 55. **Mo.**—Clydesdale Horse Co. v. Bennett, 52 Mo. App. 333. **N. Y.** Poirer v. Fisher, 8 Basw. 258.

67. Ala.—Powell v. Wade, 109 Ala. 95, 19 So. 500, 55 Am. St. Rep. 915. **Cal.**—Bibb v. Bancroft, 81 Cal. xix, 22 Pac. 484. **Ill.**—Meers v. Stevens, 106 Ill. 549. **Ind.**—Fraser v. Spofford, 5 Blackf. 207. **Ia.**—Poole v. Hintrager, 60 Iowa 180, 14 N. W. 223. **Mich.** Mink v. Morrison, 42 Mich. 567, 4 N. W. 302, action on account stated is supported by evidence that the account was stated either with the defendant or with an authorized agent. **Minn.**—Weide v. Porter, 22 Minn. 429. **Mo.**—Slevin v. Reppy, 46 Mo. 606; Clydesdale Horse Co. v. Bennett & Son, 52 Mo. App. 333. **Mont.**—Helena Nat. Bank v. Rocky Mountain Tel. Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628. **N. Y.**—Moore v. McClure, 8 Hun 557. **Eng.**—Mortimer v. McCallan, 6 M. & W. 58, 9 L. J. Ex. 73, 4 Jur. 172; Gladwell v. Steggall, 5 Bing. N. C. 733, 8 Scott 60, 35 E. C. L. 391, 8 L. J. C. P. 361, 132 Eng. Reprint 1283.

[a] **Rule the Same in Equity.** Meers v. Stevens, 106 Ill. 549.

68. Wolcott v. Smith, 15 Gray (Mass.) 537.

69. Colo.—McDermott v. Grimm, 4 Colo. App. 39, 34 Pac. 999. **Minn.** Marshall v. Gilman, 52 Minn. 88, 53 N. W. 811. **S. C.**—Black v. Childs, 14 S. C. 312.

70. Bigler v. Baker, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255.

71. Smelser v. Wayne, etc. Turnpike Co., 82 Ind. 417; Lawton v. Swihart, 10 Ind. 562.

72. Hamilton v. Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977; Draper v. Fitzgerald, 30 Mo. App. 518; Brucker v. Fromont, 6 T. R. 659, 101 Eng. Reprint 758.

73. See the title "Province of Judge and Jury."

74. U. S.—Stoll v. Loving, 112 Fed. 885, 50 C. C. A. 576. **Ala.**—Montgomery Bank v. Plannett's Admr., 37 Ala. 222. **Ark.**—Doss v. Long Prairie Levee Dist., 96 Ark. 451, 132 S. W. 443. **Ga.**—Cave v. Lougee, 134 Ga. 135, 67 S. E. 667; Jackson v. Gallagher, 128 Ga. 321, 57 S. E. 750; Pyle v. Booz, 10 Ga. App. 760, 73 S. E. 1085. **Mass.**—Kinsman v. Kershaw, 119 Mass. 140. **Mich.**—Leshner v. Loudon, 85 Mich. 52, 48 N. W. 278; Saginaw, T. & H. R. Co. v. Chappell, 56 Mich. 190, 22 N. W. 278. **Mo.**—Smith v. Stokes, 76 Mo. 178. **N. J.**—Sandford v. Miller, 80 N. J. L. 411, 78 Atl. 177. **N. Y.** Isaacs v. Andrews, 64 App. Div. 408, 72 N. Y. Supp. 177; Bostwick v. Mutual Redemption Bank, 25 How. Pr. 314. **N. C.**—Latham v. Field, 163 N. C. 356, 79 S. E. 865; Sneed v. Smith, 61 N. C. 595. **N. D.**—Morris v. Bradley, 20 N. D. 646, 128 N. W. 118. **Pa.**—Bergner v. Thompson, 74 Pa. 168. **S. D.**—Sherman v. Port Huron Engine, etc. Co., 13 S. D. 95, 82 N. W. 413. **Tex.** Campbell v. Crowley (Tex. Civ. App.), 56 S. W. 373.

conflict in the evidence, if different conclusions may reasonably be drawn from the evidence,⁷⁵ the question is for the jury. On the other hand if there is no conflict in the evidence and but one conclusion can be reasonably drawn therefrom, the matter is for the court.⁷⁶

2. Existence of Agency.—The existence of the relationship of principal and agent between two parties is usually one of fact for the jury's determination, subject to appropriate instructions.⁷⁷ Where,

75. Mich.—Fontaine Crossing & Electrical Co. v. Rauch, 117 Mich. 401, 75 N. W. 1063. **Neb.**—Thomson v. Shelton, 49 Neb. 644, 68 N. W. 1055; Southern Pine Lumb. Co. v. Fries, 1 Neb. (Unof.) 691, 96 N. W. 71. **N. Y.** Leinkauff v. Lombard, Ayres & Co., 12 App. Div. 302, 42 N. Y. Supp. 391, 76 N. Y. St. 391. **Ore.**—Connell v. McLaughlin, 28 Ore. 230, 42 Pac. 218. **S. D.**—Reid v. Kellogg, 8 S. D. 596, 67 N. W. 687; South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co., 3 S. D. 205, 52 N. W. 866. **Wis.**—Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099.

76. Ala.—McClung's Exrs. v. Spotswood, 19 Ala. 165. **Colo.**—Lester v. Snyder, 12 Colo. App. 351, 55 Pac. 613. **Ill.**—Halladay v. Underwood, 90 Ill. App. 130; St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co., 74 Ill. App. 619. **Ind.**—Michigan Mut. Life Ins. Co. v. Thompson, 44 Ind. App. 180, 86 N. E. 503. **Ky.**—German Ins. Co. v. Goodfriend, 30 Ky. L. Rep. 218, 97 S. W. 1098; Hoskins v. Morton, 25 Ky. L. Rep. 1089, 77 S. W. 195. **La.**—Mouton v. Thibodeaux, 16 La. 131. **Mich.**—Ripley v. Case, 86 Mich. 261, 49 N. W. 46. **Minn.**—State v. Fellows, 98 Minn. 179, 107 N. W. 542, 108 N. W. 825; Tarbox v. Cruzen, 68 Minn. 44, 70 N. W. 860. **Miss.**—Holcomb v. McCutchen, 30 So. 754. **N. J.** Ryle v. Manchester Bldg. & Loan Assn., 74 N. J. L. 840, 67 Atl. 87; Belcher v. Manchester Bldg. & Loan Assn., 74 N. J. L. 833, 67 Atl. 399. **N. Y.** Franklin Bank Note Co. v. Mackey, 158 N. Y. 140, 52 N. E. 737; Claflin v. Lenheim, 66 N. Y. 301; Leinkauff v. Lombard, Ayres & Co., 12 App. Div. 302, 42 N. Y. Supp. 391, 76 N. Y. St. 391. **N. C.**—Covington v. Newberger, 99 N. C. 523, 6 S. E. 205. **Ore.** Simonds v. Wrightman, 36 Ore. 120, 58 Pac. 1100. **Pa.**—Elliott v. Wanamaker, 155 Pa. 67, 25 Atl. 826; Fee v. Adams Express Co., 38 Pa. Super. 83; Langenheim v. Anschutz-Bradberry Co., 2 Pa. Super. 285. **Tenn.**

Wileox v. Hines, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761. **Utah.** McCornick v. Queen of Sheba Gold Min. & Mill. Co., 23 Utah 71, 63 Pac. 820. **Can.**—Dominion Coal Co. v. Kingwell Steamship Co., 33 Nova Scotia 499.

77. U. S.—Quinlan & Co. v. Holbrook, 162 Fed. 272, 89 C. C. A. 252; New England Mtg. Security Co. v. Gay, 33 Fed. 636. **Ala.**—Merchants' Bank v. Acme Lumber & Mfg. Co., 170 Ala. 443, 54 So. 58; Mobile, J. & K. C. R. Co. v. Odom, 169 Ala. 507, 53 So. 765; South & North Alabama R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578. **Ark.**—Short & Co. v. Johnson, 89 Ark. 279, 116 S. W. 658; Vahlberg v. Keaton, 51 Ark. 534, 11 S. W. 878, 14 Am. St. Rep. 73, 4 L. R. A. 462. **Colo.**—Schoelkopf v. Leonard, 8 Colo. 159, 6 Pac. 209. **Conn.**—Bloch v. De Lucia, 80 Conn. 716, 66 Atl. 769. **Del.**—State v. Foster, 1 Penne. 289, 40 Atl. 939. **Ga.**—Terry v. International Cotton Co., 138 Ga. 656, 75 S. E. 1044; Palmour v. Roper, 119 Ga. 10, 45 S. E. 790; Whitman v. Bolling, 47 Ga. 125. **Haw.**—Robinson v. Sresovich, 5 Hawaii 618. **Idaho.**—Morgan v. Neal, 7 Idaho 629, 65 Pac. 66, 97 Am. St. Rep. 264. **Ill.**—Freet v. American Electrical Supply Co., 257 Ill. 248, 100 N. E. 933; Hankinson v. Lombard, 25 Ill. 572, 79 Am. Dec. 348; Lyons v. Hammond El. Co., 139 Ill. App. 495. **Ind.**—Indiana Ins. Co. v. Hartwell, 100 Ind. 566; Barton v. Barton, 52 Ind. App. 537, 100 N. E. 870; American Car & F. Co. v. Smock, 48 Ind. App. 359, 91 N. E. 749, 93 N. E. 78. **Ia.** Hoyer v. Hart, 159 Iowa 234, 140 N. W. 356; Moyers v. Fogarty, 140 Iowa 701, 119 N. W. 159; Hughbanks v. Boston Inv. Co., 92 Iowa 267, 60 N. W. 640. **Kan.**—Schick v. Warren Mtg. Co., 82 Kan. 90, 107 Pac. 536. **Ky.**—Loughbridge v. Ball, 118 S. W. 321. **Me.**—Copeland v. Hall, 29 Me. 93. **Md.**—Darrin v. Whittingham, 107 Md. 46, 68 Atl. 269; Fifer v. Clearfield & C. Coal & Coke Co., 103 Md. 1, 62 Atl.

however, the evidence is not sufficient to justify a finding of the relation the matter should not be left to the jury.⁷⁸ Whether the acts of the parties and circumstances of the transaction create an agency by estoppel is generally for the jury.⁷⁹

- 1122; *Morrison v. Whiteside*, 17 Md. 452, 79 Am. Dec. 661. **Mass.**—*Whittier v. Child*, 174 Mass. 36, 54 N. E. 344; *Ayer v. R. W. Bell Mfg. Co.*, 147 Mass. 46, 16 N. E. 754; *Lovell v. Williams*, 125 Mass. 439. **Mich.**—*Reelman v. Grosfend*, 140 Mich. 681, 104 N. W. 331; *Mail & Exp. Co. v. Wood*, 140 Mich. 505, 103 N. W. 864; *Wilhelm v. Voss*, 118 Mich. 106, 76 N. W. 308. **Minn.**—*Bartleson v. Vanderhoff*, 96 Minn. 184, 104 N. W. 820; *Jensen v. Weide*, 42 Minn. 59, 43 N. W. 688. **Mo.**—*Berkson v. Kansas City Cable Ry. Co.*, 144 Mo. 211, 45 S. W. 1119; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Handlan-Buck Mfg. Co. v. State Electrical Co.*, 184 Mo. App. 247, 168 S. W. 785. **Neb.**—*Crilly v. Ruyle*, 87 Neb. 367, 127 N. W. 251; *New England Mtg. Sec. Co. v. Addison*, 15 Neb. 335, 18 N. W. 76; *Southern Pine Lumb. Co. v. Fries*, 1 Neb. (Unof.) 691, 96 N. W. 71. **N. J.**—*Manchester Bldg. & Loan Assn. v. Allee*, 81 N. J. L. 605, 80 Atl. 466; *Scull v. Skillton*, 70 N. J. L. 792, 59 Atl. 457; *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39, *affirmed*, 38 N. J. L. 580. **N. Y.**—*Greenwood v. Shumacker*, 82 N. Y. 614; *Delafeld v. J. K. Armsby Co.*, 99 App. Div. 622, 90 N. Y. Supp. 998; *Leinkauf v. Lombard*, Ayres & Co., 12 App. Div. 302, 42 N. Y. Supp. 391, 76 N. Y. St. 391. **N. D.**—*First Nat. Bank of Knox v. Bakken*, 17 N. D. 224, 116 N. W. 92. **Okla.**—*Iowa Dairy Separator Co. v. Sanders*, 40 Okla. 656, 140 Pac. 406; *Yukon Mills & G. Co. v. Imperial Roller Mills Co.*, 34 Okla. 817, 127 Pac. 422; *Midland Sav. & Loan Co. v. Sutton*, 30 Okla. 448, 120 Pac. 1007. **Ore.**—*Neppach v. Oregon & C. R. Co.*, 46 Ore. 374, 80 Pac. 482; *Connell v. McLoughlin*, 28 Ore. 230, 42 Pac. 218; *Glenn v. Savage*, 14 Ore. 567, 13 Pac. 442. **Pa.**—*Carter v. Moss*, 210 Pa. 612, 60 Atl. 310; *East Birmingham Farmers', etc. Bank v. Pittsburg Third Nat. Bank*, 165 Pa. 500, 30 Atl. 1008; *Union Refining & Storing Co. v. Bushnell*, 88 Pa. 89. **S. C.**—*Dickert v. Farmers' Mut. Assur. Assn.*, 52 S. C. 412, 29 S. E. 786; *Campbell v. Chiles*, 2 Mill Const. 251. **Tenn.**—*Wilcox v. Hines*, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761. **Tex.**—*Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405; *Stringfellow v. Brazelton* (Tex. Civ. App.), 142 S. W. 937; *Ward v. Powell* (Tex. Civ. App.), 127 S. W. 851. **Utah.**—*McCornick v. Queen of Sheba Gold Min. & Mill. Co.*, 23 Utah 71, 63 Pac. 820. **Vt.**—*Taplin v. Marcy*, 81 Vt. 428, 71 Atl. 72. **Wash.**—*Moore v. Blackburn*, 67 Wash. 117, 120 Pac. 875; *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376; *Novelty Mill Co. v. Heinzerling*, 39 Wash. 244, 81 Pac. 742. **Wis.**—*Garlick v. Morley*, 147 Wis. 397, 132 N. W. 601. **Eng.**—*Durrell v. Evans*, 1 H. & C. 174, 7 L. T. N. S. 97, 10 Wkly. Rep. 665; *Johnston v. Sumner*, 3 H. & N. 261, 27 L. J. Ex. 341, 4 Jur. (N. S.) 462, 6 Wkly. Rep. 574. **Can.**—*Macaulay v. Proctor*, 2 Grant Ch. (U. C.) 390; *Waddell v. Gildersleeve*, 16 U. C. C. P. 565; *De Blaquiére v. Becker*, 8 U. C. C. P. 167.
78. **Ala.**—*McClung's Exrs. v. Spotswood*, 19 Ala. 165. **Colo.**—*Lester v. Snyder*, 12 Colo. App. 351, 55 Pac. 613. **Conn.**—*Griffin v. Kutinsky*, 82 Conn. 693, 74 Atl. 1068. **Del.**—*Coe v. Johnson*, 6 Houst. 9. **Ill.**—*St. Louis Southwestern R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619. **Md.**—*National Mechanics' Bank v. National Bank*, 36 Md. 5. **N. Y.**—*Sanford v. Fountain*, 49 Misc. 301, 99 N. Y. Supp. 234. **Pa.**—*Singer Mfg. Co. v. Christian*, 211 Pa. 534, 60 Atl. 1087; *Lamb v. Irwin*, 69 Pa. 436; *McElroy v. Glenn Kline Lumb. Co.*, 37 Pa. Super. 393.
79. **Conn.**—*Union Trust Co. v. McKeon*, 76 Conn. 508, 57 Atl. 109. **Idaho.**—*Morgan v. Neal*, 7 Idaho 629, 65 Pac. 66, 97 Am. St. Rep. 264. **Mich.**—*McClure v. Murphey*, 126 Mich. 134, 85 N. W. 462. **Mo.**—*Hackett v. Van Frank*, 105 Mo. App. 384, 79 S. W. 1013; *Ferneau v. Whitford*, 39 Mo. App. 311. **N. Y.**—*Goodwin v. Sommer*, 49 Misc. 552, 97 N. Y. Supp. 960. **N. D.**—*First Nat. Bank of Fargo v. Minneapolis & N. Elev. Co.*, 11 N. D. 280, 91 N. W. 436. **Pa.**—*Fisher v. O'Donnell*, 153 Pa. 619, 26 Atl. 293. **Wis.**—*Parr v. Northern Electrical Mfg. Co.*, 117 Wis. 278, 93 N. W. 1099.

3. Ratification.—Ratification is ordinarily a question of fact for the jury to determine.⁸⁰ Thus whether a contract has been ratified by silent acquiescence is for the jury.⁸¹ But if the evidence clearly shows a ratification,⁸² or there is no evidence of ratification,⁸³ the matter should not be left to jury.

4. Scope and Extent of Agent's Authority.—Whether a particular act was within the scope of the authority conferred on the agent is usually for the jury, where the evidence is conflicting or such that different inferences might reasonably be drawn therefrom.⁸⁴ What is

80. U. S.—*Hansen v. Boyd*, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. ed. 746; *Aetna Indemnity Co. v. Ladd*, 135 Fed. 636, 68 C. C. A. 274; *Findlay v. Pertz*, 74 Fed. 681, 20 C. C. A. 662, 43 U. S. App. 383. **Ala.**—*Abbot v. May*, 50 Ala. 97; *Gimon v. Terrell*, 38 Ala. 208. **Cal.**—*Kraft v. Wilson*, 104 Cal. xvii, 37 Pac. 790. **Ga.**—*Burr & Co. v. Howard*, 58 Ga. 564; *Byrne v. Doughty*, 13 Ga. 46. **Ill.**—*Chicago Edison Co. v. Fay*, 164 Ill. 323, 45 N. E. 534. **Ia.**—*Robinson v. Chapline*, 9 Iowa 91. **Me.**—*Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96. **Mass.**—*American Min. & S. Co. v. Converse*, 175 Mass. 449, 56 N. E. 594. **Mo.**—*Hesse v. Travelers' Protective Assn.*, 72 Mo. App. 598; *Hance v. Wabash & W. Ry. Co.*, 62 Mo. App. 60. **Mont.**—*Trent v. Sherlock*, 26 Mont. 85, 66 Pac. 700. **N. Y.**—*Stokes v. Mackay*, 140 N. Y. 640, 649, 35 N. E. 786. **Pa.**—*East Birmingham Farmers', etc. Bank v. Pittsburg Third Nat. Bank*, 165 Pa. 500, 30 Atl. 1008; *Garrett v. Gonter*, 42 Pa. 143. **S. D.**—*Quale v. Hazel*, 19 S. D. 483, 104 N. W. 215. **Tex.**—*Hill v. Bess* (Tex. Civ. App.), 40 S. W. 202; *Campbell v. Jenkins*, 34 S. W. 673. **Va.**—*Hortons v. Townes*, 6 Leigh (33 Va.) 47. **Wis.**—*Cooper v. Schwartz*, 40 Wis. 54; *Saveland v. Green*, 40 Wis. 431. **Eng.**—*Lewis v. Read*, 13 M. & W. 834, 14 L. J. Ex. 295.

[a] "Some confusion has arisen in the minds of text writers as to whether the question of ratification is a question of law or fact, because courts have decided in some instances as a matter of law that there was no evidence of any ratification. But in that respect, ratification is like any other fact sought to be proved. Whether there is any evidence legally sufficient tending to establish it must always be a question of law, but whether in case there is such evidence, the evidence does prove it must always remain a question of fact." *Bank*

of Commerce *v. Bernero*, 17 Mo. App. 313, 318.

81. See *Deland v. Dixon Nat. Bank*, 111 Ill. 323 (where it was held that although silence is strong evidence of ratification an instruction that silence was ratification was erroneous); *Iron City Nat. Bank v. Fifth Nat. Bank* (Tex. Civ. App.), 47 S. W. 533.

82. *Wright v. Vineyard M. E. Church*, 72 Minn. 78, 74 N. W. 1015; *Twentieth Century Co. v. Quilling*, 136 Wis. 481, 117 N. W. 1007.

83. **Mich.**—*Rapid Hook & Eye Co. v. De Ruyter*, 117 Mich. 547, 76 N. W. 76. **Neb.**—*Nebraska Wesleyan University v. Parker*, 52 Neb. 453, 72 N. W. 470. **Pa.**—See *Sword v. Reformed Congregation Keneseth Israel*, 29 Pa. Super. 626. **Tex.**—*Suderman-Dolson Co. v. Rodgers*, 47 Tex. Civ. App. 67, 104 S. W. 193; *Meyer Bros. Drug Co. v. Tucker* (Tex. Civ. App.), 34 S. W. 786. **Wis.**—*Heath v. Paul*, 81 Wis. 532, 51 N. W. 876.

84. U. S.—*Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; *Lamon v. Speer Hardware Co.*, 198 Fed. 453, 119 C. C. A. 1; *Ladd v. Aetna Indemnity Co.*, 128 Fed. 298. **Ala.**—*Birmingham M. R. Co. v. Tennessee Coal, etc. Co.*, 127 Ala. 137, 28 So. 679; *La Fayette Ry. Co. v. Tucker*, 124 Ala. 514, 27 So. 447; *Lytle v. Bank of Dothan*, 121 Ala. 215, 26 So. 6. **Ark.**—*St. Louis, I. M. & S. R. Co. v. Clark*, 90 Ark. 504, 119 S. W. 825; *Brockman Com. & Cold Storage Co. v. Pound*, 77 Ark. 364, 91 S. W. 183; *Jacobson v. Poindexter*, 42 Ark. 97. **Conn.**—*Hyman v. Waas*, 79 Conn. 251, 64 Atl. 354; *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581. **Del.**—*Gray v. Gray*, 2 Boyce 308, 80 Atl. 233. **D. C.**—*Held v. Walker*, 25 App. Cas. 486; *Norfolk & Washington Steamboat Co. v. Davis*, 12 App. Cas. 306. **Fla.**—*Bush Grocery Co. v. Conely*, 61 Fla. 131, 55 So. 867; *Dunwoody v. Saunders*, 50 Fla. 202, 39 So.

usual and necessary for an agent to do in connection with the busi-

965. **Ga.**—Luckie *v.* Johnston, 89 Ga. 321, 15 S. E. 459; Century Bldg. Co. *v.* Lewkowitz, 1 Ga. App. 636, 57 S. E. 1036. **Ill.**—Freet *v.* American Electrical Supply Co., 257 Ill. 248, 100 N. E. 933; Hale Elev. Co. *v.* Hale, 201 Ill. 131, 66 N. E. 249; Glucose Sugar Refining Co. *v.* Flinn, 184 Ill. 123, 56 N. E. 400. **Ind.**—American Car & F. Co. *v.* Smock, 48 Ind. App. 359, 91 N. E. 749, 751, 93 N. E. 78; Grand Rapids & I. R. Co. *v.* King, 41 Ind. App. 701, 83 N. E. 778. **Ia.**—Anderson *v.* Patten, 157 Iowa 23, 137 N. W. 1050; Sievetsen *v.* Paxton-Eikman Chemical Co., 133 N. W. 744; De Leval Separator Co. *v.* Sharpless, 142 Iowa 60, 120 N. W. 657. **Kan.**—Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 445. **Ky.** Baskett *v.* Ohio Val. Banking, etc. Co., 125 S. W. 1066; Baldwin *v.* Tucker, 112 Ky. 282, 65 S. W. 841, 57 L. R. A. 451; Barker Cedar Co. *v.* Roberts, 23 Ky. L. Rep. 1345, 65 S. W. 123. **Me.** Davies *v.* Eastern Steamboat Co., 94 Me. 379, 47 Atl. 896, 53 L. R. A. 239. **Md.**—Brager *v.* Levy, 122 Md. 554, 90 Atl. 102; Goodman *v.* Saperstein, 115 Md. 678, 81 Atl. 695; Groscup *v.* Downey, 105 Md. 273, 65 Atl. 930. **Mass.**—Hawks *v.* Davis, 185 Mass. 119, 69 N. E. 1072; Heath *v.* New Bedford Safe Deposit & Tr. Co., 184 Mass. 481, 69 N. E. 215; Baker *v.* Tibbetts, 162 Mass. 468, 39 N. E. 350. **Mich.**—Pettinger *v.* Alpena Cedar Co., 175 Mich. 162, 141 N. W. 535; Ederer *v.* Cavanaugh, 173 Mich. 663, 139 N. W. 1025; Superior Drill Co. *v.* Carpenter, 150 Mich. 262, 114 N. W. 67; Clark *v.* Dillman, 108 Mich. 625, 66 N. W. 570. **Minn.**—Sinclair *v.* Investors' Syndicate, 125 Minn. 311, 146 N. W. 1109. **Miss.** Wilkins *v.* Commercial Bank, 6 How. 217. **Mo.**—Corder *v.* O'Neill, 176 Mo. 401, 75 S. W. 764; State Bank of St. Louis *v.* Frame, 112 Mo. 502, 20 S. W. 620; Wade *v.* Boone, 184 Mo. App. 88, 168 S. W. 360. **Neb.**—Walker *v.* Hale, 92 Neb. 829, 139 N. W. 658; New Orleans Coffee Co. *v.* Cady, 69 Neb. 412, 95 N. W. 1017; Walsh *v.* Peterson, 59 Neb. 645, 81 N. W. 853. **N. H.**—Great Falls Co. *v.* Worster, 15 N. H. 412. **N. J.**—Rodman *v.* Weinberger, 81 N. J. L. 441, 79 Atl. 328; Dierkes *v.* Hauxhurst Land Co., 80 N. J. L. 369, 79 Atl. 361, 34 L. R. A. (N. S.) 693; Crossley *v.* Kenney, 71 N. J. L. 124, 58 Atl. 395. **N. Y.**—Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Lilienthal *v.* German American Brewing Co., 121 App. Div. 628, 106 N. Y. Supp. 402; McCrea *v.* McClenahan, 114 App. Div. 70, 99 N. Y. Supp. 689, 37 Civ. Proc. 195. **N. C.**—Lovick *v.* Atlantic Coast Line R. Co., 129 N. C. 427, 40 S. E. 191. **N. D.**—First Nat. Bank of Fargo *v.* Minneapolis & N. Elev. Co., 11 N. D. 280, 91 N. W. 436. **Ohio.**—Oliver *v.* Sterling, 20 Ohio St. 391. **Okla.**—Horton *v.* Early, 39 Okla. 99, 134 Pac. 436, Ann. Cas. 1915D, 825, 47 L. R. A. (N. S.) 314; Wrought Iron Range Co. *v.* Leach, 32 Okla. 706, 123 Pac. 419; Allen *v.* Kenyon, 30 Okla. 536, 119 Pac. 900; Midland Sav. & Loan Co. *v.* Sutton, 30 Okla. 448, 120 Pac. 1007; Port Huron Eng. & T. Co. *v.* Ball, 30 Okla. 11, 118 Pac. 393. **Ore.** Roane *v.* Union Pac. Life Ins. Co., 67 Ore. 264, 135 Pac. 892; Leonard *v.* Howard, 67 Ore. 203, 135 Pac. 549; Mahon *v.* Rankin, 54 Ore. 328, 102 Pac. 608, 103 Pac. 53; Neppach *v.* Oregon & C. R. Co., 46 Ore. 374, 80 Pac. 482; Glenn *v.* Savage, 14 Ore. 567, 13 Pac. 442. **Pa.**—American Car & Foundry Co. *v.* Alexandria Water Co., 218 Pa. 542, 67 Atl. 861; Singer Mfg. Co. *v.* Christian, 211 Pa. 534, 60 Atl. 1087; Lininger *v.* Latshaw, 169 Pa. 398, 32 Atl. 440; Louchheim *v.* Davies, 148 Pa. 499, 24 Atl. 72; Union Refining & S. Co. *v.* Bushnell, 88 Pa. 89. **S. C.** Blowers *v.* Southern Ry., 74 S. C. 221, 54 S. E. 368. **S. D.**—Reid *v.* Kellogg, 8 S. D. 596, 67 N. W. 687; McLaughlin *v.* Wheeler, 1 S. D. 497, 47 N. W. 816. **Tex.**—Ft. Worth, etc. R. Co. *v.* Caruthers (Tex. Civ. App.) 157 S. W. 238; Wall *v.* Lubbock, 52 Tex. Civ. App. 405, 118 S. W. 886; International Harvester Co. *v.* Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93; Majors *v.* Goodrich (Tex. Civ. App.), 54 S. W. 919; Gulf, C. & S. F. Ry. Co. *v.* White (Tex. Civ. App.), 32 S. W. 322. **Vt.** Keyes & Co. *v.* Union Pac. Tea Co., 81 Vt. 420, 71 Atl. 201; Riley *v.* Wheeler, 42 Vt. 528. **Wash.**—Lemcke *v.* Funk & Co., 78 Wash. 460, 139 Pac. 234, Ann. Cas. 1915D, 23; Brace *v.* Northern Pac. R. Co., 63 Wash. 417, 115 Pac. 841, 38 L. R. A. (N. S.) 1135; Galbraith *v.* Weber, 58 Wash. 132, 107 Pac. 1050, 28 L. R. A. (N. S.) 341; Campbell *v.* Order of Washington, 53 Wash. 398, 102 Pac. 410; Harvey *v.* Sparks Bros., 45 Wash. 578, 88

ness in question, is generally for the jury.⁸⁵ But where the evidence as to extent of authority is clear and undisputed and but one conclusion can be reasonably drawn therefrom, the matter is one for the court.⁸⁶

Where the authority is conferred by a written instrument, the extent thereof is a question of law for the court,⁸⁷ but if the authority rests partly

Pac. 1108. **Wis.**—Stumm *v.* Western Union Tel. Co., 140 Wis. 528, 122 N. W. 1032; Domasek *v.* Kluck, 113 Wis. 336, 89 N. W. 139; McDermott *v.* Jackson, 97 Wis. 64, 72 N. W. 375. **Can.** De Blaquiére *v.* Becker, 8 U. C. C. P. 167; Patterson *v.* Fuller, 32 U. C. Q. B. 240; Workman *v.* McKinstry, 21 U. C. Q. B. 623.

[a] Whether necessities of case gave agent implied authority to act is one for the jury. Baines *v.* Coos Bay Nav. Co., 45 Ore. 307, 77 Pac. 400.

[b] Whether agency general or special for the jury. Dickinson County *v.* Mississippi Valley Ins. Co., 41 Iowa 286; Lough *v.* John Davis & Co., 35 Wash. 449, 77 Pac. 732.

85. **U. S.**—Hartford & N. Y. Transp. Co. *v.* Plymmer, 120 Fed. 624, 57 C. C. A. 288. **Ala.**—Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4. **Ark.**—Keith *v.* Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777. **Mich.**—Austrian *v.* Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350. **Mo.**—St. Louis Gunning Adv. Co. *v.* Wanamaker, 115 Mo. App. 270, 90 S. W. 737; Hayner & Co. *v.* Churchill, 29 Mo. App. 676. **Va.**—Reese *v.* Bates, 94 Va. 321, 26 S. E. 865. **Wis.**—Pickert *v.* Marston, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876.

86. **Ala.**—Witcher *v.* Brewer, 49 Ala. 119. **Ga.**—Langston *v.* Postal Tel.-Cable Co., 6 Ga. App. 833, 65 S. E. 1094. **Idaho.**—Wilson *v.* Vogeler, 10 Idaho 599, 79 Pac. 508. **Ill.**—Doggett *v.* Greene, 254 Ill. 134, 98 N. E. 219, Ann. Cas. 1913B, 1166; Illinois Moulding Co. *v.* Page & Lyon Mfg. Co., 104 Ill. App. 1; Halladay *v.* Underwood, 90 Ill. App. 130. **Ind. Ter.**—Hunt *v.* Johnson & Larimer Dry Goods Co., 7 Ind. Ter. 575, 104 S. W. 841. **Md.** Carroll *v.* Manganese Steel Safe Co., 111 Md. 252, 73 Atl. 665. **Mich.**—Rothschild *v.* Sugar Beet Products Co., 174 Mich. 237, 140 N. W. 553; Weed *v.* Construction News Co., 160 Mich. 644, 125 N. W. 695; Wierman *v.* Bay City-Michigan Sugar Co., 142 Mich. 422,

106 N. W. 75; Bond *v.* Pontiac, O. & P. A. R. Co., 62 Mich. 643, 29 N. W. 482, 4 Am. St. Rep. 885. **Minn.**—Dispatch Printing Co. *v.* National Bank of Commerce, 109 Minn. 440, 124 N. W. 236, 50 L. R. A. (N. S.) 74. **Mont.** Herbert *v.* King, 1 Mont. 475. **N. J.** Sadler *v.* Port-au-peek Realty Co., 78 N. J. L. 635, 76 Atl. 977; Ryle *v.* Manchester Bldg. & Loan Assn., 74 N. J. L. 840, 67 Atl. 87; Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728. **N. Y.**—Franklin Bank Note Co. *v.* Mackey, 158 N. Y. 140, 52 N. E. 737; Dows *v.* Perrin, 16 N. Y. 325; Arbesfeld *v.* Tanenbaum, 96 N. Y. Supp. 424. **Ore.**—Baker *v.* Seawear, 63 Ore. 350, 127 Pac. 961. **Pa.**—Elliot *v.* Wanamaker, 155 Pa. 67, 25 Atl. 826; O'Toole *v.* Escher, 47 Pa. Super. 272; Langenheim *v.* Anschutz-Bradberry Co., 2 Pa. Super. 285, 38 Wkly. N. Cas. 505. **S. D.**—Quale *v.* Hazel, 19 S. D. 483, 104 N. W. 215; South Bend Toy Mfg. Co. *v.* Dakota F. & M. Ins. Co., 3 S. D. 205, 52 N. W. 866. **Tex.**—Trammell *v.* Turner (Tex. Civ. App.), 82 S. W. 325. **Utah.**—Tyng *v.* Constant-Lorraine Inv. Co., 37 Utah 304, 108 Pac. 1109. **Wis.**—Heath *v.* Paul, 81 Wis. 532, 51 N. W. 876.

87. **U. S.**—Thiel Detective Service Co. *v.* McClure, 142 Fed. 952, 74 C. C. A. 122, 4 L. R. A. (N. S.) 843. **Ga.** Clafin *v.* Continental Jersey Works, 85 Ga. 27, 11 S. E. 721; Dobbins *v.* Etowah Mfg. & Min. Co., 75 Ga. 238. **Ill.** Glucose Sugar Refining Co. *v.* Flinn, 184 Ill. 123, 56 N. E. 400. **Kan.**—Sulivant *v.* Jähren, 71 Kan. 127, 79 Pac. 1071; Philadelphia Mtg. & Trust Co. *v.* Hardesty, 68 Kan. 683, 75 Pac. 1115; Cain Bros. Co. *v.* Wallace, 46 Kan. 138, 26 Pac. 445. **Ky.**—Hackworth *v.* Hastings Industrial Co., 146 Ky. 387, 142 S. W. 681; Baldwin *v.* Tucker, 112 Ky. 282, 65 S. W. 841, 57 L. R. A. 451. **Me.**—Millay *v.* Whitney, 63 Me. 522. **Md.**—Grosoup *v.* Downey, 105 Md. 273, 65 Atl. 930; Equitable Life Assur. Co. *v.* Poe, 53 Md. 28. **Mo.**—Nofsinger *v.* Ring, 4 Mo. App. 576. **N. Y.** Forman *v.* Berry, 163 App. Div. 594,

on written instrument and partly in parol it is for the jury.⁸⁸

5. Whether Party Acted as Agent or Principal. — Whether a party acted as a principal or as agent for another in a transaction, is for the jury;⁸⁹ unless only one inference can be drawn from the evidence,⁹⁰ or the matter rests on a contract in writing,⁹¹ in which case it is for the court to determine.

6. Exercise of Requisite Care and Diligence. — Whether an agent has exercised the required degree of skill and diligence in the particular transaction is for the jury,⁹² as is also the question whether a gratuitous agent was guilty of gross negligence.⁹³

148 N. Y. Supp. 959; Russell & Co. v. McSwegan, 84 N. Y. Supp. 614. **N. D.** Queen City Fire Ins. Co. v. Hannaford First Nat. Bank, 18 N. D. 603, 120 N. W. 545, 22 L. R. A. (N. S.) 509. **Ohio.**—Pollock v. Cohen, 32 Ohio St. 514. **Okla.**—Atwood v. Rose, 32 Okla. 355, 122 Pac. 929. **Ore.**—Sharp v. Kilborn, 64 Ore. 371, 130 Pac. 735; Anderson v. Adams, 43 Ore. 621, 74 Pac. 215; Williamson v. North Pac. Lumb. Co., 38 Ore. 560, 63 Pac. 16, 64 Pac. 854. **Pa.**—American Car & Foundry Co. v. Alexandria Water Co., 218 Pa. 542, 67 Atl. 861; Singer Mfg. Co. v. Christian, 211 Pa. 534, 60 Atl. 1087; Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 Am. Dec. 390; Fisher v. Moyer, 17 W. N. C. 500. **S. C.** McCreery v. Garvin, 39 S. C. 375, 17 S. E. 828. **Tex.**—Berry v. Harnage, 39 Tex. 638; De Cordova v. Knowles, 37 Tex. 19. **Eng.**—Berwick v. Horsfall, 4 C. B. N. S. 450, 93 E. C. L. 450, 140 Eng. Reprint 1160; Collen v. Wright, 7 El. & Bl. 301, 90 E. C. L. 301, 119 Eng. Reprint 1259. **Can.**—Churchill & Sons v. McKay, 20 Can. Sup. Ct. 472. **88.** McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816.

89. **Ala.**—Lewis v. Smith, 150 Ala. 161, 43 So. 717. **Ark.**—Boyington v. Van Etten, 62 Ark. 63, 35 S. W. 622. **Ill.**—Morris v. Dixon Nat. Bank, 55 Ill. App. 298. **Ia.**—Leasure v. Boie, 142 Iowa 284, 120 N. W. 643. **Mass.**—Marston v. Reynolds, 211 Mass. 590, 98 N. E. 601; Shattuck v. Eastman, 12 Allen 369; Delano v. Curtis, 7 Allen 470. **Mont.**—McGowan Commercial Co. v. Midland Coal & L. Co., 41 Mont. 211, 108 Pac. 655. **Neb.**—Equitable Life Assur. Co. v. Brobst, 18 Neb. 526, 26 N. W. 204. **N. H.**—Whitney v. Swett, 22 N. H. 10, 53 Am. Dec. 228. **N. J.** Stewart v. Johnson, 1 N. J. L. 27. **N. Y.**—Badger v. Cook, 117 App. Div. 328, 101 N. Y. Supp. 1067; Hill v.

Granat, 134 N. Y. Supp. 529; De Bavier v. Funke, 66 Hun 633, 21 N. Y. Supp. 410, 50 N. Y. St. 442 (*affirmed*, 142 N. Y. 633, 37 N. E. 566); Cunningham v. Soules, 7 Wend. 106. **S. C.** Ohio Pottery & Glass Co. v. Talbert, 87 S. C. 194, 69 S. E. 211. **Tex.** Knight v. Dolinski, 63 Tex. Civ. App. 445, 133 S. W. 474. **Wash.**—Heinzerling v. Agen; 46 Wash. 390, 90 Pac. 262. **Wis.**—Conroe v. Case, 79 Wis. 338, 48 N. W. 480; Northern Nat. Bank v. Lewis, 78 Wis. 475, 47 N. W. 834.

90. **Kan.**—Schiek v. Warren Mtg. Co., 86 Kan. 812, 122 Pac. 872, Ann. Cas. 1913C, 466. **Neb.**—New Orleans Coffee Co. v. Cady, 69 Neb. 412, 95 N. W. 1017. **N. Y.**—La Societe Anonyme de L'Union des Papeteries v. Marks, 67 Hun 648, 21 N. Y. Supp. 706, 50 N. Y. St. 497. **Vt.**—Johnson v. Cate, 77 Vt. 218, 59 Atl. 830.

91. **N. Y.**—Peck v. Gardner, 9 Hun 704. **N. C.**—Fowle v. Kerchner, 87 N. C. 49. **Vt.**—Roberts v. Button, 14 Vt. 195.

92. **U. S.**—Milwaukee Nat. Bank v. City Bank, 103 U. S. 668, 26 L. ed. 417. **Ga.**—Southern Express Co. v. Frink, 67 Ga. 201; Brown, Shipley & Co. v. Clayton, 12 Ga. 564. **Ill.**—Munford v. Miller, 7 Ill. App. 62. **Mass.** Harlow v. Bartlett, 170 Mass. 584, 49 N. E. 1014; Buell v. Chapin, 99 Mass. 594, 97 Am. Dec. 58. **Mich.**—Kaempfer v. Lindsay, 121 Mich. 425, 80 N. W. 107. **Mo.**—Eddy v. Livingston, 35 Mo. 487, 88 Am. Dec. 122; Clink-scales v. Clark, 137 Mo. App. 12, 118 S. W. 1182. **N. D.**—Morris v. Bradley, 20 N. D. 646, 128 N. W. 118. **Ohio.** Darling v. Younger, 37 Ohio St. 487, 41 Am. Rep. 532. **Pa.**—Perry v. Jensen, 142 Pa. 125, 21 Atl. 866, 12 L. R. A. 393. **Va.**—Blosser v. Harshbarger, 21 Gratt. (62 Va.) 214.

93. **U. S.**—Preston v. Prather, 137

7. Trade Usage or Custom.—Whether there is a custom or usage governing the agency in question is for the jury to determine.⁹⁴

8. Who Agent Acted for.—On disputed facts the question as to whom an agent acted for in a particular transaction, is for the jury.⁹⁵

9. Right of Agent to Compensation.—Where the claim is not based entirely upon a written instrument, the amount of compensation, if any, to which the agent is entitled is for the jury.⁹⁶ So whether the agent procured a sale or purchase to be made is for the jury.⁹⁷

10. To Whom Credit Was Given.—Whether credit was given to agent or principal, where the contract is not in writing, is generally for the jury.⁹⁸

11. Whether Election Made To Hold Principal or Agent.—Where a third person has a right to elect whether he will proceed against the principal or agent, it is generally for the jury to determine whether the circumstances of the case and the acts of the plaintiff show an election to have been made.⁹⁹ So whether a party has elected to

U. S. 604, 11 Sup. Ct. 162, 34 L. ed. 788. **Ill.**—Gray *v.* Merriam, 148 Ill. 179, 35 N. E. 810, 39 Am. St. Rep. 172, 32 L. R. A. 769. **Eng.**—Doorman *v.* Jenkins, 2 Ad. & El. 256, 29 E. C. L. 132, 111 Eng. Reprint 99.

94. U. S.—Forrestier *v.* Bordman, 1 Story 43, 9 Fed. Cas. No. 4,945. **Ia.** Hichhorn *v.* Bradley, 117 Iowa 130, 90 N. W. 592. **Va.**—Reese *v.* Bates, 94 Va. 321, 26 S. E. 865.

[a] **Custom that salesmen may warrant the quality of their goods.** See **Ala.**—Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4. **Mo.**—Hayner & Co. *v.* Churchill, 29 Mo. App. 676. **Va.**—Reese *v.* Bates, 94 Va. 321, 26 S. E. 865. **Wis.**—Westurn *v.* Page, 94 Wis. 251, 68 N. W. 1003; Pickert *v.* Marston, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876.

95. U. S.—New England Mtg. Sec. Co. *v.* Gay, 33 Fed. 636. **Ala.**—State *v.* Bristol Sav. Bank, 108 Ala. 3, 18 So. 533, 54 Am. St. Rep. 141. **Mo.**—Schlesinger *v.* Texas, etc. R. Co., 87 Mo. 146. **N. Y.**—Carlisle *v.* Norris, 144 App. Div. 690, 129 N. Y. Supp. 585.

96. Cal.—Mattingly *v.* Roach, 84 Cal. 207, 23 Pac. 1117. **Colo.**—Miles *v.* Mays, 15 Colo. 133, 25 Pac. 312. **N. J.**—Ruckman *v.* Bergholz, 38 N. J. L. 531. **N. Y.**—Darling *v.* Howe, 60 Hun 578, 14 N. Y. Supp. 561, 28 N. Y. St. 706. **S. D.**—Sherman *v.* Port Huron Engine, etc. Co., 8 S. D. 343, 66 N. W. 1077. **Tex.**—Missouri Glass Co. *v.* Roberts (Tex. Civ. App.), 137 S. W. 433. **Wis.**—Coolican *v.* Milwaukee & Sault Ste. Marie Imp. Co., 79 Wis. 471, 48 N. W. 717.

97. Ark.—Addressograph Co. *v.* Office Appliance Co., 106 Ark. 536, 153 S. W. 804. **Conn.**—Huntington *v.* Wolcott, 5 Day 390. **Mich.**—Kelso *v.* Woodruff, 88 Mich. 299, 50 N. W. 249. **Minn.**—Ferguson *v.* Glaspie, 38 Minn. 418, 38 N. W. 352. **Mo.**—Merton *v.* J. I. Case Threshing Mach. Co., 99 Mo. App. 630, 74 S. W. 434. **N. Y.**—Ransom *v.* Wheelwright, 17 Misc. 141, 39 N. Y. Supp. 342. **Pa.**—Brodhead *v.* Pullman Ventilator Co., 29 Pa. Super. 19. **Wis.**—Coolican *v.* Milwaukee & Sault Ste. Marie Imp. Co., 79 Wis. 471, 48 N. W. 717. **Eng.**—Bayley *v.* Chadwick, 39 L. T. N. S. 429; Kynaston *v.* Nicholson, 8 L. T. N. S. 671.

98. Ala.—Anderson *v.* Timberlake, 114 Ala. 377, 22 So. 431, 62 Am. St. Rep. 105. **Ga.**—Phinizy *v.* Bush, 129 Ga. 479, 492, 59 S. E. 259; Raleigh & G. R. Co. *v.* Pullman Co., 122 Ga. 700, 50 S. E. 1008; Stubbs & Co. *v.* Waddell, 4 Ga. App. 264, 61 S. E. 145. **Ind.**—Lowrey *v.* Scargill, 7 Ind. Ter. 497, 104 S. W. 813. **Mo.**—Hovey *v.* Pitcher, 13 Mo. 191. **N. H.**—Brown *v.* Rundlett, 15 N. H. 360. **N. J.**—Kean *v.* Davis, 20 N. J. L. 425. **N. Y.**—Wasserman *v.* Bacon, 80 App. Div. 505, 81 N. Y. Supp. 193; Maryland Coal Co. *v.* Edwards, 4 Hun 432; Pentz *v.* Stanton, 10 Wend. 271, 25 Am. Dec. 558. **R. I.**—McKeen *v.* Providence County Sav. Bank, 24 R. I. 542, 54 Atl. 49. **S. C.**—Miller *v.* Ford, 4 Strobb. 213. **Tenn.**—Ahrens *v.* Cobb, 9 Humph. 643. **Eng.**—Edwards *v.* Smith, 5 L. J. C. P. (O. S.) 11.

99. U. S.—Barrell *v.* Newby, 127 Fed. 656, 62 C. C. A. 382. **Ill.**—Ferry

hold the agent or principal, where the agency was undisclosed,¹ or where the agent has entered into an unauthorized contract,² is generally for the jury.

12. Revocation or Termination of Relation.—Whether the relation has in fact been terminated by revocation of the agent's authority or otherwise is for the jury,³ as is the question whether notice of revocation was given.⁴ Judgment⁵ and review⁶ in actions involving principal and agent, follow the general rules elsewhere treated.

v. Moore, 18 Ill. App. 135, 141. **Ky.** *Hoffman v. Anderson*, 112 Ky. 893, 67 S. W. 49. **Mass.**—*Raymond v. Crown & Eagle Mills*, 2 Mete. 319. **N. J.** *Lambert v. Metropolitan Sav. & Loan Assn.*, 65 N. J. L. 79, 46 Atl. 766. **N. Y.**—*Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Wasserman v. Bacon*, 80 App. Div. 505, 81 N. Y. Supp. 193; *Ranger v. Thalmann*, 65 App. Div. 5, 72 N. Y. Supp. 451; *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558. **R. I.** *McKeen v. Providence County Sav. Bank*, 24 R. I. 542, 54 Atl. 49. **Eng.** *Calder v. Dobell*, L. R. 6 C. P. 486, 40 L. J. C. P. 224, 25 L. T. N. S. 129, 19 Wkly. Rep. 978; *Curtis v. Williamson*, L. R. 10 Q. B. 57, 44 L. J. Q. B. 27, 31 L. T. N. S. 678, 23 Wkly. Rep. 236.

1. *Barrell v. Newby*, 127 Fed. 656, 62 C. C. A. 382; *Gay v. Kelley*, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742.

2. **Ill.**—*Ferry v. Moore*, 18 Ill. App. 135. **N. Y.**—*Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51. **Eng.**—*Calder v. Dobell*, L. R. 6 C. P. 486, 40 L. J. C. P. 224, 25 L. T. N. S. 129, 19 Wkly. Rep. 978; *Curtis v. Williamson*, L. R. 10 Q. B. 57, 59, 44 L. J. Q. B. 27, 31 L. T. N. S. 678, 23 Wkly. Rep. 236.

3. **Colo.**—*Clamp v. Cutler*, 39 Colo. 117, 88 Pac. 854. **Mich.**—*Johnson v.*

Doon, 131 Mich. 452, 91 N. W. 742. **Mo.**—*La Mothe v. St. Louis Marine Ry. & D. Co.*, 17 Mo. 204. **N. H.**—*Beard v. Kirk*, 11 N. H. 397. **Pa.**—*French v. Pullman Motor Car Co.*, 242 Pa. 136, 88 Atl. 876. **Tex.**—*Mason v. Ward* (Tex. Civ. App.), 166 S. W. 456.

4. **Ky.**—*Gragg v. New York Home Ins. Co.*, 32 Ky. L. Rep. 988, 107 S. W. 321. **N. Y.**—*Claffin v. Lenheim*, 66 N. Y. 301; *McNeilly v. Continental Life Ins. Co.*, 66 N. Y. 23. **Pa.**—*Perrine v. Jermyn*, 163 Pa. 497, 30 Atl. 202; *Deford & Co. v. Reynolds*, 36 Pa. 325. **Wash.**—*Parker v. Advance Thresher Co.*, 75 Wash. 505, 135 Pac. 229.

[a] **If facts not disputed**, it is for court to determine whether sufficient notice given. **Ind.**—*Clark v. Mullenix*, 11 Ind. 532. **Mass.**—*Howe v. Thayer*, 17 Pick. 91. **N. Y.**—*Claffin v. Lenheim*, 66 N. Y. 301; *American Linen Thread Co. v. Wortendyke*, 24 N. Y. 550.

5. See the title "Judgments," and the cross-references there found.

Confession of judgment by agent, see 18 STANDARD PROC. 83; 14 STANDARD PROC. 796, 817.

Consent judgment by agent, see 14 STANDARD PROC. 915, 922.

6. See the title "Appeals," and related titles treating particular phases of review.

PRINCIPAL AND SURETY

By the Editorial Staff.

I. DEFINITIONS AND DISTINCTIONS, 573

II. ENFORCEMENT OF CONTRACT OF SURETY, 574

- A. *In General*, 574
- B. *Nature and Form of Action*, 576
- C. *Jurisdiction and Venue*, 576
- D. *Time To Commence Action*, 577
- E. *Parties*, 577
 - 1. *Plaintiff*, 577
 - 2. *Defendant*, 578
 - 3. *Intervention*, 580
 - 4. *Dismissal*, 580
- F. *Pleading*, 580
 - 1. *Declaration or Complaint*, 580
 - 2. *Plea or Answer*, 582
 - a. *In General*, 582
 - b. *Release or Discharge*, 582
 - c. *Payment*, 583
 - 3. *Replication or Reply*, 583
 - 4. *Cross-Action*, 584
- G. *Trial*, 584
 - 1. *In General*, 584
 - 2. *Questions of Law and Fact*, 584
 - 3. *Instructions*, 585
 - 4. *Verdict and Findings*, 585
- H. *Judgment or Decree*, 585
 - 1. *In General*, 585
 - 2. *Amount of Recovery*, 585
 - 3. *Recitals as to Execution*, 586
 - 4. *Summary Judgment*, 587
 - 5. *Enforcement of*, 587
- I. *Appeal*, 588

III. PROCEEDINGS BY SURETY, 588

- A. *Remedies*, 588
 - 1. *In Equity*, 588
 - a. *Cancellation*, 588
 - b. *Compelling Performance by Principal*, 589
 - c. *Subrogation*, 591

- d. *Accounting*, 591
- e. *Contribution From Co-Surety*, 591
- 2. *At Law*, 592
 - a. *Actions*, 592
 - b. *Summary Proceedings*, 593
- B. *Jurisdiction*, 594
- C. *Parties*, 594
 - 1. *Plaintiff*, 594
 - 2. *Defendant*, 594
- D. *Pleading*, 595
- E. *Judgment or Decree*, 595
 - 1. *In General*, 595
 - 2. *Costs*, 596
 - 3. *Attorney's Fees*, 597

CROSS-REFERENCES:

Bonds;	Justification of Sureties;
Contribution;	Recognizances and Bail;
Guaranty;	Subrogation;
Indemnity;	Undertakings.

For forms, see 9 STANDARD PROC. 998, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITIONS AND DISTINCTIONS.—Suretyship is an undertaking to answer for the debt, default, or miscarriage of another, by which the surety becomes bound as the principal or original debtor is bound.¹ It is a primary obligation,² binding the surety as an

1. Bouv. L. Dict. See also the following cases: **U. S.**—*McIntosh-Huntington Co. v. Reed*, 89 Fed. 464. **Ala.** *White's Admr. v. Life Assn. of America*, 63 Ala. 419, 35 Am. Rep. 45; *Evans v. Keeland*, 9 Ala. 42. **Ga.** *Buck v. Bank of State*, 104 Ga. 660, 30 S. E. 872. **Ind.**—*Woody v. Haworth*, 24 Ind. App. 634, 57 N. E. 272. **N. Y.** *Keene v. Newark Watch Case M. Co.*, 39 Misc. 6, 78 N. Y. Supp. 753. **Ore.** *Hoffman v. Habighorst*, 38 Ore. 261, 63 Pac. 610, 53 L. R. A. 908.

[a] **Nature of Contract.**—(1) The undertaking of the surety is essentially a pledge to make good the misfeasance or non-feasance of his principal to an amount co-extensive with the penalty of his bond. *Leggett v. Humphreys*, 21 How. (U. S.) 66, 76, 16 L. ed. 50.

(2) An instrument purporting to be a "formal declaration of obligation and guaranty," but in which the obligor declares himself as surety, expressly binding himself to be "directly" responsible and to "answer directly" to the obligee, is a contract of suretyship, although the word "guarantees" is used therein. *Society San Cristoforo v. Rock*, 176 Ill. App. 132.

[b] **What Contract Includes.**—A contract of suretyship, by which one person undertakes to be responsible for debts to be contracted by another, does not ordinarily include debts contracted by the latter jointly with a third person, as partners or otherwise. *Waterman v. Alden*, 143 U. S. 196, 12 Sup. Ct. 435, 36 L. ed. 123.

2. *Kroncké v. Madsen*, 56 Neb. 609,

original promisor,³ and making him an insurer of the debt.⁴ In other words, the surety undertakes to perform the contract of the principal, if the latter does not.⁵ His liability arises at once upon the principal's default,⁶ and no prior judgment is necessary to fix the same.⁷ The distinctions elsewhere drawn between the contract of suretyship and that of guaranty⁸ and indemnity⁹ should be closely observed.

The surety is the party who thus binds himself to pay the debt or perform the obligation of the principal if the latter fails to do so.¹⁰

A co-surety is one who is equally bound with other sureties on a contract of suretyship for the same obligation.¹¹

A supplemental surety is a surety to a surety, a surety to whom another surety sustains the relation of principal.¹²

II. ENFORCEMENT OF CONTRACT OF SURETY.—A. IN GENERAL.—Upon default of the principal, the creditor is, under some

77 N. W. 202; *Judge of Probate v. Sulloway*, 68 N. H. 511, 44 Atl. 720, 73 Am. St. Rep. 619, 49 L. R. A. 347.

3. *Ala.*—*J. R. Watkins Med. Co. v. Lovelady*, 186 Ala. 414, 65 So. 52. *Colo.* *News-Times Pub. Co. v. Doolittle*, 51 Colo. 386, 118 Pac. 974. *Mich.*—*Bedford v. Kelley*, 173 Mich. 492, 139 N. W. 250, Ann. Cas. 1914D, 848. *N. Y.* *Stein v. Whitman*, 156 App. Div. 861, 142 N. Y. Supp. 4.

4. *Ga.*—*McClain v. Georgian Co.*, 17 Ga. App. 648, 87 S. E. 1090. *N. D.* *Northern State Bank v. Bellamy*, 19 N. D. 509, 125 N. W. 888, 31 L. R. A. (N. S.) 149. *Pa.*—*Kramph v. Hatz*, 52 Pa. 525.

5. *Reigart v. White*, 52 Pa. 438.

6. *Reigart v. White*, 52 Pa. 438.

7. *Kroncke v. Madsen*, 56 Neb. 609, 77 N. W. 202. And see *infra*, II, A.

8. See 10 STANDARD PROC. 667.

9. See 12 STANDARD PROC. 24.

10. See the following: *U. S.*—*Hall v. Weaver*, 34 Fed. 104, 13 Sawy. 188. *Ala.*—*Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 So. 723. *Ind.*—*Young v. McFadden*, 125 Ind. 254, 25 N. E. 284. *Ia.*—*Pitkins v. Boyd*, 4 G. Gr. 255. *Me.*—*Read v. Cutts*, 7 Greenl. 186, 22 Am. Dec. 184. *Minn.*—*Cassan v. Maxwell*, 39 Minn. 391, 40 N. W. 357; *Wendlandt v. Sohre*, 37 Minn. 162, 33 N. W. 700. *Ohio.*—*Wise v. Miller*, 45 Ohio St. 388, 14 N. E. 218. *Tex.* *Magill v. Brown*, 20 Tex. Civ. App. 662, 50 S. W. 143, 642. *Va.*—*Field v. Harrison*, Wythe 273. *W. Va.*—*Johnson v. Young*, 20 W. Va. 614.

[a] **Code Definition.**—"A surety is one who at the request of another, and for the purpose of securing to him a

benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." *Thayer v. Braden*, 27 Cal. App. 435, 150 Pac. 653.

11. *Ga.*—*Waldrop v. Wolff*, 114 Ga. 610, 40 S. E. 830. *Ind.*—*Houck v. Graham*, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727. *N. Y.*—*Toucey v. Schell*, 15 Misc. 350, 37 N. Y. Supp. 879, 72 N. Y. St. 858. *S. C.*—*Harris v. Ferguson*, 2 Bailey 397.

[a] "The test of cosuretyship (1) is common liability upon the same obligation." So where, one of two or more sureties, each becomes liable for a fractional part only of the entire loss, their contracts are separate and distinct, and the relation of cosuretyship does not arise. *Assets Realization Co. v. American Bonding Co.*, 88 Ohio 216, 102 N. E. 719, Ann. Cas. 1915A, 1194. (2) Where one individual fills two offices, and for each office secures a bond by different surety companies, such sureties are not cosureties. *Fidelity & Deposit Co. v. Gill*, 116 Va. 86, 81 S. E. 39. See also *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104, 37 Am. St. Rep. 627.

12. See the following cases: *Conn.* *Bulkeley v. House*, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247. *Ill.*—*Robertson v. Deatherage*, 82 Ill. 511. *Miss.* *Hunt v. Chambliss*, 7 Smed. & M. 532. *Mo.*—*Leeper v. Paschal*, 70 Mo. App. 117. *N. Y.*—*Schram v. Werner*, 85 Hun 293, 32 N. Y. Supp. 995, 66 N. Y. St. 479. *Tenn.*—*Tennessee Hospital v. Fuqua*, 1 Lea 608. *Tex.*—*Mulkey v. Templeton* (Tex. Civ. App.), 60 S. W. 439. *Vt.*—*Adams v. Flanagan*, 36 Vt

statutes, obliged to first exhaust any security he may have for the payment of the debt,¹³ or, must on notice and demand by the surety, sue or permit the surety in his name to sue the principal.¹⁴ But in the absence of such statutes, the creditor may proceed at once against the surety¹⁵ without first exhausting his remedy against the principal,¹⁶ or enforcing any collateral security which he may hold.¹⁷ No delay in suing the principal will defeat the creditor's remedy against the surety; not even though insolvency of the principal intervenes,¹⁸ or

403. **W. Va.**—Singer Mfg. Co. v. Bennett, 28 W. Va. 16.

13. *Post v. W. H. Bailey & Co.*, 68 W. Va. 434, 69 S. E. 910.

14. **Ark.**—Hempstead v. Watkins, 6 Ark. 317, 42 Am. Dec. 696. **Ind.**—Reid v. Cox, 5 Blackf. 312. **Ia.**—Citizens' Bank v. Hickman, 162 N. W. 606; Dorothy v. Hicks, 63 Iowa 240, 18 N. W. 909. **Kan.**—Ingels v. Sutliff, 36 Kan. 444, 13 Pac. 828. **Ky.**—Baker v. Whittaker, 177 Ky. 197, 197 S. W. 644. **Miss.**—Smith v. Clopton, 48 Miss. 66. **W. Va.**—Gillilan v. Ludington, 6 W. Va. 128.

[a] Prior suit against estate of insane principal cannot be thus compelled by surety. National Bank of Commerce v. Gilvin (Tex. Civ. App.), 152 S. W. 652.

15. *Post v. W. H. Bailey & Co.*, 68 W. Va. 434, 69 S. E. 910.

[a] An unsatisfied judgment against the principal on a joint and several obligation is not a bar to recovery against a surety. McPharlin v. Fidelity & Deposit Co., 162 Mich. 141, 127 N. W. 307.

16. **U. S.**—Dennis v. Rider, 2 McLean 451, 7 Fed. Cas. No. 3,797. **Cal.**—Dane v. Corduan, 24 Cal. 157, 85 Am. Dec. 53; Hartman v. Burlingame, 9 Cal. 557. **Del.**—Wilds v. Attix, 4 Del. Ch. 253. **Ill.**—Taylor v. Beck, 13 Ill. 376. **Ind.**—Halstead v. Brown, 17 Ind. 202. **Me.**—Eaton v. Waite, 66 Me. 221; Leavitt v. Savage, 16 Me. 72. **Md.**—Freaner v. Yingling, 37 Md. 491. **Mass.**—Adams Bank v. Anthony, 18 Pick. 238; Bellows v. Lovell, 5 Pick. 307; Frye v. Barker, 4 Pick. 382. **Minn.**—Benedict v. Olson, 37 Minn. 431, 35 N. W. 10. **Miss.**—Kerr v. Baker, Walk. 140. **Mo.**—State v. Reynolds, 3 Mo. 95. **Neb.**—Bank of Maywood v. McAllister, 56 Neb. 188, 76 N. W. 552. **N. H.**—Davis v. Huggins, 3 N. H. 231. **N. J.**—Pintard v. Davis, 21 N. J. L. 632, 47 Am. Dec. 172. **N. Y.**—Wells v. Mann, 45 N. Y. 327, 6 Am. Rep. 93; Huffman v. Hulbert, 13 Wend. 377; Row v. Pul-

ver, 1 Cow. 246. **Ohio.**—Washburn v. Holmes, Wright 67. **Ore.**—Guernsey v. Marks, 55 Ore. 323, 106 Pac. 334; White v. Savage, 48 Ore. 604, 87 Pac. 1040; Findley v. Hill, 8 Ore. 247, 34 Am. Rep. 578. **Pa.**—Dehuff v. Turbett, 3 Yeates 157. **S. C.**—Pickett v. Land, 2 Bailey 608; Caston v. Dunlap, Rich. Eq. Cas. 77, 23 Am. Dec. 194. **Vt.**—Hickok v. Farmers' & Mechanics' Bank, 35 Vt. 476; Hogaboom v. Herrick, 4 Vt. 131. **Va.**—Croughton v. Duval, 3 Call. (7 Va.) 69. **Wis.**—Harris v. Newell, 42 Wis. 687.

17. *Stanley v. Akoi*, 12 Hawaii 344; *Erwin v. Du Pont*, etc. Powder Co. (Tex. Civ. App.), 156 S. W. 1097.

18. **U. S.**—Smith v. United States, 5 Pet. 292, 8 L. ed. 130; Bradley v. Andrus, 107 Fed. 196, 46 C. C. A. 238, 53 L. R. A. 432. **Ala.**—Darbey v. Berney Nat. Bank, 97 Ala. 643, 11 So. 881. **Ark.**—Petty v. Gacking, 97 Ark. 217, 133 S. W. 832, 33 L. R. A. (N. S.) 175; Wilson v. White, 82 Ark. 407, 102 S. W. 201; King v. State Bank, 9 Ark. 185. **Cal.**—Carver v. Steele, 116 Cal. 116, 47 Pac. 1007, 58 Am. St. Rep. 156. **Ill.**—Lyle v. Morse, 24 Ill. 95; Diversy v. Moor, 22 Ill. 330, 74 Am. Dec. 157. **Ind.**—May v. Reed, 125 Ind. 199, 25 N. E. 216. **Ky.**—Stout v. Ashton, 5 Mon. 251; Harrison v. Lane, 4 Bibb 466. **Me.**—Stowell v. Goodenow, 31 Me. 538. **Mich.**—Rogers v. Detroit Sav. Bank, 146 Mich. 639, 110 N. W. 74, 18 L. R. A. (N. S.) 530. **Mo.**—Burge v. Duden, 105 Mo. App. 8, 78 S. W. 653. **Mont.**—Hefferlin v. Krieger, 19 Mont. 123, 47 Pac. 638. **N. Y.**—People v. White, 28 Hun 289; People v. Russell, 4 Wend. 570. **Okla.**—Linton v. Chestnutt-Gibbons Grocer Co., 30 Okla. 103, 118 Pac. 385. **Pa.**—Shaffstall v. McDaniel, 152 Pa. 598, 25 Atl. 576; Johnston v. Thompson, 4 Watts 446. **Tex.**—Nunn v. Smith (Tex. Civ. App.), 194 S. W. 406; *Erwin v. Du Pont*, etc. Powder Co. (Tex. Civ. App.), 156 S. W. 1097. **Va.**—Alexander v.

the debt becomes barred,¹⁹ and notwithstanding the surety requested the creditor to sue the principal before he became insolvent.²⁰ But under some statutes insolvency of the principal or delay beyond the limitation period after notice and demand to sue will release the surety.²¹

B. NATURE AND FORM OF ACTION.—The usual remedy of the creditor against the surety is an action at law²² upon the surety's bond, if there is one,²³ but in case the legal remedy is inadequate or incomplete a suit in equity is maintainable.²⁴

C. JURISDICTION AND VENUE.—Where no particular place of performance is named,²⁵ a suit against the surety is maintainable in the county where he resides,²⁶ or if jointly against him and the principal, in the county where either of them reside.²⁷ But where a place of payment is named, a surety may be sued at such place.²⁸

Byrd, 85 Va. 690, 8 S. E. 577; *Updike's Admr. v. Lane*, 78 Va. 132.

[a] **The measure of damages, not affected by delay.** *Mohawk Co. v. Bankers' Surety Co.*, 162 Wis. 272, 156 N. W. 154.

19. **La.**—*Cooley v. Lawrence*, 4 Mart. (O. S.) 639. **Neb.**—*Eickhoff v. Eickenbary*, 52 Neb. 332, 72 N. W. 308. **N. H.** *Townsend v. Riddle*, 2 N. H. 448. **N. Y.** *Looney v. Hughes*, 26 N. Y. 514.

20. **Mont.**—*Smith v. Freyler*, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358. **Ohio.**—*Morrison v. Equitable Nat. Bank*, 9 Ohio Dec. 31, 6 Ohio N. P. 7. **Okla.**—*Palmer v. Noe*, 48 Okla. 450, 150 Pac. 462.

21. **Ia.**—*Citizens' Bank v. Hickman*, 162 N. W. 606. **Ky.**—*Baker v. Whitaker*, 177 Ky. 197, 197 S. W. 644. **Tex.**—*National Bank of Commerce v. Gilvin* (Tex. Civ. App.), 152 S. W. 652.

See generally the statutes.

22. **D. C.**—*Wilkinson v. McKimmie*, 36 App. Cas. 336. **Ga.**—*Osborn v. Harris County*, 17 Ga. 123. **Ky.**—*Ditto v. Young*, 3 J. J. Marsh. 187.

[a] **Assumpsit.**—*Butler v. Rawson*, 1 Denio (N. Y.) 105; *Tomlinson v. Willey*, 1 How. Pr. (N. Y.) 247; *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095; *Vaughn v. Rugg*, 52 Vt. 235.

23. **Ark.**—*Willamouiez v. Strong*, 8 Ark. 467. **La.**—*Parham v. Cobb*, 9 La. Ann. 423. **N. Y.**—*Wilkesbarre Rlty. Co. v. Powell*, 86 Misc. 321, 149 N. Y. Supp. 209.

[a] **Covenant.**—*Wilkinson v. McKimmie*, 36 App. Cas. (D. C.) 336.

24. **Miss.**—*Ogden v. Waller*, 24 Miss. 190. **N. Y.**—*Illinois Surety Co. v. Mat-*

tone, 138 App. Div. 173, 122 N. Y. Supp. 928; *Cappadonna v. Illinois Surety Co.*, 68 Misc. 470, 125 N. Y. Supp. 162. **Tenn.**—*Hay v. Marshall*, 3 Humph. 623. **Va.**—*Graves v. McCaul*, 1 Call (5 Va.) 414. **Eng.**—*Sheffield v. Castleton*, 1 Eq. Cas. Abr. 93, 21 Eng. Reprint 904.

[a] **Incidental Jurisdiction.**—Where equity has jurisdiction to determine matters of trust, or account, etc., it will assume jurisdiction to enforce a surety's liability as incidental to the main controversy. **Ky.**—*Moore v. Waller's Heirs*, 1 A. K. Marsh. 488. **Md.** *Gorsuch v. Briscoe*, 56 Md. 573. **N. Y.** *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689.

[b] **To Prevent Multiplicity of Suits.** *American Surety Co. v. Mills*, 232 Fed. 841, 147 C. C. A. 35; *Guffanti v. Nat. Surety Co.*, 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848, *affirming* 133 App. Div. 610, 118 N. Y. Supp. 207.

[c] **In case of mistake in bond** equity has jurisdiction to enforce the bond according to its real intent and purpose. *Clark v. Nickell*, 73 W. Va. 69, 79 S. E. 1020, Ann. Cas. 1917A, 1286.

25. *Lindheim v. Muschamp*, 72 Tex. 33, 12 S. W. 125.

26. *Hays v. Comstock-Castle Stove Co.*, 70 Ark. 151, 66 S. W. 649.

27. *Vandiver v. Third Nat. Bank*, 15 Ga. App. 433, 83 S. E. 673; *Harrell v. Williams*, 11 Ga. App. 552, 75 S. E. 904; *Lyons v. Daugherty* (Tex. Civ. App.), 26 S. W. 146.

28. *Taylor v. Gribble* (Tex. Civ. App.), 33 S. W. 765.

D. TIME TO COMMENCE ACTION.—An action on the surety's bond must be brought within the period prescribed therein.²⁹

E. PARTIES.³⁰—**1. Plaintiff.**—The surety's liability may be enforced by the creditor,³¹ or the obligee in the bond,³² or under statute by one for whose benefit the contract was made.³³ Several obligees

As to venue generally, see the title "Venue."

29. *Leshner v. U. S. Fidelity & Guaranty Co.*, 239 Ill. 502, 88 N. E. 208; *East Liverpool China Co. v. Illinois Surety Co.*, 152 Ill. App. 89; *Fitger Brew. Co. v. American Bonding Co.*, 127 Minn. 330, 149 N. W. 539. See *Monro v. National Surety Co.*, 47 Wash. 488, 92 Pac. 280.

[a] **Contract Unperformed.**—(1) Even where the surety's bond relates to a contract to perform a certain work, which by reason of delay is not completed until after the date specified for the commencement of any action on the bond, such action must be started if at all before the date mentioned in the bond, and a delay in doing so will not be excused by reason of the non-performance of the contract until a subsequent date. *Leshner v. U. S. Fidelity & Guaranty Co.*, 239 Ill. 502, 88 N. E. 208. (2) But manifestly the limitation cannot be pleaded where the limitation period does not begin to run until the performance or completion of the contract and the principal has failed to perform. *Comey v. United Surety Co.*, 217 N. Y. 268, 111 N. E. 832, *affirming* 160 App. Div. 698, 145 N. Y. Supp. 674.

[b] **Breach of Contract.**—(1) Where one of the conditions of the bond is that an action thereon must be instituted within six months from a breach of the contract, the period of limitation, on a building contract which has been breached by failure to pay for material used, begins to run from the time judgments are entered against the obligee on materialmen's liens arising out of said breach. *Fitger Brew. Co. v. American Bonding Co.*, 127 Minn. 330, 149 N. W. 539; *Martin v. Empire State Surety Co.*, 53 Wash. 290, 101 Pac. 876; *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052; *Friend v. Ralston*, 35 Wash. 422, 77 Pac. 794. (2) But an action on the bond for such a contract, which is begun as soon as materialmen's liens are placed upon the obligee's property, is not prematurely brought, the obligee being entitled to

consider the placing of the incumbrance upon his property as a breach of the contract. *Friend v. Ralston*, 35 Wash. 422, 77 Pac. 794.

30. See generally the title "Parties."

31. **Ohio.**—*American Surety Co. v. Boyle*, 65 Ohio St. 486, 63 N. E. 73. **Tex.**—See *National Bank of Cleburne v. Gulf, C. & S. F. R. Co.*, 95 Tex. 176, 66 S. W. 203. **Eng.**—*Agacio v. Forbes*, 4 L. T. (N. S.) 155, 14 Moore P. C. 160, 15 Eng. Reprint 267. **Can.**—*Guthrie v. O'Connor*, 36 U. C. Q. B. 372.

32. *Owens v. Georgia Life Ins. Co.*, 165 Ky. 507, 177 S. W. 294.

[a] **Where a bond runs in favor of a court** to secure the payment of certain moneys by its clerk, part of which are to be turned over by the clerk to the bailiff of the court, a failure to account to the bailiff for the moneys to which he is entitled gives the bailiff a right of action on the bond against the sureties. *Cool v. Switzer*, 19 U. C. Q. B. 199.

[b] **Subsequent Partner.**—Where the obligee takes a partner during the life of the bond, an action will not lie in favor of the partnership. *Barnett v. Smith*, 17 Ill. 565.

[c] **Bond to the United States** for the benefit of the materialmen should be sued on in the name of the United States to the use of the real plaintiff. See *Title Guaranty & Trust Co. v. Crane Co.*, 219 U. S. 24, 31 Sup. Ct. 140, 55 L. ed. 72, *affirming* 163 Fed. 168, 89 C. C. A. 618.

33. **Cal.**—*People's Lumb. Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576. **Ind.**—*Brown v. Markland*, 22 Ind. App. 652, 53 N. E. 295. **Ia.**—*Getchell*, etc. *Lumber Co. v. Peterson*, 124 Iowa 599, 100 N. W. 550. **Ky.**—*Owens v. Georgia Life Ins. Co.*, 165 Ky. 507, 177 S. W. 294; *Federal Union Surety Co. v. Com.*, 139 Ky. 92, 129 S. W. 335. **Pä.**—*Philadelphia v. Harry C. Nichols Co.*, 214 Pa. 265, 63 Atl. 886. **Wash.**—*Rust v. United States Fidelity & G. Co.*, 87 Wash. 93, 151 Pac. 248. **Eng.**—*Lloyd's v. Harper*, 50 L. J. Ch. 140, 16 Ch. D. 290, 29 Wkly. Rep. 452, 43 L. T.

may sue separately when their causes of action are several,³⁴ and when they are numerous an action in equity may be brought by one representing all.³⁵

2. Defendant.—When jointly liable principal and surety should be joined;³⁶ but by statute the liability of principal and surety is generally joint and several,³⁷ even when, in some jurisdictions, the instrument creating the obligation refers to such liability as joint;³⁸ hence they may generally be sued either jointly or severally.³⁹ The

(N. S.) 481. **Can.**—*Verratt v. McAulay*, 5 Ont. 313.

Action by third person for whose benefit contract was made, see the title "Parties."

[a] **Materialmen.**—Where part of the obligation of a surety's bond on a building contract is to save harmless the obligee from the payment of all liens, claims, etc., arising out of the performance of the contract, and the contractor fails to complete the work, leaving unpaid a number of bills for materials used therein, the obligee, being under no obligation to pay such bills by reason of liens or otherwise, cannot maintain an action on the bond against the surety for the benefit of the materialmen. *Rust v. United States Fidelity & G. Co.*, 87 Wash. 93, 151 Pac. 248. As to recovery by materialmen generally, see the title "**Mechanics' Liens.**"

34. *Palmer v. Sparshott*, 4 Man. & G. 137, 11 L. J. C. P. 204, 4 Scott N. R. 743, 43 E. C. L. 79, 134 Eng. Reprint 57.

35. *Guffanti v. Nat. Surety Co.*, 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848, *affirming* 133 App. Div. 610, 113 N. Y. Supp. 207. See generally the title "**Parties.**"

36. **U. S.**—*Pickersgill v. Lahens*, 15 Wall. 140, 21 L. ed. 119. **Ga.**—*Scarratt v. F. W. Cook Brew. Co.*, 117 Ga. 181, 43 S. E. 413. **Haw.**—*Stanley v. Akoi*, 12 Hawaii 344. **Ind.**—*South Side Planing Mill Assn. v. Cutler & S. Lumb. Co.*, 64 Ind. 560; *Wheeler v. Rohrer*, 21 Ind. App. 477, 52 N. E. 780. **La.**—*New Orleans v. Ripley*, 5 La. 120, 25 Am. Dec. 175; *Etzberger v. Menard*, 11 Mart. (O. S.) 434; *Aston v. Morgan*, 2 Mart. (O. S.) 336, 5 Am. Dec. 733. **Mont.**—*Cole Mfg. Co. v. Morton*, 24 Mont. 58, 60 Pac. 587. **Okla.**—See *Fidelity & Deposit Co. v. N. S. Sherman Mach. & Iron Wks.*, 161 Pac. 793. **Pa.**—*Philadelphia v. Reeves*, 48 Pa. 472. **Tenn.**—*Kendrick v. Moss*, 104 Tenn. 376, 58 S. W. 127. **Eng.**—*Strong*

v. Foster, 17 C. B. 201, 25 L. J. C. P. 106, 4 Wkly. Rep. 151, 84 E. C. L. 201, 139 Eng. Reprint 1047; *Jones v. Beach*, 2 De G. M. & G. 886, 22 L. J. Ch. 425, 42 Eng. Reprint 1119.

37. *Fidelity & Deposit Co. v. N. S. Sherman Mach. & Iron Wks. (Okla.)*, 161 Pac. 793.

38. *Fidelity & Deposit Co. v. N. S. Sherman Mach. & Iron Wks. (Okla.)*, 161 Pac. 793.

39. **U. S.**—*United States v. Hodge*, 6 How. 279, 12 L. ed. 437; *United States v. Comet Oil & Gas Co.*, 187 Fed. 674 (Okla.). **Ala.**—*J. R. Watkins Med. Co. v. Lovelady*, 186 Ala. 414, 65 So. 52. **Ark.**—*Hays v. Comstock-Castle Stove Co.*, 70 Ark. 151, 66 S. W. 649. **Colo.**—*News-Times Pub. Co. v. Doolittle*, 51 Colo. 386, 118 Pac. 974. **D. C.**—*Wilkinson v. McKimmie*, 36 App. Cas. 336. **Ga.**—*Fourth Nat. Bank v. Mayer*, 100 Ga. 87, 26 S. E. 83. **Ill.**—*Harrison v. Thackaberry*, 248 Ill. 512, 94 N. E. 172. **Ind.**—*Stevenson v. Stunkard*, 44 Ind. App. 716, 90 N. E. 106; *Foster v. Honan*, 22 Ind. App. 252, 53 N. E. 667; *Webster v. Smith*, 4 Ind. App. 44, 30 N. E. 139. **Ia.**—*Pierce v. Durham*, 73 N. W. 862. **Ky.**—*Owens v. Georgia Life Ins. Co.*, 165 Ky. 507, 177 S. W. 294. **La.**—*City of Shreveport v. U. S. Fidelity & Guaranty Co.*, 131 La. 933, 60 So. 621; *Bonny v. Brashear*, 19 La. 383; *Rogay v. Juilliard*, 25 La. Ann. 395; *State v. McDonnell*, 12 La. Ann. 741. **Mich.**—*People v. Butler*, 74 Mich. 643, 42 N. W. 273. **Miss.**—*Davis v. Hoopes*, 33 Miss. 173. **Mo.**—*Board of Education v. U. S. Fidelity & Guaranty Co.*, 166 Mo. App. 410, 149 S. W. 46. **N. Y.**—*Stein v. Whitman*, 156 App. Div. 861, 142 N. Y. Supp. 4; *Town of Hadley v. Garner*, 116 App. Div. 68, 101 N. Y. Supp. 777; *Riehl v. Illinois Surety Co.*, 85 Misc. 245, 148 N. Y. Supp. 339; *American Surety Co. v. Thurber*, 24 Jones & S. 338, 4 N. Y. Supp. 191, *affirmed*, 121 N. Y. 655, 23 N. E. 1129. **N. C.**—*McNeill v. McBryde*, 112 N. C. 408, 16

statutes of some jurisdictions, however, provide that in every action against a surety, with certain exceptions, such as absence from the state, death or insolvency, the principal is a necessary party,⁴⁰ unless judgment has previously been rendered against the principal.⁴¹

As to cosureties the same general principle applies, namely, that when jointly and severally liable they may be sued either jointly or separately.⁴² Cosureties may be joined even though one of them is liable only for a limited amount,⁴³ or when unity exists in the principal obligation, though the sureties are liable on separate bonds,⁴⁴ but not, as a rule, if their liability arises out of separate contracts.⁴⁵

In equity all the obligors on the bond should be joined, unless their absence may be excused by reason of insolvency or other substantial cause,⁴⁶ and if any of them are dead their personal representatives

S. E. 841; *Brown v. McKee*, 108 N. C. 387, 13 S. E. 8; *Davis v. Sanderlin*, 23 N. C. 389. **Ohio**.—*Walsh v. Miller*, 51 Ohio St. 462, 38 N. E. 381. **Okla.** *Baker v. Gaines Bros. Co.*, 166 Pac. 159; *Fidelity & Deposit Co. v. N. S. Sherman Mach. & Iron Co.*, 161 Pac. 793; *Palmer v. Noe*, 48 Okla. 450, 150 Pac. 462. **Pa.**—*Domestic Sew. Mach. Co. v. Saylor*, 86 Pa. 287; *Lishy v. O'Brien*, 4 Watts 141; *Supplee v. Herrman*, 16 Pa. Super. 45. **P. I.**—*Chinese Chamber of Commerce v. Pua Te Ching*, 16 Phil. Isl. 406. **S. C.**—*State v. Williams*, 19 S. C. 62; *Lowndes v. Pinckney*, 2 Strobb. Eq. 44; *Lainhart v. Reilly's Admr.*, 3 Des. Eq. 590. **Tenn.** *Maxwell v. Smith*, 86 Tenn. 539, 8 S. W. 340; *Whiteside v. Latham*, 2 Coldw. 91. **Va.**—*Dabney's Admr. v. Smith's Legatees*, 5 Leigh (32 Va.) 13. **Wash.** *Pacific Bridge Co. v. United States Fidelity & Guar. Co.*, 33 Wash. 47, 73 Pac. 772. **Eng.**—*Berwick-Upon-Tweed v. Murray*, 7 De G. M. & G. 497, 26 L. J. Ch. 201, 3 Jur. (N. S.) 847, 5 Wkly. Rep. 208, 44 Eng. Reprint 194.

[a] **Administrator of deceased principal** need not be joined in such case. *Baker v. Gaines Bros. Co.* (Okla.), 166 Pac. 159.

[b] **The holder of a promissory note** may, at his option, maintain an action against the parties who sign the same as sureties without joining the principal debtor as a party defendant. *Baker v. Gaines Bros. Co.* (Okla.), 166 Pac. 159.

[c] **The contractor is not a necessary party defendant** to a sub-contractor's action on the building contractor's bond. *Board of Education v. U. S. Fidelity & Guaranty Co.*, 166 Mo. App. 410, 149 S. W. 46.

40. *Hume v. Perry* (Tex. Civ. App.), 136 S. W. 594.

[a] **Insolvent Principal**.—*Reeves & Co. v. Jowell* (Tex. Civ. App.), 140 S. W. 364.

[b] **In an action against the principal and one surety**, where other sureties are liable severally for limited amounts, such sureties are proper but not necessary parties. *Bolton v. Clifford & Co.*, 45 Tex. Civ. App. 140, 100 S. W. 210.

41. *Hume v. Perry* (Tex. Civ. App.), 136 S. W. 594.

42. **Ind.**—*Tourtelott v. Junkin*, 4 Blackf. 483. **N. Y.**—*Phalen v. Dingee*, 4 E. D. Smith 379. **Okla.**—*Fidelity & Deposit Co. v. N. S. Sherman Mach. & Iron Wks.*, 161 Pac. 793; *Palmer v. Noe*, 48 Okla. 450, 150 Pac. 462.

[a] **The personal representative of a deceased cosurety** is a proper party. *White v. Alexander*, 63 Tex. Civ. App. 512, 131 S. W. 437.

43. *White v. Alexander*, 63 Tex. Civ. App. 512, 131 S. W. 437.

44. *Powell v. Powell*, 48 Cal. 234; *Keowne v. Love*, 65 Tex. 152.

45. *Southmayd v. Jackson*, 15 Misc. 476, 37 N. Y. Supp. 201, 72 N. Y. St. 781.

[a] **In an action to apportion collateral**, all sureties liable should be made parties to the proceeding in order that the collateral may be apportioned, and the judgment binding on all. *State Bank v. Bryan*, 268 Ill. 151, 108 N. E. 1004, affirming 186 Ill. App. 207. *Compare Bank of Monroe v. Gifford*, 79 Iowa 300, 44 N. W. 558.

46. **Ky.**—*Payne v. Hays*, 4 J. J. Marsh. 176; *Sneed's Exr. v. White*, 3 J. J. Marsh. 525, 20 Am. Dec. 175; *Tobin v. Wilson*, 3 J. J. Marsh. 63.

should be named as parties to the suit.⁴⁷

3. **Intervention.**—A surety, on a proper showing, may intervene to defend an action against his principal.⁴⁸

4. **Dismissal.**—In case the liability is joint and several, dismissal may be had as to either principal⁴⁹ or surety,⁵⁰ and the case permitted to proceed to judgment against the other party.

F. **PLEADING.**—1. **Declaration or Complaint.**⁵¹—Facts should be stated showing both the suretyship contract,⁵² and the principal⁵³

Md.—Carroll *v.* Waring, 3 Gill & J. 491. **N. C.**—Hart *v.* Coffee, 57 N. C. 321. **Va.**—Loop *v.* Summers, 3 Rand. 511. **W. Va.**—Clark *v.* Nickell, 73 W. Va. 69, 79 S. E. 1020, Ann. Cas. 1917A, 1286. **Eng.**—Brooks *v.* Stuart, 8 L. J. Ch. (N. S.) 279, 1 Beav. 512, 48 Eng. Reprint 1039; Cockburn *v.* Thompson, 16 Ves. Jr. 321, 33 Eng. Reprint 1005. **Can.**—Canada Exch. Bank *v.* Springer, 29 Grant Ch. (U. C.) 270.

[a] **Bill Against Principal.**—(1) When the object of the suit is to reach property belonging to the principal it is not necessary to join the surety. **N. J.**—Cooper's Exr. *v.* Cooper, 5 N. J. Eq. 498. **N. Y.**—Dias *v.* Bouchaud, 10 Paige 445. **Eng.**—Adams *v.* Thompson, 6 L. J. Ch. 109. (2) Nor is it necessary to join the surety when the bill in equity is solely for the purpose of securing an accounting by the principal. Newton *v.* Egmont, 4 Sim. 574, 58 Eng. Reprint 215.

47. **Ark.**—Roane *v.* Pickett, 7 Ark. 510. **Va.**—Wytheville Crystal Ice & D. Co. *v.* Frick Co., 96 Va. 141, 30 S. E. 491. **W. Va.**—Clark *v.* Nickell, 73 W. Va. 69, 79 S. E. 1020, Ann. Cas. 1917A, 1286. **Eng.**—Berwick-Upon-Tweed *v.* Murray, 7 De G. M. & G. 497, 26 L. J. Ch. 201, 3 Jur. (N. S.) 847, 44 Eng. Reprint 194.

48. **Cal.**—Coburn *v.* Smart, 53 Cal. 742. **N. J.**—Moore *v.* Hammell (N. J. Eq.), 14 Atl. 743. **N. Y.**—Hoffman *v.* Steinau, 34 Hun 239; Lyon *v.* Tallmadge, 14 Johns. 501; Jewett *v.* Crane, 13 Abb. Pr. 97, 35 Barb. 208.

49. **Cal.**—See Nunan *v.* Berry, 66 Cal. 305, 5 Pac. 358. **D. C.**—Wilkinson *v.* McKimmie, 36 App. Cas. 336. **Ill.**—Harrison *v.* Thackberry, 248 Ill. 512, 94 N. E. 172. **Ind.**—Stevenson *v.* Stunkard, 44 Ind. App. 716, 90 N. E. 106. **Ia.**—Dorothy *v.* Hicks, 63 Iowa 240, 18 N. W. 909. **Miss.**—Wilkinson *v.* Flowers, 37 Miss. 579, 75 Am. Dec. 78. **Tex.**—See Burden *v.* J. C. Cross & Co., 33 Tex. 685.

See the title "Dismissal, Discontinuance and Nonsuit."

50. Concord Bank *v.* Rogers, 16 N. H. 9.

For dismissal as to part of defendants in actions ex contractu generally, see 7 STANDARD PROC. 667.

51. See generally the title "Declaration and Complaint."

52. American Surety Co. *v.* Pangburn, 182 Ind. 116, 105 N. E. 769, Ann. Cas. 1916E, 1126; Wild Cat Branch *v.* Ball, 45 Ind. 213; Church *v.* Campbell, 7 Wash. 547, 35 Pac. 381.

Manner of pleading contracts generally, see the title "Implied and Express Agreements."

[a] Consideration between the principal and obligee must be shown. Bixler *v.* Ream, 3 Pen. & W. (Pa.) 282.

[b] **Execution and Delivery.**—In an action by a creditor against a principal debtor and his sureties, an allegation of the making of a bond by defendants, by the terms of which they bound themselves, is a sufficient allegation of execution and delivery. Jacobs *v.* Curtiss, 67 Conn. 497, 35 Atl. 501; North St. Louis Planing Mill Co. *v.* Essex, 157 Mo. App. 18, 137 S. W. 295.

[c] **Alleging Formal Acceptance.** When the surety contract is essentially a part of the original contract, or when, being a mere offer, its acceptance is shown by the actions of the parties, it need not be alleged in an action against the surety to enforce the obligation of his bond. Bruce Co. *v.* Lambour, 123 La. 969, 49 So. 659.

[d] **A written contract** need not be alleged unless within the statute of frauds. Lilly *v.* Hewitt, 11 Price 494. See the title "Frauds, Statute of."

53. **Cal.**—Stockton Sav. Bank *v.* McCown, 170 Cal. 600, 150 Pac. 985; Wolf *v.* Aetna Indemnity Co., 163 Cal. 597, 126 Pac. 470. **Fla.**—Orlando *v.* Gooding, 34 Fla. 244, 15 So. 770. **Ind.**—State *v.* Adams, 15 Ind. App. 310, 44 N. E. 47. **N. Y.**—Cooney *v.* Winants, 19 Wend. 504. See also Calvo *v.* Davies, 73 N. Y. 211, 29 Am. Rep. 130.

obligation, or a novation as to either,⁵⁴ and the subsequent breach.⁵⁵ It is not necessary to allege demand on the principal,⁵⁶ nor notice of his default to the surety,⁵⁷ unless demand and notice are essential in fixing the surety's liability.⁵⁸ Performance of conditions precedent to recovery must be alleged,⁵⁹ or their non-performance excused;⁶⁰ but waiver does not constitute performance, and where there is a

[a] A promise to pay is included in the allegation of indebtedness. *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 93, 46 N. E. 479. As to the allegation of payment of a bill or note generally, see 4 STANDARD PROC. 248. See also the title "Payment."

[b] The original note, being the principal obligation, must be set out in the declaration and its non-payment alleged. *Stockton Sav. Bank v. McCown*, 170 Cal. 600, 150 Pac. 985.

54. See *People's Lumb. Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576; *Victor Sewing Mach. Co. v. Scheffler*, 61 Cal. 530.

[a] The surety's assent to the new contract must be averred. *Wilkinson v. McKimmie*, 36 App. Cas. (D. C.) 336; *Weed Sew. Mach. Co. v. Oberreich*, 38 Wis. 325.

[b] Extension of Time.—Where the contract provides that an extension of time may be granted the principal without releasing the surety or affecting his liability, an extension, if made, is not a material change in the contract such as must be pleaded. *Mankedick v. Consolidated Coal & Lime Co.*, 25 Ind. App. 135, 57 N. E. 256.

55. Cal.—*Stockton Sav. Bank v. McCown*, 170 Cal. 600, 150 Pac. 985. Conn.—*New Haven v. Eastern Pav. Brick Co.*, 78 Conn. 689, 63 Atl. 517. Ga.—*McGarry v. Seiz*, 129 Ga. 296, 58 S. E. 856. Ind.—*Cummings v. Tell City Brew. Co.*, 26 Ind. App. 541, 60 N. E. 359. Ky.—*United States Fidelity & Guaranty Co. v. Com.*, 101 S. W. 360; *Merkley v. U. S. Fidelity & Guaranty Co.*, 24 Ky. L. Rep. 2308, 73 S. W. 1126. Minn.—*Danvers Farmers' Elev. Co. v. Johnson*, 93 Minn. 323, 101 N. W. 492. N. Y.—*Keene v. Newark Watch Case M. Co.*, 39 Misc. 6, 78 N. Y. Supp. 753 (*affirmed*, 81 App. Div. 48, 80 N. Y. Supp. 859); *Chicago Crayon Co. v. Slattery*, 123 N. Y. Supp. 987; *Cooney v. Winants*, 19 Wend. 504. Tex.—*May v. Chicago Crayon Co.* (Tex. Civ. App.), 147 S. W. 733. Wash.—*Pacific Bridge Co. v. United States Fidelity & Guar.* Co., 33 Wash. 47, 73 Pac. 772.

As to alleging a breach of the conditions of a bond generally, see 4 STANDARD PROC. 504.

[a] Failure to show a breach, fatal. *Brashears' Heirs v. Brashears*, 144 Ky. 451, 139 S. W. 738.

[b] Failure To Account.—When the action is for the principal's failure to account for money received, a breach of the contract is stated by the averment that the principal received money which it was his duty to account for and that he had failed to account for it. *State v. Ridgway*, 12 Ill. 14.

[c] A specific breach (1) need not be averred (*Chicago Crayon Co. v. Slattery*, 123 N. Y. Supp. 987), (2) but may be. *State v. Peterson*, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094; *Palestine Bldg. Assn. v. Spengeman* (N. J. L.), 43 Atl. 653.

[d] Breach by the surety need not be averred. *Farley v. Moran*, 96 Cal. xvii, 31 Pac. 158.

56. Ark.—*Newton v. More*, 14 Ark. 166. Cal.—*Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20; *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2. Ind.—*Burns v. Singer Mfg. Co.*, 87 Ind. 541; *McMillan v. Bull's Head Bank*, 32 Ind. 11, 2 Am. Rep. 323; *Webster v. Smith*, 4 Ind. App. 44, 30 N. E. 139. N. Y.—*Heebner v. Townsend*, 8 Abb. Pr. 234. Ohio.—*Bush v. Critchfield*, 4 Ohio 103. S. C.—*State v. Williams*, 19 S. C. 62.

57. See cases cited in preceding note.

58. *Morgan v. Menzies*, 65 Cal. 243, 3 Pac. 807.

59. U. S.—*California Sav. Bank v. American Surety Co.*, 82 Fed. 866, 87 Fed. 118. Pa.—*Moreland School Dist. v. Picker*, 14 Montg. Co. 85. Eng.—*Higgins v. Dixon*, 3 D. & L. 124, 10 Jur. 376, 14 L. J. Q. B. 329.

60. *California Sav. Bank v. American Surety Co.*, 82 Fed. 866; *Manufacturers' & Merchants' Mut. Fire Ins. Co. v. Canada Guarantee Co.*, 43 U. C. Q. B. 247; *Royal Canadian Bank v. European Assur. Soc.*, 29 U. C. Q. B. 579.

waiver it should be pleaded, together with the facts.⁶¹

2. Plea or Answer.⁶² — a. *In General.* — Suretyship, as a defense, must generally be pleaded,⁶³ and when the relationship is different from that exhibited by the note or other instrument sued upon, knowledge on the part of the payee, creditor or obligee must also be pleaded.⁶⁴ The statute of limitations,⁶⁵ discharge,⁶⁶ fraud,⁶⁷ duress,⁶⁸ non-performance of conditions precedent to the surety's liability,⁶⁹ and delivery without authority,⁷⁰ must be specially pleaded.

b. *Release or Discharge.* — Any act or circumstance by which the surety claims a release from liability, with the specific facts relating thereto, must as a rule be specially pleaded;⁷¹ such as extension⁷² of

61. *Guilford Granite Co. v. Harrison Granite Co.*, 23 App. Cas. (D. C.) 1.
62. See generally the titles "Pleas;" "Answers."

63. *Colo.*—*Crosby v. Woodbury*, 37 Colo. 1, 89 Pac. 34. *La.*—*Kilgore v. Tippit*, 26 La. Ann. 624; *Pecquet v. Pecquet's Exr.*, 17 La. Ann. 204. *Tex.*—*Pyron v. Grinder*, 25 Tex. (supplement) 159; *McNeese v. First Nat. Bank* (Tex. Civ. App.), 183 S. W. 1184.

64. *Crosby v. Woodbury*, 37 Colo. 1, 89 Pac. 34.

65. *Leshner v. United States Fidelity & Guaranty Co.*, 239 Ill. 502, 88 N. E. 208. But see the title "Limitation of Actions."

66. See *infra*, II, F, 2, b.

By payment, see *infra*, II, F, 2, c.

67. *Wilson v. Monticello*, 85 Ind. 10; *Fishburn v. Jones*, 37 Ind. 119; *Ellis v. McCormick*, 1 Hilt. (N. Y.) 313. See the title "Fraud and Deceit."

[a] *Pleading Acts of Fraud.*—A plea of release on the ground of the creditor's fraud should set out the fraudulent acts relied upon. *Taylor v. Taylor* (Ala.), 75 So. 912. See 10 STANDARD PROC. 53.

[b] *Rescission, under a plea of fraud on the principal*, is sufficiently averred by the statement of the principal's refusal to perform the contract. *Hazard v. Irwin*, 18 Pick. (Mass.) 95.

68. *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931. See the title "Duress."

[a] *By Illegal Imprisonment.*—That the surety became liable as a surety by reason of the illegal imprisonment of his principal should also aver that the illegality of such arrest was not within the knowledge of the surety at the time he became bound. *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931.

69. *U. S.*—*George A. Fuller Co. v. Doyle*, 87 Fed. 687. *Ala.*—*Shehan v. Hampton*, 9 Ala. 942. *Ga.*—*Bonner v.*

Nelson, 57 Ga. 433. *Ohio.*—*Headington v. Neff*, 7 Ohio (pt. 1) 229. *Eng.*—*White v. Ansdell*, 5 L. J. Exch. 180, 1 Tyr. & G. 785, 1 M. & W. 348.

[a] *Failure To First Sue Principal.* *Petty v. Cleveland*, 2 Tex. 404.

[b] *In setting forth notice and demand to proceed against the principal*, the plea (1) should state that the same was given in writing (*Ala.*—*Darby v. Berney Nat. Bank*, 97 Ala. 643, 11 So. 881. *Ill.*—*Ward v. Stout*, 32 Ill. 399. *Ind.*—*Mendel v. Cairnes*, 84 Ind. 141. *Ohio.*—*Headington v. Neff*, 7 Ohio (pt. 1) 229) after (2) the debt became due (see *Baker v. Whittaker*, 177 Ky. 197, 197 S. W. 644) and (3) while the principal was solvent (*Darby v. Berney Nat. Bank*, 97 Ala. 643, 11 So. 881) and (4) failure to comply therewith. *National Bank of Commerce v. Gilvin* (Tex. Civ. App.), 152 S. W. 652.

70. *Baker County v. Huntington*, 46 Ore. 275, 79 Pac. 187.

71. *Cal.*—*Bull v. Coe*, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235. *Colo.*—*Carlile v. People*, 27 Colo. 116, 59 Pac. 48.

48. *Ga.*—*Stewart v. Barrow*, 55 Ga. 664. *Mass.*—*Cutter v. Evans*, 115 Mass.

27. *Pa.*—*Donough v. Boger*, 10 Phila. 616, 31 Leg. Int. 286. *R. I.*—*Shelton v. Hurd*, 7 R. I. 403, 84 Am. Dec. 564.

72. *Rawlings v. Cole*, 67 Mich. 431, 35 N. W. 66; *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924.

[a] That the general issue will admit a defense of extension, see *Warner v. Crane*, 20 Ill. 148; *Wiley v. Temple*, 85 Ill. App. 69.

[b] *Creditor's knowledge of the suretyship must be averred.* *McCloskey v. Indianapolis Manufacturers' & Carpenters' Union*, 67 Ind. 86, 33 Am. Rep. 76.

[c] *Consideration for the extension should be pleaded.* *Ala.*—*Lehnert v.*

time and loss of securities,⁷³ and, in some jurisdictions, an unauthorized change of the contract.⁷⁴

c. *Payment*.—Payment must be specially pleaded,⁷⁵ and in some jurisdictions, particularly in an affidavit of defense, the plea must set out the time, place and manner of payment,⁷⁶ but the same particularity is not required of a surety when such facts are not within his knowledge.⁷⁷

3. *Replication or Reply*.—The general rules relating to replica-

Lewey, 142 Ala. 149, 37 So. 921. **Colo.** Winne v. Colorado Springs Co., 3 Colo. 155. **Ind.**—Prather v. Young, 67 Ind. 480; Brooks v. Allen, 62 Ind. 401. **Minn.**—St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 Minn. 486, 73 N. W. 408. **Mont.**—Smith v. Freyler, 4 Mont. 489, 1 Pac. 214, 47 Am. Rep. 358. **Neb.**—Smith v. Mason, 44 Neb. 610, 63 N. W. 41. **N. Y.**—National Citizens' Bank v. Toplitz, 178 N. Y. 464, 71 N. E. 1. **Tex.**—National Bank of Commerce v. Gilvin (Tex. Civ. App.), 152 S. W. 652; Hall v. Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861. **Vt.** Marshall v. Aiken, 25 Vt. 327.

[d] *Extension for a definite period*, should be shown. **Ala.**—Lehnert v. Lewey, 142 Ala. 149, 37 So. 921. **Ind.** Prather v. Young, 67 Ind. 480; Brooks v. Allen, 62 Ind. 401; Sample v. Martin, 46 Ind. 226. **Tex.**—National Bank of Commerce v. Gilvin (Tex. Civ. App.), 152 S. W. 652; Hall v. Johnston, 6 Tex. Civ. App. 110, 24 S. W. 861. But see Huey v. Pinney, 5 Minn. 310.

[e] *That surety's consent to extension was not given* must be pleaded. **Ark.**—Stone v. State Bank, 8 Ark. 141. **N. D.**—Patnode v. Deschenes, 15 N. D. 100, 136 N. W. 573. **Eng.**—Maingay v. Lewis, Ir. R. 5 C. L. 229.

[f] *Averment of loss or injury to a surety company resulting from the extension, necessary.* United States Fid. & Guar. Co. v. United States, 178 Fed. 692, 102 C. C. A. 192.

[g] *An allegation of the giving a promissory note to the creditor by the principal, does not state facts sufficient to indicate an extension.* Lindeman v. Rosenfield, 67 Ind. 246, 33 Am. Rep. 79.

73. Hoffman & Co. v. Atkins, 11 La. Ann. 172; Barnes v. Crandell, 11 La. Ann. 119; Hayden v. Cook, 34 Neb. 670, 52 N. W. 165.

[a] *Value of securities must be shown in a plea of release through loss of securities by the plaintiff.* First

Nat. Bank v. Watt, 7 Idaho 510, 64 Pac. 223.

[b] *A plea of change in the contract will not authorize a showing of loss of securities.* Howard v. Baker, 119 Mo. 397, 24 S. W. 200.

74. **Ala.**—Hill v. Fitzpatrick, 6 Ala. 314. **Ind.**—Security Mut. Life Ins. Co. v. Frankel, 46 Ind. App. 212, 92 N. E. 183. **N. Y.**—Sachs v. American Surety Co., 72 App. Div. 60, 76 N. Y. Supp. 335, 33 Civ. Proc. 41; Kunzweiler v. Lehman, 34 Misc. 466, 70 N. Y. Supp. 290. **Tex.**—Connor v. Thornton (Tex. Civ. App.), 51 S. W. 354.

But see 1 STANDARD PROC. 829, 830.

[a] *Under the general issue a material change in the contract may be shown in some jurisdictions.* Mundy v. Stevens, 61 Fed. 77, 9 C. C. A. 366; Fairhaven v. Cowgill, 8 Wash. 686, 36 Pac. 1093.

[b] *Changes in Contract Should Be Set Out.*—Randle v. Barnard, 99 Fed. 348; Leppert v. Flaggs, 101 Md. 71, 60 Atl. 450.

[c] *The facts which increased the surety's risk should be set out.* Steward v. Barrow, 55 Ga. 664.

75. **Ga.**—Yancey v. Citizens' Bank & Trust Co., 14 Ga. App. 310, 80 S. E. 700. **N. Y.**—Cappadonna v. Illinois Surety Co., 68 Misc. 479, 125 N. Y. Supp. 162. **Pa.**—Cook v. Com., 8 Sad. 413, 11 Atl. 574.

See generally the title "Payment."

[a] *Acceptance by the plaintiff, must be averred.* Morris Canal & Banking Co. v. Van Vorst's Admx., 21 N. J. L. 100.

[b] *Averring execution of a promissory note by the principal to the creditor is not a plea of payment.* Lindeman v. Rosenfield, 67 Ind. 246, 33 Am. Rep. 79.

76. Com. v. Magee, 224 Pa. 168, 73 Atl. 347. See 1 STANDARD PROC. 699.

77. Com. v. Magee, 224 Pa. 168, 73 Atl. 347.

tion or reply, which are treated elsewhere in this work,⁷⁸ should be observed in an action to enforce a surety's contract.⁷⁹

4. Cross-Action.—A cross-action by the surety against the principal debtor is sometimes permitted by statute.⁸⁰

G. TRIAL.—**1. In General.**—The trial of a case to enforce a contract of suretyship involves the application of the general rules applicable to all civil cases.⁸¹

2. Questions of Law and Fact.⁸²—Where the facts are in dispute, it is for the jury to determine whether there has been an alteration in the contract and the materiality thereof,⁸³ as well as whether the surety consented to the alteration.⁸⁴ So generally it is for the jury to determine whether the damages claimed resulted from the default of the surety's principal;⁸⁵ whether or not the surety was notified of the principal's default within a reasonable time;⁸⁶ what was a reason-

78. See the title "**Replication and Reply.**"

79. See *Cooke v. Williamson*, 11 Ind. 242.

[a] **Facts in avoidance of a plea** (1) should not be negatived in the plea, but are matter for a replication. *Winfield Bank & Trust Co. v. Roberts* (Ala.), 76 So. 79; *Leshar v. U. S. Fidelity & Guaranty Co.*, 239 Ill. 502, 88 N. E. 208 (plea of limitations). Where (2) release by extension is pleaded by the surety, the plaintiff cannot assert a waiver thereof without pleading it. *Cruse v. Gau* (Tex. Civ. App.), 193 S. W. 405. (3) Matter in estoppel must be specially pleaded. *Trinkle v. Ladoga B. L. F. & S. Assn.* (Ind. App.), 117 N. E. 542.

[b] **That the surety has not been injured** by the plaintiff's failure to sue the principal, where that defense has been set up in the answer, must be asserted by way of replication. *Gillilan v. Ludington*, 6 W. Va. 128.

[c] **A reply is sufficient** which, although unnecessarily long, denies a material part of the defense. *Moore v. Andrew*, 23 U. C. Q. B. 367. See *Wilkes v. Clement*, 9 U. C. Q. B. 339.

[d] **Sufficiency.**—(1) A replication to a defense of changing the contract without the surety's consent, which avers a ratification and agreement to pay with a full knowledge of the facts, is good. *Owens v. Tague*, 3 Ind. App. 245, 29 N. E. 784. (2) But where, in reply to a defense of signing the note sued on after delivery without consideration, a replication avers that defendant signed on an agreement that another surety would pay one-half, it must also allege with whom the agree-

ment was made and performance of the condition by the other surety. *Owens v. Tague*, 3 Ind. App. 245, 29 N. E. 784.

80. See *Chrisman v. Perrin*, 67 Ind. 586, but it cannot delay the principal action.

81. See generally the title "**Trial**," and the references there made.

82. See the title "**Province of Judge and Jury.**"

83. U. S.—*Equitable Surety Co. v. Board of Comrs.*, 231 Fed. 33, 145 C. C. A. 221; *Pittsburg-Buffalo Co. v. American Fidelity Co.*, 219 Fed. 818, 135 C. C. A. 488. **Ark.**—*Hinton v. Stanton*, 112 Ark. 207, 165 S. W. 299. **Miss.**—*Moore v. Redding*, 69 Miss. 841, 13 So. 849. **Wis.**—*Lloyd Inv. Co. v. Illinois Surety Co.*, 164 Wis. 282, 160 N. W. 58.

See 1 STANDARD PROC. 839.

84. *Hinton v. Stanton*, 112 Ark. 207, 165 S. W. 299; *Lipsett v. Dettering*, 94 Wash. 629, 162 Pac. 1007.

85. *Macleod v. National Surety Co.*, 133 Minn. 351, 158 N. W. 619.

86. U. S.—*Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. ed. 1193. **Cal.**—*Bacigalupi v. Phoenix Bldg. & Const. Co.*, 14 Cal. App. 632, 112 Pac. 892. **Ga.**—*Thomason v. Keeney*, 8 Ga. App. 852, 70 S. E. 220, 4 Ga. App. 721, 62 S. E. 470. **Ore.**—*Williams v. Pacific Surety Co.*, 77 Ore. 210, 146 Pac. 147, 149 Pac. 524; *Bross v. McNicholas*, 66 Ore. 42, 133 Pac. 782, Ann. Cas. 1915B, 1272; *Dakin v. Queen City Fire Ins. Co.*, 59 Ore. 269, 117 Pac. 419. **Vt.**—*Donahue v. Windsor County M. F. Ins. Co.*, 56 Vt. 374.

able time, after notice of the principal's default, for the surety to exercise an option of completing the contract;⁸⁷ whether permission to sue the principal in the name of the creditor was given a surety upon the surety's request to sue under the statute;⁸⁸ and whether the surety's demand that the principal be sued has been abandoned.⁸⁹

3. Instructions.⁹⁰ — In accordance with the general rules as to instructions, the court's charge to the jury should cover all material issues.⁹¹

4. Verdict and Findings.⁹² — When the question of suretyship is an issue in the case a finding as to who is principal and who is surety should be made in order to preserve the rights of one against the other.⁹³

A directed verdict for the surety is proper where the uncontradicted evidence shows a material extension of the principal obligation made without his consent.⁹⁴

H. JUDGMENT OR DECREE.⁹⁵ — **1. In General.** — A judgment against a principal and surety properly before the court should be joint,⁹⁶ unless the obligation upon which they are sued is joint and several.⁹⁷

2. Amount of Recovery. — The judgment against the surety should equal in amount that rendered against the principal.⁹⁸ If upon a

87. *Thomason v. Keeney*, 8 Ga. App. 852, 70 S. E. 220, 4 Ga. App. 721, 62 S. E. 470.

88. *Citizens' Bank v. Hickman* (Iowa), 162 N. W. 606.

89. *Citizens' Bank v. Hickman* (Iowa), 162 N. W. 606.

90. See generally 13 STANDARD PROC. 698.

91. *Hubbell v. Bissell*, 2 Allen (Mass.) 196; *Smith v. Traders' Nat. Bank*, 82 Tex. 368, 17 S. W. 779; *Jackson v. Rollins* (Tex. Civ. App.), 128 S. W. 681.

[a] Instruction upon the law relating to notice of default should be given. *Larrabee v. Title Guaranty & Surety Co.*, 250 Pa. 135, 95 Atl. 416, L. R. A. 1916F, 709.

[b] Instructions upon abstract propositions of law not warranted. *Thomason v. Keeney*, 8 Ga. App. 852, 70 S. E. 220. See 13 STANDARD PROC. 772.

[c] Where a change in the contract has been made the court should instruct the jury as to the effect thereof on the surety's liability. *Hustace v. Davis*, 23 Hawaii 606.

92. See generally the titles "Findings and Conclusions;" "Verdict."

93. *Citizens' Bank v. Bowdon*, 98 Kan. 140, 157 Pac. 429.

[a] But when such a finding is not necessary to support the judgment a

timely application to include it must be made or its omission will not be corrected by amendment. *Citizens' Bank v. Bowdon*, 98 Kan. 140, 157 Pac. 429.

94. *Park v. Cordray*, 20 Ga. App. 35, 92 S. E. 394.

95. See generally the titles "Decrees;" "Judgments."

96. *Kingsland v. Koeppe*, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; *Rutherford v. Moore*, 24 Ind. 311.

[a] A judgment on principal's counterclaim in favor of himself should be for the principal alone, and not for both principal and surety. *Gilliam v. Coon*, 10 Ill. App. 43; *Gardner v. Alexander*, 159 Ky. 713, 169 S. W. 466.

97. *Western Twine Co. v. Wright*, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438.

98. *Clark v. Blalock*, 114 Ga. 309, 40 S. E. 228; *Jones v. Lewis*, 87 Ga. 446, 13 S. E. 578; *Robinson v. Chamberlain*, 29 Tex. Civ. App. 170, 68 S. W. 209.

[a] As against a co-surety, (1) the judgment may be for the whole amount of the debt (*Edward B. Bruce Co. v. Lambour*, 123 La. 969, 49 So. 659), unless (2) by his contract he has bound himself for a less amount. *Heppe v. Johnson*, 73 Cal. 265, 14 Pac. 833; *People v. Love*, 25 Cal. 520.

bond⁹⁹ or a note¹ the judgment is limited, as a rule, to the amount thereof, but when for unliquidated damages, it should be for the amount of the loss.²

Interest is awarded³ unless the action is on the bond for unliquidated damages.⁴

3. Recitals as to Execution.—Decrees in equity against principal and surety,⁵ and under some statutes judgments at law against them,⁶

99. U. S.—United States *v.* Tillotson, 1 Paine 305, 28 Fed. Cas. No. 16,524. **Cal.**—Gay *v.* Milwaukee Brewery, 34 Cal. App. 75, 166 Pac. 1017. **Ga.**—Westbrooke *v.* Moore, 59 Ga. 204. **N. J.**—Tunison *v.* Cramer, 5 N. J. L. 498. **N. Y.**—Agawam Bank *v.* Strever, 16 Barb. 82; Dunham & Co. *v.* McCann, 110 App. Div. 157, 97 N. Y. Supp. 212. **N. C.**—Donlan *v.* American Bonding & Trust Co., 139 N. C. 212, 51 S. E. 924. **Ore.**—McCargar *v.* Moore, 157 Pac. 1107. **Pa.**—Com. *v.* Forney, 3 Watts & S. 353. **W. Va.**—Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553. **Wis.**—Zinns Mfg. Co. *v.* Mendelson, 89 Wis. 133, 61 N. W. 302. **Eng.**—Smith *v.* Brandram, 2 Man. & G. 244, 5 Jur. 173, 2 Scott, N. R. 539, 9 D. P. C. 430, 40 E. C. L. 583, 133 Eng. Reprint 737.

As to the amount recoverable on a bond generally, see 4 STANDARD PROC. 532, et seq.

[a] If against one surety on several bonds, the judgment as a rule should be severally for the amount of each bond and not for their total. Cassady *v.* Board of Trustees, 93 Ill. 394.

[b] If by mistake the surety pays more he may recover the excess from the creditor. Gay *v.* Milwaukee Brewery, 34 Cal. App. 75, 166 Pac. 1017.

1. Vance Shoe Co. *v.* Haught, 41 W. Va. 275, 23 S. E. 553; Agricultural Ins. Co. *v.* Sargeant, 26 Can. Sup. Ct. 29.

2. Mercantile Trust Co. *v.* Hensey, 27 App. Cas. (D. C.) 210 (*affirmed*, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. ed. 811); Leavel *v.* Porter, 52 Mo. App. 632.

3. D. C.—Goff *v.* United States, 22 App. Cas. 512. **Kan.**—McMullen *v.* Winfield Bldg. & Loan Assn., 64 Kan. 298, 67 Pac. 892, 91 Am. St. Rep. 236, 56 L. R. A. 924. **La.**—Parker *v.* Alexander, 2 La. Ann. 188. **Mass.** Bank of Brighton *v.* Smith, 12 Allen 243, 90 Am. Dec. 144. **N. Y.**—Degnon-McLean Const. Co. *v.* City Trust, Safe Dep. & Surety Co., 40 Misc. 530, 82 N. Y. Supp. 944. **Pa.**—Holmes *v.* Frost,

125 Pa. 328, 17 Atl. 424. **Eng.**—Meek *v.* Wallis, 27 L. T. (N. S.) 650. **Can.** Montreal *v.* Ste. Cunegonde, 32 Can. Sup. Ct. 135; London *v.* Citizens' Ins. Co., 13 Ont. 713.

As to recovery of interest generally, see 14 STANDARD PROC. 115; in actions on bonds, see 4 STANDARD PROC. 538.

4. State *v.* Wayman, 2 Gill & J. (Md.) 254; Degnon-McLean Const. Co. *v.* City Trust, Safe Dep. & Surety Co., 99 App. Div. 195, 90 N. Y. Supp. 1029 (*affirmed*, 184 N. Y. 544, 76 N. E. 1093). But see Williams *v.* Pacific Surety Co., 77 Ore. 210, 146 Pac. 147, 149 Pac. 524.

5. **Ky.**—Patton's Admr. *v.* Patton's Heirs, 3 B. Mon. 160. **Tenn.**—Pace *v.* Plumlee, 2 Tenn. Cas. 55. **Va.**—Beckham *v.* Duncan, 9 S. E. 1002.

[a] Insolvent Principal.—This rule is not observed when the principal is shown to be insolvent. May *v.* May, 19 Fla. 373.

6. **U. S.**—Cooper *v.* Jewett, 233 Fed. 618, 147 C. C. A. 426 (Ia. Code, 1897, §3779). **Ind.**—Montgomery *v.* Vicory, 110 Ind. 211, 11 N. E. 38; Douch *v.* Bliss, 80 Ind. 316; Williams *v.* Fleenor, 77 Ind. 36; Rooker *v.* Wise, 14 Ind. 276. **Ia.**—State *v.* McGlothlin, 61 Iowa 312, 16 N. W. 137. **Mich.**—Prentiss *v.* Spalding, 2 Doug. 84. **Miss.**—Work *v.* Harper, 31 Miss. 107, 66 Am. Dec. 549. **Neb.**—Eseritt *v.* Michaleson, 73 Neb. 634, 103 N. W. 300, 106 N. W. 1016; Trester *v.* Pike, 60 Neb. 510, 83 N. W. 676. **N. C.**—Stewart *v.* Ray, 26 N. C. 269. **Ohio.**—Peters *v.* McWilliams, 36 Ohio St. 155; Wilkins *v.* Ohio Nat. Bank, 31 Ohio St. 565; Elliott *v.* Elmore, 16 Ohio 27. **Tenn.**—Grissom *v.* Moore, 1 Sneed 361. **Tex.**—Abney *v.* Citizens' Nat. Bank (Tex. Civ. App.), 152 S. W. 734; Dignowity *v.* Staacke (Tex. Civ. App.), 25 S. W. 824; Montrose *v.* Fannin County Bank (Tex. Civ. App.), 23 S. W. 709.

[a] The judgment may be opened up and modified to make the necessary showing in this respect. Emery

should recite the order of their liability and direct the officer to make the execution out of the property of the principal before resorting to that of the surety.

4. Summary Judgment.⁷—The statutes of some states authorize a summary judgment on motion against the surety upon judgment being taken against the principal.⁸

5. Enforcement of.⁹—Statutes may require the judgment creditor to first exhaust the property of the principal,¹⁰ otherwise, except in equity where the principal's property will as a rule be first subjected

v. Farmers' State Bank, 97 Kan. 231, 155 Pac. 34.

[b] In the absence of a statute, such recital not necessary. *Keaton v. Cox*, 26 Ga. 162.

[c] As to parties who were not before the court, the statute has no application. *Brownlee v. Young*, 25 Mont. 38, 63 Pac. 798; *Kirkland Land & Imp. Co. v. Jones*, 18 Wash. 407, 51 Pac. 1043.

7. See the title "Summary Proceedings."

8. **U. S.**—*Beall v. New Mexico*, 16 Wall. 535, 21 L. ed. 292. **Ark.**—*Prairie Creek Coal Min. Co. v. Kittrell*, 107 Ark. 361, 155 S. W. 496. **Cal.**—*Ladd v. Parnell*, 57 Cal. 232. **Ga.**—*Walker v. Walker*, 42 Ga. 141. **Ill.**—*Johnson v. Chicago, etc. Elevator Co.*, 105 Ill. 462; *Rietzell v. People*, 72 Ill. 416; *Hennies v. People*, 70 Ill. 100. **Ia.**—*Andres & Co. v. Schlueter*, 140 Iowa 389, 118 N. W. 429. **Mich.**—*Lang v. People*, 14 Mich. 439; *Chappee v. Thomas*, 5 Mich. 53. **Minn.**—*Stapp v. Steam-Boat Clyde*, 44 Minn. 510, 47 N. W. 160; *Davidson v. Farrell*, 8 Minn. 258. **Miss.**—*Peck v. Critchlow*, 7 How. 243. **Ore.**—*McCargar v. Moore*, 157 Pac. 1107.

On forthcoming bonds see 10 STANDARD PROC. 25.

[a] In absence of statute no such judgment can be entered. *Walker v. Walker*, 42 Ga. 141.

[b] The statutes are strictly construed and cannot be extended by construction. *Prairie Creek Coal Min. Co. v. Kittrell*, 107 Ark. 361, 155 S. W. 496; *Creanor v. Creanor*, 36 Ark. 91.

[c] Where upon default to file a denial under oath, a summary judgment may be entered against the principal, for the same reason such a judgment may be entered against the surety. *Fidelity & Deposit Co. v. United States*, 20 App. Cas. (D. C.) 376.

9. As to enforcement of judgments

and decrees generally, see 15 STANDARD PROC. 701.

10. **U. S.**—*Cooper v. Jewett*, 233 Fed. 618, 147 C. C. A. 426 (Ia. Code, 1897, §3966); *In re Nashville Laundry Co.*, 240 Fed. 795. **Ind.**—*McTaggart v. Dolan*, 86 Ind. 314; *Lacy v. Lofton*, 26 Ind. 324. **Ia.**—*Andres & Co. v. Schlueter*, 140 Iowa 389, 118 N. W. 429. **Kan.**—*Emery v. Farmers' State Bank*, 97 Kan. 231, 155 Pac. 34. **La.**—*New Orleans v. Waggaman*, 31 La. Ann. 299; *Stinson v. Hill*, 21 La. Ann. 560. **Miss.**—*Smith v. Clopton*, 48 Miss. 66; *Walker v. Gilbert*, 13 Smed. & M. 693. **Pa.**—*Kirkpatrick v. White*, 29 Pa. 176. **Tenn.**—*Sellers v. Fite*, 3 Baxt. 120; *Bryant v. Rudisell*, 4 Heisk. 656; *Morris v. McAnally*, 3 Coldw. 304. **Tex.**—*Magill v. Rugeley* (Tex. Civ. App.), 171 S. W. 528; *Abney v. Citizens' Nat. Bank* (Tex. Civ. App.), 152 S. W. 734; *Hollimon v. Karger*, 30 Tex. Civ. App. 558, 71 S. W. 299. **Va.**—*Wytheville Crystal Ice & D. Co. v. Frick Co.*, 96 Va. 141, 30 S. E. 491; *Womack v. Paxton's Exrs.*, 84 Va. 9, 5 S. E. 550; *Grove v. Little*, 11 Leigh (38 Va.) 180. **W. Va.**—*Post v. W. H. Bailey & Co.*, 68 W. Va. 434, 69 S. E. 910.

Recitals in judgment as to executing first on principal's property, see *supra*, II, H, 3.

[a] Statute directory, see *In re Nashville Laundry Co.*, 240 Fed. 795.

[b] "The return upon previous citations stating that no property of the land company could be found out of which the judgment could be made was prima facie sufficient to authorize the levy upon the property of the surety." *Magill v. Rugeley* (Tex. Civ. App.), 171 S. W. 528.

[c] Insolvency of principal will authorize immediate resort to the surety's property. **Ind.**—*Watson v. Beabout*, 18 Ind. 281. **La.**—*Morgan v. Creditors*, 4 La. (O. S.) 5. **Miss.**—*Caruthers v. Dean*, 11 Smed. & M. 178.

to the decree,¹¹ the creditor may at his election proceed against the property of either,¹² or against the property of one cosurety.¹³

I. APPEAL.—On appeal the same general rules apply to such cases as are applied to all civil actions.¹⁴

III. PROCEEDINGS BY SURETY.—A. REMEDIES.—1. In Equity.¹⁵—a. *Cancellation*.—A surety, who has been induced by fraud to enter into a contract of suretyship, may maintain an action against the creditor to have it canceled.¹⁶

Mo.—Phillips v. Robbins, 59 Mo. 107. Pa.—Kirkpatrick v. White, 29 Pa. 176.

[d] When principal's property cannot be reached by execution, (1) that of the surety may be first taken. Ind.—Knode v. Baldrige, 73 Ind. 54. La.—Lepretre v. Barthet, 25 La. Ann. 124; Womack v. Fluker, 13 La. Ann. 196; Dejean's Syndics v. Martin's Heirs, 7 Mart. N. S. 194. Va.—Meade v. Grigsby's Admr's., 26 Gratt. (67 Va.) 612. Thus (2) where property belonging to the principal is in the hands of a receiver and not subject to levy the property of the surety may be taken. Knode v. Baldrige, 73 Ind. 54.

11. Ark.—Hill v. Mellon, 55 Ark. 450, 18 S. W. 540. Ky.—Bridgewater v. England, 23 Ky. L. Rep. 338, 62 S. W. 882. N. Y.—Boughton v. Bank of Orleans, 2 Barb. Ch. 458. Va.—Horton v. Bond, 28 Gratt. (69 Va.) 815. W. Va.—Post v. W. H. Bailey & Co., 68 W. Va. 434, 69 S. E. 910; Alderson's Admr. v. Alderson, 53 W. Va. 388, 44 S. E. 313; Shenandoah Val. Nat. Bank v. Bates, 20 W. Va. 210.

12. Ark.—Walker v. Files, 94 Ark. 453, 127 S. W. 739. Ga.—Williams v. Kennedy, 134 Ga. 339, 67 S. E. 821; Manry v. Shepperd, 57 Ga. 68; Battle v. Stephens, 32 Ga. 25; Keaton v. Cox, 26 Ga. 162; Bank of La Fayette v. Wardlaw, 20 Ga. App. 741, 93 S. E. 236; Jordan v. Farmers' & Merchants' Bank, 5 Ga. App. 244, 62 S. E. 1024. Me.—Fuller v. Loring, 42 Me. 481. N. C.—Eason v. Petway, 18 N. C. 44. Ohio.—Stanley v. Lucas, Wright 34. Tex.—Turner v. Smith, 9 Tex. 626. Vt. Crane v. Stickles, 15 Vt. 252. W. Va.—Post v. W. H. Bailey & Co., 68 W. Va. 434, 69 S. E. 910.

[a] In Case of Stay by Principal. Where judgment is rendered against a principal and several sureties, and a stay bond is given by the principal which prevents the collection of the judgment for sixty days, the plaintiff in execution has the right to collect the amount due on the same by a levy

and sale of the property of either of the sureties in the original judgment, without levying on the property of the principal, or of either of such other sureties, or of the surety on the stay bond. Williams v. Kennedy, 134 Ga. 339, 67 S. E. 821.

13. Minick v. Brock, 41 Neb. 512, 59 N. W. 782.

14. See the title "Appeals," and other titles dealing with particular phases of appellate procedure.

[a] Reversal of Joint Judgment. Where the judgment is joint, but erroneous either as to the principal or as to the surety, it must be reversed as to all. Ky.—Carr v. Bob, 7 Dana 417. Tenn.—Draper v. State, 1 Head 262. Va.—Munford v. Nottoway Overseers, 2 Rand. (23 Va.) 313.

[b] Joint and Several Judgment. (1) A joint and several judgment, if improper as to the sureties, may be reversed as to the sureties and affirmed as to the principal. Evans v. Bell, 20 Ala. 509. (2) Where such a judgment is rendered in favor of the principal and surety on the principal's counterclaim, for an amount in excess of the creditor's demand, it may be reversed in part as to the surety and affirmed as to the principal. Picard v. Lang, 3 App. Div. 51, 38 N. Y. Supp. 229, 73 N. Y. St. 846. (3) In case such a judgment is rendered against cosureties it may be reversed as to one or more and affirmed as to the others, notwithstanding the fact that the right of contribution may be affected by so doing. Morgan v. Smith, 70 N. Y. 537.

15. As to protection against fraudulent conveyances by the principal, see 10 STANDARD PROC. 112.

16. Ia.—Benton County Sav. Bank v. Boddicker, 105 Iowa 548, 75 N. W. 632, 67 Am. St. Rep. 310, 45 L. R. A. 321. Tex.—Trammell v. Swan, 25 Tex. 473. Eng.—Blest v. Brown, 3 Gifford 450, 8 Jur. N. S. 187, 5 L. T. (N. S.) 663, 66 Eng. Reprint 486.

b. *Compelling Performance by Principal.*—Upon maturity of the debt, the surety may, where circumstances justify such relief, resort to equity to coerce the creditor to proceed against the principal,¹⁷ or to subject the property of the principal,¹⁸ or the principal's securities in his hands to the payment of the debt,¹⁹ or to marshal securities held by him,²⁰ or to compel the creditor to act in order to secure the release of his property where the creditor retains the securities in preference to canceling the obligation.²¹ He may also, even before

See generally the title "**Cancellation and Rescission.**"

17. **Haw.**—Macfie v. Kilauea Sugar Co., 6 Hawaii 440. **Md.**—Sasscer v. Young, 6 Gill & J. 243. **Minn.**—Huey v. Pinney, 5 Minn. 310. **N. Y.**—King v. Baldwin, 17 Johns. 384, 8 Am. Dec. 415. **Eng.**—Wooldridge v. Norris, L. R. 6 Eq. 410, 37 L. J. Ch. 640, 19 L. T. (N. S.) 144, 16 Wkly. Rep. 965. **Can.**—Campbell v. Robinson, 27 Grant Ch. (U. C.) 634.

But see *Abercrombie v. Knox*, 3 Ala. 728, 37 Am. Dec. 721.

[a] **By Statute.**—*Baker v. Gaines Bros. Co.* (Okla.), 166 Pac. 159; *Columbia Bank & Tr. Co. v. United States Fidelity & G. Co.*, 33 Okla. 535, 126 Pac. 556.

[b] **The surety must indemnify the creditor against the risk, delay and expense of suit.** *Macfie v. Kilauea Sugar Co.*, 6-Hawaii 440; *Huey v. Pinney*, 5 Minn. 310.

[c] **Against assignees of creditor.** *Macfie v. Kilauea Sugar Co.*, 6 Hawaii 440.

18. **Ark.**—*Hill v. Crowley*, 55 Ark. 450, 18 S. W. 540. **Ind.**—*Moffitt v. Roche*, 77 Ind. 48; *Nunemacher v. Ingle*, 20 Ind. 135. **N. J.**—*Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151; *Irick v. Black*, 17 N. J. Eq. 189. **N. C.**—*Allen v. Smitherman*, 41 N. C. 341. **Okla.**—*Moorehead v. Daniels*, 153 Pac. 623. **Va.**—*Beckham v. Duncan*, 9 S. E. 1002; *West v. Belches*, 5 Munf. (19 Va.) 187. **W. Va.**—*Wilson v. Carrio*, 50 W. Va. 336, 40 S. E. 439. **Eng.**—*Bechervaise v. Lewis*, L. R. 7 C. P. 372, 41 L. J. C. P. 161, 26 L. T. (N. S.) 848, 20 Wkly. Rep. 726.

19. **U. S.**—*United States v. Cushman*, 2 Sumn. 426, 25 Fed. Cas. No. 14,908. **Ia.**—*Richards v. Osceola Bank*, 79 Iowa 707, 45 N. W. 294. **N. J.**—*Guttenberg v. Vassel*, 74 N. J. L. 553, 65 Atl. 994. **N. Y.**—*Wright v. Austin*, 56 Barb. 13. **N. C.**—*Egerton v. Alley*, 41 N. C. 188. **S. C.**—*Bank of State v. Campbell*, 2 Rich. Eq. 179. **W. Va.**

Neal v. Buffington, 42 W. Va. 327, 26 S. E. 172. **Can.**—*Teeter v. St. John*, 10 Grant Ch. (U. C.) 85.

20. **Ala.**—*West Huntsville Cotton Mills Co. v. Alter*, 164 Ala. 305, 51 So. 338; *Gresham v. Ware*, 79 Ala. 192. **Ark.**—*Kempner v. Dooley*, 60 Ark. 526, 31 S. W. 145. **Ind.**—*Hoppes v. Hoppes*, 123 Ind. 397, 24 N. E. 139; *Wright v. Crump*, 25 Ind. 339. **Ky.**—*Wheat v. McBrayer*, 16 Ky. L. Rep. 195, 26 S. W. 809. **Mass.**—*Bearse v. Lebowich*, 212 Mass. 344, 99 N. E. 175. **Mich.**—*Grand Rapids Sav. Bank v. Denison*, 92 Mich. 418, 52 N. W. 733. **Minn.**—*Northwestern Mut. L. Ins. Co. v. Allis*, 23 Minn. 337. **Mo.**—*Wilcox v. Todd*, 64 Mo. 388. **N. J.**—*St. Peter's Catholic Church v. Vannote*, 66 N. J. Eq. 78, 56 Atl. 1037; *Kidd v. Hurley*, 54 N. J. Eq. 177, 33 Atl. 1057; *Tiffany v. Crawford*, 14 N. J. Eq. 278. **N. Y.**—*Smith v. First Nat. Bank of Albany*, 151 App. Div. 317, 135 N. Y. Supp. 985; *Sheppard v. Conley*, 9 N. Y. Supp. 777, 30 N. Y. St. 639; *Vartie v. Underwood*, 18 Barb. 561. **N. C.**—*Weil v. Thomas*, 114 N. C. 197, 19 S. E. 103. **Tenn.**—*Kirkman v. Bank of America*, 2 Coldw. 397. **Tex.**—*Lazarus v. Henrietta Nat. Bank*, 72 Tex. 354, 10 S. W. 252.

21. *West Huntsville Cotton Mills Co. v. Alter*, 164 Ala. 305, 51 So. 338.

[a] **In Case of Mortgage.**—"A like equity arises in the case of a mortgage, executed by the principal debtor and the surety, on the separate and individual property of each. . . . The surety need not wait the pleasure of the mortgagee as to the time of foreclosure, and suffer his property continued under the incumbrance. As, after the debt has become due, a surety may file a bill to compel the principal to pay it; so, after forfeiture, he may bring a bill for the redemption of his property from a mortgage covering the property of both the principal and himself, without first paying the entire mortgage debt; and in the same suit, as ancillary to re-

he is sued by the creditor and before paying the claim,²² maintain a bill to compel the principal to discharge the debt,²³ or to have it paid

demption, compel the application of the principal's property to its payment. It is sufficient if he pays, or offers to pay, the balance that may be due." *Gresham v. Ware*, 79 Ala. 192. See also *Bearse v. Lebowich*, 212 Mass. 344, 99 N. E. 175.

22. *Norton v. Reid*, 11 S. C. 593.

23. **U. S.**—*Southwestern Surety Ins. Co. v. Wells*, 217 Fed. 294. **Ala.**—*West Huntsville Cotton Mills Co. v. Alter*, 164 Ala. 305, 51 So. 338; *Tillis v. Folmar*, 145 Ala. 176, 39 So. 913, 117 Am. St. Rep. 31; *Thomas v. St. Paul M. E. Church*, 86 Ala. 138, 5 So. 508. **Ark.**—*Rice v. Dorrian*, 57 Ark. 541, 22 S. W. 213. **Conn.**—*Merwin v. Austin*, 58 Conn. 22, 18 Atl. 1029, 7 L. R. A. 84. **Del.**—*Miller v. Stout*, 5 Del. Ch. 259. **D. C.**—*Pavarini v. Title Guaranty & S. Co.*, 36 App. Cas. 348. **Fla.**—*Hayden v. Thrasher*, 18 Fla. 795. **Ga.**—*Valdosta Bank & Trust Co. v. Pendleton*, 145 Ga. 336, 89 S. E. 216; *Cooper v. National Fertilizer Co.*, 132 Ga. 529, 64 S. E. 650. **Haw.**—*Macfie v. Kilauea Sugar Co.*, 6 Hawaii 440. **Ill.**—*Street v. Chicago Wharfing & S. Co.*, 157 Ill. 605, 41 N. E. 1108; *Moore v. Topliff*, 107 Ill. 241; *Wise v. Shepherd*, 13 Ill. 41; *Keach v. Hamilton*, 84 Ill. App. 413. **Ind.**—*Hoppes v. Hoppes*, 123 Ind. 397, 24 N. E. 139; *Ritenour v. Mathews*, 42 Ind. 7. **Ia.**—*Des Moines Bridge & Iron Wks. v. Plane*, 163 Iowa 18, 143 N. W. 866. **Ky.**—*Huss v. Rice*, 92 Ky. 362, 17 S. W. 869. **Md.**—*Whitridge v. Durkee's Exrs.*, 2 Md. Ch. 442. **Miss.**—*Graham v. Thornton*, 9 So. 292. **N. H.**—*Fidelity & Deposit Co. v. Buckley*, 75 N. H. 506, 77 Atl. 402. **N. J.**—*Irick v. Black*, 17 N. J. Eq. 189. **N. Y.**—*Hannay v. Pell*, 3 E. D. Smith 432. **N. C.**—*Taylor v. Miller*, 62 N. C. 365; *Thigpen v. Price*, 62 N. C. 146. **Ohio.**—*Hale v. Wetmore*, 4 Ohio St. 600; *McConnell v. Scott*, 15 Ohio 401, 45 Am. Dec. 583. **Okla.**—*Columbia Bank & Tr. Co. v. United States Fidelity & G. Co.*, 33 Okla. 535, 126 Pac. 556. **Pa.**—*In re Fame Ins. Co.'s Appeal*, 83 Pa. 396; *Beaver v. Beaver*, 23 Pa. 167. **S. C.**—*Norton v. Reid*, 11 S. C. 593. **Tenn.**—*Saylors v. Saylors*, 3 Heisk. 525. **Tex.**—*Yndo v. Rivas* (Tex. Civ. App.), 142 S. W. 920. **Vt.**—*Bishop v. Day*, 13 Vt. 81, 37 Am. Dec. 582. **Va.**—*Coffman v. Moore's Exrs.*, 29 Gratt. (70 Va.)

244. **W. Va.**—*Burlew v. Smith*, 68 W. Va. 458, 69 S. E. 908; *First Nat. Bank v. Parsons*, 45 W. Va. 688, 32 S. E. 271; *Glenn v. Morgan*, 23 W. Va. 467. **Wis.**—*Dobie v. Fidelity & Casualty Co.*, 95 Wis. 540, 70 N. W. 482. **Eng.**—*Ranelough v. Hayes*, 1 Vern. Ch. 189, 23 Eng. Reprint 405.

See also 8 STANDARD PROC. 438, 441.

[a] **Suretyship Essential.**—A bill in equity in the nature of exoneration will not lie by one party against another if both are primarily liable on the obligation, the relation of principal and surety is essential. *Comstock v. Corbin*, 191 Mich. 639, 158 N. W. 106.

[b] **Obligation Must Be Absolute.** Exoneration in equity is based upon the equitable principle of cutting corners wherever justice is obtained thereby, but the doctrine is limited to the extent that the surety's obligation to pay must be absolute. To hold otherwise would be to confer upon the surety the power to annul his own contract of suretyship. *Southwestern Surety Ins. Co. v. Wells*, 217 Fed. 294.

[c] **By Intervention in Receivership Case.**—Where a railroad is being operated by a receiver under order of the court, who has funds on hand received from the operation of the road, a surety on the railroad company's note which is due but unpaid may intervene in the receivership case and compel the receiver to pay the note out of the funds on hand. *Valdosta Bank & Trust Co. v. Pendleton*, 145 Ga. 336, 89 S. E. 216.

[d] **Nature of Suit.**—"This suit is not to enforce a liability created by the statute, or the bond, but to enforce the equitable rights of the surety company arising out of the relation of principal and surety created by the execution of the bond. Unaffected by the origin of the relation, or the extent of the liability, the suit is nothing more than one for exoneration brought before the payment of the secured debt, because of the surety's fear growing out of the failure of the principal to pay, and the delay of the creditor to assert his own right. Such relief, if the party be entitled to it, can only be given by a court of equity." *Pava-*

out of his estate.²⁴ The right may be asserted, not only against the principal, but against his assignee or a trustee of particular funds out of which the claim is sought to be paid,²⁵ but where the surety seeks in equity to subject a fund belonging to the principal to the payment of the debt, he must pay or offer to pay the difference, if any, between such fund and the amount of his obligation.²⁶

c. *Subrogation*.—A surety who pays the debt of his principal will be subrogated to all the securities, liens, equities, rights, remedies and priorities held by the creditor against the principal and entitled to enforce them against the latter in a court of equity,²⁷ but this rule cannot be extended to deprive the creditor of superior equities which he may have in securities held by him.²⁸

d. *Accounting*.—An accounting by the creditor of securities held by him, will be declared at the instance of the surety,²⁹ even though a stay of proceedings commenced by the creditor to enforce the contract of suretyship may be necessary.³⁰

e. *Contribution From Co-Surety*.—A surety upon paying the debt of his principal is entitled to contribution as against his co-sureties, a remedy which is not peculiar to the relation of cosuretyship and is treated elsewhere in this work.³¹

rini v. Title Guaranty & S. Co., 36 App. Cas. (D. C.) 348.

[e] **Basis of equity jurisdiction is by way of quia timet**, rather than exoneration. *St. Croix Timber Co. v. Joseph*, 142 Wis. 55, 124 N. W. 1049. See also 8 STANDARD PROC. 438.

24. *Des Moines Bridge & Iron Wks. v. Plane*, 163 Iowa 18, 143 N. W. 866; *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531, 1 L. R. A. 639.

[a] **Estate of Bankrupt**.—*Wright v. Simpson*, 6 Ves. Jr. 714, 31 Eng. Rep. 1272.

[b] **Estate of Insolvent**.—*McCollum v. Hinckley*, 9 Vt. 143.

25. **Ia.**—*Des Moines Bridge & Iron Wks. v. Plane*, 163 Iowa 18, 143 N. W. 866. **N. C.**—*Gastonia v. McEntee-Peterson Eng. Co.*, 131 N. C. 359, 42 S. E. 857. **Tenn.**—*Glenn v. Doyle*, 3 Tenn. Ch. 324. **Vt.**—See *Hale v. Windsor Sav. Bank*, 90 Vt. 487, 98 Atl. 993.

26. *Patch & Co. v. First Nat. Bank*, 90 Vt. 4, 96 Atl. 423.

27. **Ark.**—*Kissire v. Plunkett-Jarrell Gro. Co.*, 103 Ark. 473, 145 S. W. 567; *Richeson v. Nat. Bank of Mena*, 96 Ark. 594, 132 S. W. 913. **N. Y.**—*Sexton v. Fensterer*, 154 App. Div. 542, 139 N. Y. Supp. 811. **N. C.**—*Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852. **Okla.** *Cummins v. Line*, 43 Okla. 575, 143 Pac. 672. **Tex.**—*Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528; *Nunn v. Smith* (Tex. Civ.

App.), 194 S. W. 406; *Green v. Hoppe* (Tex. Civ. App.), 175 S. W. 1117. **Wis.** *Mason v. Pierron*, 63 Wis. 239, 23 N. W. 119.

See generally the title "Subrogation," and 8 STANDARD PROC. 441.

28. *Richeson v. Nat. Bank of Mena*, 96 Ark. 594, 132 S. W. 913.

[a] **Mortgage Lien**.—Where the creditor is secured by a mortgage on the principal's property and the debt is paid by the surety he is ordinarily entitled to an assignment of the mortgage, but if the mortgage is held as security for other debts the surety cannot claim the benefit of the mortgage unless he pays the entire debt of the principal to secure which the mortgage was given. *Richeson v. Nat. Bank of Mena*, 96 Ark. 594, 132 S. W. 913.

29. **Ia.**—*Stringfield v. Graff*, 22 Iowa 438. **Kan.**—*Packard v. Herrington*, 41 Kan. 469, 21 Pac. 621. **N. Y.**—*Alston v. Conger*, 66 Barb. 272. **N. C.**—*Womble v. Fraps*, 77 N. C. 198. **Tex.**—*Robertson v. Angle* (Tex. Civ. App.), 76 S. W. 317. **Can.**—*Lee v. Ellis*, 27 Ont. 608. 30. **Ark.**—*McConnell v. Beattie*, 34 Ark. 113. **N. J.**—*Kidd v. Hurley*, 54 N. J. Eq. 177, 33 Atl. 1057. **N. Y.** *Sheppard v. Conley*, 9 N. Y. Supp. 777, 30 N. Y. St. 639.

31. See 5 STANDARD PROC. 497.

As to exoneration, the right to compel a cosurety, in equity, before the payment of the debt, to contribute his

2. At Law. — a. *Actions*.³² — A surety who has paid the debt may maintain an action against the principal on the implied promise of indemnity,³³ his assignee,³⁴ or legal representative.³⁵ Assumpsit for money paid³⁶ is a proper formal remedy in such cases and it will lie

proportionate share of the obligation, see 8 STANDARD PROC. 441.

32. As to attachment by a surety, see 3 STANDARD PROC. 335.

Contribution from cosurety, see *supra* III, A, 1, e.

33. Ala.—Bragg v. Patterson, 85 Ala. 233, 4 So. 716; Dubberly v. Black's Admr., 38 Ala. 193. **Cal.**—Williams v. Riehl, 127 Cal. 365, 59 Pac. 762, 78 Am. St. Rep. 60; *In re Hill's Estate*, 67 Cal. 238, 7 Pac. 664; Townsend v. Sullivan, 3 Cal. App. 115, 84 Pac. 435. **Colo.**—Fitch v. Hammer, 17 Colo. 591, 31 Pac. 336. **Ky.**—Thomas v. Beckman, 1 B. Mon. 29. **Md.**—Nally v. Long, 56 Md. 567. **Mass.**—Coburn v. Parker, 11 Gray 335; Winslow v. Otis, 5 Gray 360. **Mich.**—Lange v. Perley, 47 Mich. 352, 11 N. W. 193. **Minn.**—Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. 700; Kimmel v. Lowe, 28 Minn. 265, 9 N. W. 764. **N. Y.**—Lyth v. Green, 21 App. Div. 300, 47 N. Y. Supp. 478; Ransom v. Keyes, 9 Cow. 128. **N. C.**—Hudson v. Aman, 158 N. C. 429, 74 S. E. 97; Graeber v. Sides, 151 N. C. 596, 66 S. E. 600. **P. I.**—Saenz v. Yap Chuan, 16 Phil. Isl. 76. **Ohio.**—Second Nat. Bank v. American Bonding Co., 93 Ohio St. 362, 113 N. E. 221; Poe v. Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713. **Okla.**—Pendergraft v. Phillips, 156 Pac. 1189. **Ore.**—Guernsey v. Marks, 55 Ore. 323, 106 Pac. 334. **S. C.**—Stokes v. Hodges, 11 Rich. Eq. 135. **Tex.**—Saunders v. Ireland, 87 Tex. 316, 28 S. W. 271; Hays v. Housewright (Tex. Civ. App.), 133 S. W. 922. **W. Va.**—George v. Crim, 66 W. Va. 421, 66 S. E. 526. **Wis.**—Gray v. McDonald, 19 Wis. 213. **Eng.**—Layer v. Nelson, 1 Vern. Ch. 456, 23 Eng. Reprint 582; Stirling v. Forrester, 3 Bligh 575, 4 Eng. Reprint 712.

[a] **Even before payment** of the debt the surety may be permitted by statute to sue the principal but cannot in such case enforce any judgment he may obtain till after payment. Kuenzle v. Tan Sunco, 16 Phil. Isl. 670.

34. Merwin v. Austin, 58 Conn. 22, 18 Atl. 1029, 7 L. R. A. 84.

35. Cal.—*In re Hill's Est.*, 67 Cal. 238, 7 Pac. 664. **Fla.**—Walker v. Drew, 20 Fla. 908. **Ky.**—Conley's

Heirs v. Boyle's Exrs., 6 Mon. 637. **N. Y.**—Thomson v. Taylor, 11 Hun 274, *affirmed*, 72 N. Y. 32. **Ohio.**—Eekert v. Myers, 45 Ohio St. 525, 15 N. E. 862. **S. C.**—Thomson v. Palmer, 3 Rich. Eq. 139. **Tenn.**—Reeves v. Pulliam, 7 Baxt. 119. **Vt.**—Hale v. Windsor Sav. Bank, 90 Vt. 487, 98 Atl. 993; West v. Bank of Rutland, 19 Vt. 403. **Va.**—Tinsley v. Oliver's Admr., 5 Munf. (19 Va.) 419. **Wis.**—Webster v. Lawson's Estate, 73 Wis. 561, 41 N. W. 710. **Eng.**—Ingram v. Thorp, 7 Hare 67, 68 Eng. Reprint 27.

[a] **Retainer** is a proper remedy by a surety who is executor. Powell's Exrs. v. White, 11 Leigh (38 Va.) 309. See also *In re Hill's Est.*, 67 Cal. 238, 7 Pac. 664.

36. U. S.—Bendey v. Townsend, 109 U. S. 665, 3 Sup. Ct. 482, 27 L. ed. 1065; Hall v. Smith, 5 How. 98, 12 L. ed. 66; Wiggin v. Dorr, 3 Sumn. 410, 29 Fed. Cas. No. 17,625. **Ala.**—Martin v. Ellerbe's Admr., 70 Ala. 326; Sanders v. Watson, 14 Ala. 198; Scott v. Bradford, 5 Port. 443. **Cal.**—Chipman v. Morrill, 20 Cal. 130. **Colo.**—Fitch v. Hammer, 17 Colo. 591, 31 Pac. 336. **Conn.**—Ward v. Henry, 5 Conn. 595, 13 Am. Dec. 119; Bunce v. Bunce, Kirby 137. **Ill.**—Cleiman v. Murphy, 34 Ill. App. 633; Simpson v. McPhail, 17 Ill. App. 499. **Ind.**—Campbell v. Tomlinson, 177 Ind. 63, 98 N. E. 720; Collins v. Paris, 57 Ind. 151. **Ky.**—Maysville Tel. Co. v. First Nat. Bank, 142 Ky. 578, 134 S. W. 886; Nutall's Admr. v. Brannin's Exrs., 5 Bush 11; Lansdale v. Cox, 7 Mon. 401. **Me.**—Smith v. Sayward, 5 Greenl. 504. **Md.**—Fuhrman v. Fuhrman, 115 Md. 436, 80 Atl. 1082; Crisfield v. State, 55 Md. 192. **Mass.**—Gibbs v. Bryant, 1 Pick. 118; Randall v. Rich, 11 Mass. 494; Ford v. Keith, 1 Mass. 139, 2 Am. Dec. 4. **Minn.**—Kimmel v. Lowe, 28 Minn. 265, 9 N. W. 764. **Miss.**—Rucks v. Taylor, 49 Miss. 552; Dinkins v. Bailey, 23 Miss. 284. **Mo.**—Ferguson's Admr. v. Carson's Admr., 86 Mo. 673; Miller v. Woodward, 8 Mo. 169. **Nev.**—Frevert v. Henry, 14 Nev. 191. **N. H.**—Riddle v. Bowman, 27 N. H. 236; Lord v. Staples, 23 N. H. 448; Pearson v. Parker, 3 N. H. 366. **N. J.**—Apgar's

even though there may be an express contract of indemnity between the surety and principal,³⁷ or though the claim against the principal has been assigned by the creditor to the surety,³⁸ or to a third party.³⁹

b. *Summary Proceedings*.⁴⁰—A surety who has discharged the judgment against his principal is in some jurisdictions given a summary remedy against the latter by judgment on motion,⁴¹ or by execution in his own name upon the judgment against the principal,⁴²

Admrs. v. Hiler, 24 N. J. L. 812. **N. Y.** 297; *Bonney v. Seely*, 2 Wend. 481; *Ainslie v. Wilson*, 7 Cow. 662, 17 Am. Dec. 532. **N. C.**—*Hudson v. Aman*, 158 N. C. 429, 74 S. E. 97; *Bledsoe v. Nixon*, 68 N. C. 521; *Gray v. Bowls*, 18 N. C. 437. **Ohio**.—*Second Nat. Bank v. American Bonding Co.*, 93 Ohio 362, 113 N. E. 221; *Poe v. Dixon*, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713; *Purviance v. Sutherland*, 2 Ohio St. 478. **Ore.**—*Guernsey v. Marks*, 55 Ore. 323, 106 Pac. 334. **Pa.**—*Hill v. Voorhies*, 22 Pa. 68; *Hassinger v. Solms*, 5 Serg. & R. 4. **S. C.**—*Peters v. Barnhill*, 1 Hill L. 234. **Tenn.**—*Lane v. Keith*, 2 Baxt. 189. **Tex.**—*Saunders v. Ireland*, 87 Tex. 316, 28 S. W. 271; *Holliman v. Rogers*, 6 Tex. 91. **Utah**. *Miller v. Ziegler*, 3 Utah 17, 5 Pac. 518. **Vt.**—*Hulett v. Soullard*, 26 Vt. 295. **Va.**—*Harper's Admr. v. McVeigh's Admr.*, 82 Va. 751, 1 S. E. 193. **Wash.** *Denny v. Sayward*, 10 Wash. 422, 39 Pac. 119. **Wis.**—*Gray v. McDonald*, 19 Wis. 213. **Eng.**—*Woffington v. Sparks*, 2 Ves. Sen. 569, 28 Eng. Reprint 363. 37. *Gibbs v. Bryant*, 1 Pick. (Mass.) 118.

38. **U. S.**—*Daniel v. Riggs*, 16 Fed. Cas. No. 8,745. **Ill.**—*Katz v. Moesinger*, 110 Ill. 372. **Tex.**—*Boyd v. Beville*, 91 Tex. 439, 44 S. W. 287.

39. *Archer v. Laidlaw*, 135 Mich. 88, 97 N. W. 159.

40. See generally the title "*Summary Proceedings*."

41. *Grimes v. Nolen*, 3 Humph. (Tenn.) 412.

42. **Ark.**—*Prairie Creek Coal Min. Co. v. Kittrell*, 107 Ark. 361, 155 S. W. 496. **Ind.**—*Kreider v. Isenbice*, 123 Ind. 10, 23 N. E. 786; *Scherer v. Schutz*, 83 Ind. 543. **Kan.**—*Worden v. Jones*, 1 Kan. App. 501, 40 Pac. 1071. **Ky.** *Fidelity & Deposit Co. v. Sousley*, 151 Ky. 39, 151 S. W. 353; *Duke v. Pigman*, 110 Ky. 756, 62 S. W. 867; *Morris v. Evans*, 2 B. Mon. 84, 36 Am. Dec. 591; *Wilson's Guardian v. Wilson*, 20 Ky. L. Rep. 1971, 50 S. W.

260. **La.**—*Sprigg v. Beaman*, 6 La. 59; *Connely v. Bourg*, 16 La. Ann. 108, 79 Am. Dec. 568. **Minn.**—*Ankeny v. Moffett*, 37 Minn. 109, 33 N. W. 320; *Kimmel v. Lowe*, 28 Minn. 265, 9 N. W. 764. **Miss.**—*Dibrell v. Dandridge*, 51 Miss. 55. **Neb.**—*Nelson v. Webster*, 72 Neb. 332, 100 N. W. 411, 117 Am. St. Rep. 799, 68 L. R. A. 513; *Drexel v. Pusey*, 57 Neb. 30, 77 N. W. 351. **N. H.** *Morrison v. Citizens' Nat. Bank*, 65 N. H. 253, 20 Atl. 300, 23 Am. St. Rep. 39, 9 L. R. A. 282; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207. **N. Y.**—*Townsend v. Whitney*, 75 N. Y. 425; *Alden v. Clark*, 11 How. Pr. 209. **Ohio**.—*Hill v. King*, 48 Ohio St. 75, 26 N. E. 988; *Peters v. McWilliams*, 36 Ohio St. 155. **Pa.**—See *Ort v. Condon*, 21 Pa. Co. Ct. 609. **S. C.** *Garvin v. Garvin*, 27 S. C. 472, 4 S. E. 148. **Tex.**—*Abney v. Citizens' Nat. Bank* (Tex. Civ. App.), 152 S. W. 734; *Hall v. Taylor* (Tex. Civ. App.), 95 S. W. 755; *Hollimon v. Karger*, 30 Tex. Civ. App. 558, 71 S. W. 299.

As to satisfaction of judgment by payment by surety generally, see 16 STANDARD PROC. 541.

[a] **Rule Stated**.—"The rule, that payment by a codebtor discharges the debt, must be subject to this exception: if the codebtor making the payment is a surety, the debt will be holden undischarged, so far as is necessary to preserve and give effect to the collateral securities against the principal, assigned by the creditor to the surety, either voluntarily or by a decree of a court of equity. . . . The payment, for most purposes, discharges the debt, but does not so discharge it as to destroy the security of the surety; but a judgment may be entered up, to be levied on the property attached, or, if judgment be rendered, a levy on that property may be effectually made." *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207.

[b] **Assignment of Judgment**.—(1) In some states it is necessary for the surety, upon making payment, to take

in which latter case he may recover not only the amount paid, but also interest thereon from the time of payment.⁴³

B. JURISDICTION.⁴⁴—When the court's jurisdiction is determined by the amount in controversy, that amount is not the principal's debt, but the sum which the surety pays and seeks to recover.⁴⁵

C. PARTIES.—**1. Plaintiff.**—At common law sureties as a rule must sue their principal separately for reimbursement,⁴⁶ unless they pay the obligation jointly or out of a joint fund,⁴⁷ but this rule has been changed by statute in many jurisdictions.⁴⁸ In a suit by a surety against the creditor to be released from the contract of suretyship, the principal is not a necessary party,⁴⁹ but when the suit is for exoneration the principal is a necessary party,⁵⁰ as is also a cosurety.⁵¹

2. Defendant.—When the surety sues the principal in a court of equity to compel him to satisfy the obligation, the creditor or obligee should be made a party defendant,⁵² but not when, after pay-

an assignment of the judgment, otherwise his recourse against the principal is by an action on the implied promise of indemnity. *Fidelity & Deposit Co. v. Soursley*, 151 Ky. 39, 151 S. W. 353. (2) In other states the statute provides that upon payment by the surety the judgment "shall be considered as assigned to such surety." *Abney v. Citizens' Nat. Bank* (Tex. Civ. App.), 152 S. W. 734.

[c] **Separate Judgments.**—When separate judgments are recovered against the principal and surety, payment of his judgment by the surety entitles him to be substituted in equity to all the rights of the creditor on his judgment against the principal and in his own name may enforce it against the principal. *Ala.*—*Knighton v. Curry*, 62 Ala. 404; *Lyon v. Bolling*, 9 Ala. 463, 44 Am. Dec. 444. *Md.*—*Sotheren's Lessee v. Reed*, 4 Har. & J. 307; *Norwood v. Norwood*, 2 Har. & J. 238. *Minn.*—*Folsom v. Carli*, 5 Minn. 333. 80 Am. Dec. 429.

[d] **When the question of suretyship has not been determined** it must be settled in a separate proceeding brought for that purpose before the surety may have the benefit of the judgment he has paid. *Todd v. Oglebay*, 153 Ind. 595, 64 N. E. 32.

43. *Patton's Exr. v. Smith*, 130 Ky. 819, 114 S. W. 315, 23 L. R. A. (N. S.) 1124.

44. See generally the title "Jurisdiction."

45. *Wainwright v. Atkins*, 104 Miss. 438, 61 So. 454.

Jurisdiction as affected by amount in

controversy, see 17 **STANDARD PROC.** 892.

46. *Md.*—*Fuhrman v. Fuhrman*, 115 Md. 436, 80 Atl. 1082. *Mo.*—*Sevier v. Roddie*, 51 Mo. 580. *N. H.*—*Peabody v. Chapman*, 20 N. H. 418. *N. Y.*—*Gould v. Gould*, 8 Cow. 168. *N. C.*—*Hudson v. Aman*, 158 N. C. 429, 74 S. E. 97. *Pa.*—*Boggs v. Curtin*, 10 Serg. & R. 211. *Tenn.*—*Newnan v. Campbell*, Mart. & Y. 63; *Graham v. Green*, 4 Hayw. 187; *Williams v. Alley*, Cooke 257.

47. *Ala.*—*Parker v. Leek*, 1 Stew. 523. *Ill.*—*Whitbeck v. Ramsay's Estate*, 74 Ill. App. 524. *Kan.*—*Rizer v. Callen*, 27 Kan. 339. *Me.*—*Day v. Swann*, 13 Me. 165. *Md.*—*Fuhrman v. Fuhrman*, 115 Md. 436, 80 Atl. 1082. *Mass.*—*Weeks v. Parsons*, 176 Mass. 570, 58 N. E. 157; *Clapp v. Rice*, 15 Gray 557, 77 Am. Dec. 387. *N. Y.*—*Bates v. Merriek*, 2 Hun 568, 5 Thomp. & C. 701. *N. C.*—*Hudson v. Aman*, 158 N. C. 429, 74 S. E. 97. *S. C.*—*Stewart v. Vaughan*, Rice 33. *Vt.*—*Thomas v. Carter*, 63 Vt. 699, 22 Atl. 720, 14 L. R. A. 82; *Prescott v. Newell*, 39 Vt. 82.

48. See generally the statutes, and the following: *Skiff v. Cross*, 21 Iowa 459; *Fuhrman v. Fuhrman*, 115 Md. 436, 80 Atl. 1082.

49. *Reeves & Co. v. Jowell* (Tex. Civ. App.), 140 S. W. 364.

50. *Miles v. Rankin*, 6 Mon. (Ky.) 78; *St. Croix Timber Co. v. Joseph*, 142 Wis. 55, 124 N. W. 1049.

51. *Allan v. Houlden*, 6 Beav. 148, 12 L. J. Ch. 181, 49 Eng. Reprint 782.

52. *D. C.*—*Pavarini v. Title Guar-*

ing the debt, the surety proceeds against the principal or a fund to recover the amount paid.⁵³ Cosureties are not necessary parties in an action against the principal by one surety to recover his proportionate share of the debt.⁵⁴

D. PLEADING.—In proceedings by a surety for relief the general rules of pleading are followed.⁵⁵ Generally the plaintiff must state the essential facts constituting his cause of action,⁵⁶ and entitling him to the relief sought.⁵⁷

E. JUDGMENT OR DECREE.⁵⁸—1. **In General.**—The decree in a suit by the surety to compel the principal to pay the creditor, in so far as it directs payment of the debt should run in favor of the creditor rather than the surety,⁵⁹ and when the action is for indemnity before payment the judgment should specify the exact amount of the indemnity.⁶⁰ While a surety is entitled to full reimbursement from his principal,⁶¹ he can recover only the amount he pays to release

anty & S. Co., 36 App. Cas. 348. **Ky.** Bamberger v. Moayon, 91 Ky. 517, 16 S. W. 276. **N. C.**—Murphy v. Jackson, 58 N. C. 11. **Ohio.**—Still v. Holland, 1 Ohio Dec. (Reprint) 584. **Tenn.**—Gilliam v. Esselman, 5 Sneed 86. **Va.** Call v. Scott, 4 Call (8 Va.) 402.

53. Murphy v. Jackson, 58 N. C. 11.

54. Stone v. Hammell (Cal.), 22 Pac. 203.

55. See titles dealing with particular phases of pleading and forms of action.

56. See Clanton v. Coward, 67 Cal. 373, 7 Pac. 787 (action for reimbursement); Kreider v. Isenbice, 123 Ind. 10, 23 N. E. 786.

[a] The allegations in a bill in equity to compel the principal to meet the obligation "that the plaintiffs are surety for the defendant, that the debt has become due and payment has been demanded, which the defendant has neglected to make, authorize a decree requiring him to perform his obligation in the absence of any facts tending to show that such a decree would be inequitable." Fidelity & Deposit Co. v. Buckley, 75 N. H. 506, 77 Atl. 402.

[b] In an action by the surety to recover attorney fees for assisting in successfully defending an action on the bond the principal's assent or the necessity for the employment of counsel must be shown. American Surety Co. v. Vinsonhaler, 92 Neb. 1, 137 N. W. 848.

57. Boyd v. Beville, 91 Tex. 439, 44 S. W. 287.

[a] Exoneration.—A petition by a

surety praying solely for the return of pledged collateral and the appointment of a receiver is not a petition for exoneration and cannot be sustained as such. Hincley v. Pfister, 83 Wis. 64, 53 N. W. 21.

[b] **Prayer Indicating Action on Implied Contract.**—Where a petition by a surety against his principal avers the execution and delivery of a note by them as principal and surety, the payment of same by the latter and its indorsement to him, and prays for the recovery of the amount paid out by him thereon, and for whatever relief he might be entitled to thereunder, the action may be regarded as a suit upon the implied contract, rather than upon the note. The prayer for general relief here is of supreme importance. Without it the action would be on the note, which in this jurisdiction is not permitted. Green v. Hoppe (Tex. Civ. App.), 175 S. W. 1117.

58. See the titles "Decrees;" "Judgments."

59. Burlew v. Smith, 68 W. Va. 458, 69 S. E. 908. See also Pavarini v. Title Guaranty & S. Co., 36 App. Cas. (D. C.) 348.

60. Mudd v. Rogers, 10 La. Ann. 648.

61. See *infra*, this note.

[a] **In Case of Joint Judgment.** While judgment may be rendered jointly against the principal and surety, this does not entitle the principal to assume the position of a cosurety and hold the surety to a recovery of but one-half the amount he pays to satisfy the obligation. Wainwright v. Atkins, 104 Miss. 438, 61 So. 454.

himself from the obligation,⁶² with interest thereon⁶³ from the date of payment.⁶⁴ So if he pays less than the face of the claim and takes an assignment thereof,⁶⁵ or settles the obligation by transferring to the creditor real property,⁶⁶ or securities,⁶⁷ of a value less than the debt, he cannot as a general rule recover more than he pays or more than the value of the property or securities. On the other hand, if the property is worth more than the debt, no more than the amount of the debt can be recovered.⁶⁸

2. Costs.⁶⁹—Upon principles of equity, a surety is entitled to reimbursement from his principal, not only for what he is obliged to pay in discharge of the obligation for which he is surety, but also for all reasonable expenses and necessary costs⁷⁰ legitimately incurred

62. **Ala.**—*Graham v. King*, 15 Ala. 563; *Gee v. Nicholson*, 2 Stew. 512. **Ga.**—*Stanford v. Connery*, 84 Ga. 731, 11 S. E. 507. **Ind.**—*Gieseke v. Johnson*, 115 Ind. 308, 17 N. E. 573. **Ia.**—*Heaton v. Ainley*, 74 N. W. 766. **Ky.**—*Taylor v. Jefferson*, 167 Ky. 454, 180 S. W. 801; *Hickman v. McCurdy*, 7 J. J. Marsh. 555. **Md.**—*Martindale v. Brock*, 41 Md. 571. **Miss.**—*Wainwright v. Atkins*, 104 Miss. 438, 61 So. 454. **Mo.**—*Hearne v. Keath*, 63 Mo. 84. **Neb.**—*Eaton v. Lambert*, 1 Neb. 339. **N. H.**—*Osgood v. Osgood*, 39 N. H. 209. **N. J.**—*Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151. **Pa.**—*Vail v. Hartman*, 1 C. Pl. 132, 2 L. T. (N. S.) 9. **P. I.**—*Saenz v. Yap Chuan*, 16 Phil. Isl. 76. **Tex.**—*Abney v. Citizens' Nat. Bank* (Tex. Civ. App.), 152 S. W. 734. **Va.**—*Southall v. Farish*, 85 Va. 403, 7 S. E. 534, 1 L. R. A. 641; *Kendrick v. Forney*, 22 Gratt. (63 Va.) 748.

[a] **Interest on Debt.**—The amount of the obligation is, of course, not merely the face of the claim, but also interest thereon which the surety pays. **Ga.**—*Polhill v. Brown*, 84 Ga. 338, 10 S. E. 921. **Mo.**—*Bushong v. Taylor*, 82 Mo. 660. **Va.**—*Robinson v. Sherman*, 2 Gratt. (43 Va.) 178, 44 Am. Dec. 381.

63. **Cal.**—*Smith v. Johnson*, 23 Cal. 63; *Townsend v. Sullivan*, 3 Cal. App. 115, 84 Pac. 435. **Ind.**—*Gieseke v. Johnson*, 115 Ind. 308, 17 N. E. 573. **Ky.**—*Taylor v. Jefferson*, 167 Ky. 454, 180 S. W. 801. **Md.**—*Winder v. Dffen-derffer*, 2 Bland 166. **Mo.**—*Newman v. Newman*, 29 Mo. App. 649. **Neb.**—*Eaton v. Lambert*, 1 Neb. 339. **W. Va.**—*Cranmer v. McSwords*, 26 W. Va. 412.

[a] **In some states statutes provide for the payment of interest in such cases.** *McGee v. Russell*, 49 Ark. 104,

4 S. W. 284; *Goodwin v. Davis*, 15 Ind. App. 120, 43 N. E. 881.

64. **Ark.**—*McGee v. Russell*, 49 Ark. 104, 4 S. W. 284. **Ky.**—*Maysville Tel. Co. v. First Nat. Bank*, 142 Ky. 578, 134 S. W. 886. **N. H.**—*Child v. Eureka Powder Wks.*, 44 N. H. 354. **Va.**—*Robinson v. Sherman*, 2 Gratt. (43 Va.) 178, 44 Am. Dec. 381. **W. Va.**—*Butler v. Butler's Admr.*, 8 W. Va. 674.

65. *Wainwright v. Atkins*, 104 Miss. 438, 61 So. 454.

[a] **Recovery of Face Value.**—In some jurisdictions the surety may recover from the principal the face value of the assigned claim no matter what it cost him. *Fowler v. Strickland*, 107 Mass. 552.

66. *Lord v. Staples*, 23 N. H. 448.

67. **Ark.**—*Jordan v. Adams*, 7 Ark. 348. **Ky.**—*Owings v. Owings*, 3 J. J. Marsh. 590. **La.**—*Dinkgrave's Succession*, 31 La. Ann. 703. **Va.**—*Kendrick v. Forney*, 22 Gratt. (63 Va.) 748.

68. *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 555.

[a] **Property sold on execution sale to satisfy a judgment against the surety for his principal's obligation, while of greater value than the judgment for which it is sold, will not authorize the surety to recover from his principal more than the amount of the judgment.** *Coleman v. Riggs*, 61 Iowa 543, 16 N. W. 583.

69. See the title "Costs."

70. **Ill.**—*Stevens v. Hay*, 61 Ill. 399. **Ky.**—*Thomas v. Beckman*, 1 B. Mon. 29. **Mass.**—*Hayden v. Cabot*, 17 Mass. 169. **Miss.**—*Whitworth v. Tilman*, 40 Miss. 76. **Neb.**—*American Surety Co. v. Vinsonhale*, 92 Neb. 1, 137 N. W. 848. **N. Y.**—*Thompson v. Taylor*, 72 N. Y. 32; *Elwood v. Deifendorf*, 5 Barb. 398; *Baker v. Martin*, 3 Barb. 634.

for his own protection; such as taxable costs of trial and appeal;⁷¹ but not where it appears that they were incurred in defending against an obviously meritorious claim,⁷² unless the principal requested such action.⁷³

3. Attorney's Fees. — The surety may recover attorney's fees from the principal when the payment of such fees is a part of the original contract,⁷⁴ or when the surety defends an action on the bond successfully,⁷⁵ or with the principal's assent.⁷⁶

Pa.—*Miller v. Caldwell*, 4 Pa. 160; *Wynn v. Brooke*, 5 Rawle 106. **Tex.** *Bennett v. Dowling*, 22 Tex. 660. **Vt.** *Downer v. Baxter*, 39 Vt. 467; *Hulett v. Soullard*, 26 Vt. 295. **Va.**—*Robinson v. Sherman*, 2 Gratt. (43 Va.) 178, 44 Am. Dec. 381. **W. Va.**—*Feamster v. Withrow*, 12 W. Va. 611; *Butler v. Butler's Admr.*, 8 W. Va. 674. **Eng.** *Goddard v. Whyte*, 2 Giffard 449, 6 Jur. N. S. 1364, 3 L. T. (N. S.) 313, 66 Eng. Reprint 188; *Pierce v. Williams*, 23 L. J. Exch. 322; *Caldbeck v. Boon, Ir. R.* 7 C. L. 32. **Can.**—*Joice v. Duffy*, 5 Can. L. J. 141; *Harper v. Culbert*, 5 Ont. 152.

71. *City Trust, Safe Dep. & Surety Co. v. American Brew. Co.*, 182 N. Y. 285, 74 N. E. 948, reversing 93 App. Div. 606, 87 N. Y. Supp. 1130.

72. **Conn.**—*Beckley v. Munson*, 22 Conn. 299. **Me.**—*Emery v. Vinall*, 26 Me. 295. **Mass.**—*Sheehan v. Carroll*, 124 Mass. 67. **Miss.**—*Whitworth v. Tilman*, 40 Miss. 76; *Hayden v. Cabot*, 17 Miss. 169. **N. Y.**—*Thompson v. Taylor*, 72 N. Y. 32; *Hasbrouck v. Labriola*, 150 N. Y. Supp. 817; *Holmes v. Weed*, 24 Barb. 546. **Pa.**—*Wynn v. Brooks*, 5 Rawle 106. **W. Va.**—*Cranmer v. McSwords*, 26 W. Va. 412. **Can.**—*Whitehouse v. Glass*, 7 Grant Ch. (U. C.) 45.

73. *City Trust Safe Dep. & Surety Co. v. American Brew. Co.*, 182 N. Y. 285, 74 N. E. 948, reversing 93 App. Div. 606, 87 N. Y. Supp. 1130.

74. **Ill.**—*Ellis v. Conrad Seipp Brew. Co.*, 207 Ill. 291, 69 N. E. 808, affirming 107 Ill. App. 139. **Ind.**—See *Gieseke v. Johnson*, 115 Ind. 308, 17 N. E. 573. **Ia.**—*United States Fidelity & G. Co. v. Hittle*, 121 Iowa 352, 96 N. W. 782.

[a] **Collateral Matters.** — Under a contract by which the principal agrees to pay any necessary attorney fees for services in any controversy growing out of or arising under the contract, a recovery of attorney fees cannot be had for services rendered in collecting an annual premium on the bond. *Fidelity & Deposit Co. v. Crouse*, 86 N. J. L. 55, 90 Atl. 1026.

75. *Ellis v. Norman*, 19 Ky. L. Rep. 1798, 44 S. W. 429; *Abeles v. Mitchell*, 13 Phila. (Pa.) 81.

[a] **Unnecessary Expense.** — Where the principal and surety are sued and the former successfully defends the action, the latter, also employing counsel to assist in the defense, cannot recover attorney fees expended for such defense without showing necessity therefor or assent by the principal. *American Surety Co. v. Vinsonhaler*, 92 Neb. 1, 137 N. W. 848.

76. **La.**—*Berry v. Slocomb*, 2 La. Ann. 993, holding that assent or approval of principal is implied from his silence upon being notified of employment of counsel. **Pa.**—*Miller v. Caldwell*, 4 Pa. 160. **Vt.**—*Bancroft v. Pearce*, 27 Vt. 668.

PRINTING. — See Appeals; Briefs; Costs; Newspapers; Obscenity; Service of Process and Papers.

PRIOR ADJUDICATION. — See Jeopardy; Judgments; Res Judicata.

PRISONS AND PRISONERS

By the Editorial Staff.

I. ESCAPE, 599

- A. *Civil Proceedings*, 599
 - 1. *Remedies*, 599
 - 2. *Pleading*, 600
 - a. *Complaint or Declaration*, 600
 - b. *Demurrer, Plea or Answer*, 600
 - 3. *Trial and Judgment*, 601
- B. *Criminal Cases*, 601
 - 1. *Jurisdiction and Venue*, 601
 - 2. *Indictment and Information*, 601
 - a. *In General*, 601
 - b. *Charging Prisoner With Escape*, 602
 - c. *Against Officer for Suffering an Escape*, 602
 - d. *Aiding an Escape*, 603
 - e. *Attempt To Escape*, 603
 - 3. *Trial*, 604
 - a. *Time for Holding Trial*, 604
 - b. *Proof and Variance*, 604
 - c. *Questions for Jury*, 604
 - d. *Instructions*, 604
 - e. *Verdict*, 605

II. PROCEEDINGS BY AND AGAINST CONVICTS, 605

- A. *Civil Proceedings*, 605
 - 1. *In General*, 605
 - 2. *Parties*, 606
 - 3. *Service of Process on Convicts*, 606
 - 4. *Trial of Action*, 606
- B. *Prosecutions for Other Crimes*, 606
 - 1. *Offenses Prior to Conviction*, 606
 - 2. *Crimes Committed While Prisoner*, 607

III. CONTRACT LABOR, 608

- A. *Criminal Prosecutions*, 608
- B. *Actions Respecting Contract Labor*, 608
 - 1. *In General*, 608
 - 2. *Pleading*, 609

CROSS-REFERENCES:

Extradition;	Pardon;
False Imprisonment;	Recognizances and Bail;
Habeas Corpus;	Reformatories;
Judgments and Decrees,	Rescue;
Enforcement of;	Warrants.

As to civil arrest, see "Arrest in Civil Cases."

As to execution against the person, see 16 STANDARD PROC. 269, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. ESCAPE.—A. CIVIL PROCEEDINGS.—1. Remedies.—The creditor may proceed against the sheriff or other officer responsible for the escape of a debtor committed to his custody.¹ Case is the proper form of action at common law.² Under the statutes of some states debt will lie,³ and various summary remedies are also available.⁴

The sheriff in turn has his remedy against a deputy or jailer who suffers an escape, his cause being to resort to the bond of indemnity,⁵ and if the sheriff has omitted to take such a bond, the jailer or deputy sheriff is only answerable in assumpsit, on his implied promise to serve the sheriff with diligence and fidelity.⁶

1. *Folsom v. Gregory*, 12 N. C. 233.

[a] Only the creditor at whose instance the prisoner was arrested or charged in execution can maintain the action. *Riggs v. Thatcher*, 1 Greenl. (Me.) 68; *Folsom v. Gregory*, 12 N. C. 233.

[b] The action is not waived (1) by the creditor's subsequent resistance of the debtor's application for the benefit of the insolvent laws (*Browning v. Rittenhouse*, 38 N. J. L. 279; *Currie v. Worthy*, 48 N. C. 315); nor (2) is such right waived by the appearance of a creditor's attorney and his protest against the discharge of the prisoner. *Hotchkiss v. Whitten*, 71 Me. 577.

2. Ind.—*State v. Hamilton*, 33 Ind. 502; *Gwinn v. Hubbard*, 3 Blackf. 14. N. H.—*Lovell v. Bellows*, 7 N. H. 375. N. Y.—*Loosey v. Orser*, 4 Bosw. 391. N. C.—*Wiley v. Eure*, 53 N. C. 320. Vt.—See *Wheeler v. Pettes*, 21 Vt. 398. Eng.—*Bonafous v. Walker*, 2 T. R. 126, 100 Eng. Reprint 69.

3. Ind.—*State v. Hamilton*, 33 Ind. 502. Me.—*Fullerton v. Harris*, 8 Greenl. 393. N. Y.—*Barnes v. Willett*, 11 Abb.

Pr. 225, 19 How. Pr. 564, *affirmed*, 35 Barb. 514, 12 Abb. Pr. 448. See also *McCreery v. Willett*, 4 Bosw. 643, *affirmed*, 9 Bosw. 600, 23 How. Pr. 129; *Renick v. Orser*, 4 Bosw. 384. N. C. *Wiley v. Eure*, 53 N. C. 320. Eng. *Planck v. Anderson*, 5 T. R. 37, 101 Eng. Reprint 21; *Bonafous v. Walker*, 2 T. R. 126, 100 Eng. Reprint 69.

[a] Debt is cumulative to common law remedy. N. H.—*Lovell v. Bellows*, 7 N. H. 375. N. C.—*Wiley v. Eure*, 53 N. C. 320. Eng.—*Bonafous v. Walker*, 2 T. R. 126, 100 Eng. Reprint 69.

[b] Only where execution issues from court of record will debt lie. *Brown v. Genung*, 1 Wend. (N. Y.) 115.

[c] Debt abolished in such cases. *Chase v. Keyes*, 2 Gray (Mass.) 214. 4. See *infra*, this note.

[a] Attachment against sheriff. *Craig v. Maltbie*, 1 Ga. 544.

[b] Motion for Judgment.—*State v. Lawson*, 2 Gill (Md.) 62, 73.

[c] Rule for Escape.—*Abbott v. Holland*, 20 Ga. 598.

5. *Kain v. Ostrander*, 8 Johns. (N. Y.) 207.

6. *Kain v. Ostrander*, 8 Johns. (N.

The venue and place of trial are governed by general rules elsewhere treated.⁷

2. Pleading.—*a. Complaint or Declaration.*—Where the escape was from arrest on final process, the declaration or complaint should set forth facts showing a judgment by the plaintiff against the prisoner,⁸ the taking of the prisoner into custody under process,⁹ and the subsequent escape.¹⁰

b. Demurrer, Plea or Answer.—The demurrer,¹¹ plea,¹² or answer,¹³ of the defendant is governed by the general rules regulating

Y.) 207; *Atterton v. Harward*, Cro. Eliz. 349, 78 Eng. Reprint 597.

7. And see generally the title "Venue."

[a] An action for an escape is properly brought in the county where the escape occurred, although the judgment on which the prisoner was held is recorded in a different county. *Bogert v. Hildreth*, 1 Caines (N. Y.) 1.

[b] Place of Trial.—By reason of statute it is sometimes made necessary to try an action against a prison officer for an act done by him in virtue of his office, in the county where the cause of action or some part thereof arose. *Porter v. Pillsbury*, 11 How. Pr. (N. Y.) 240.

8. Ind.—*Hall v. Johnson*, 3 Blackf. 363. **Ky.**—*Brown v. Com.*, 6 Mon. 621. **N. Y.**—*Smith v. Knapp*, 30 N. Y. 581; *McCreery v. Willett*, 4 Bosw. 643, *affirmed*, 9 Bosw. 600, 23 How. Pr. 129.

[a] Basis of Judgment.—When the statute provides that to preclude a defendant from taking the poor debtor's oath the court on rendering judgment must adjudge that the cause of action arose from the wilful and malicious act of the defendant, and that a minute of such adjudication must be indorsed on the execution, it is necessary for the declaration to allege the making of such a minute. *Barber v. Chase*, 3 Vt. 340.

[b] But if the prisoner is arrested on mesne process, the complaint must allege that an indebtedness exists between plaintiff and the prisoner. *Cosgrove v. Bowe*, 10 Daly (N. Y.) 353, 2 Civ. Proc. 61.

9. Ill.—*Lattin v. Smith*, 1 Ill. 361. **Ky.**—*Gordon v. Ryan*, 1 J. J. Marsh 55, 59. **N. H.**—*Atherton v. Gilmore*, 9 N. H. 185. **N. J.**—*Dunham v. Solomon*, 16 N. J. L. 50. **N. Y.**—*Smith v. Knapp*, 30 N. Y. 581; *McCreery v. Willett*, 4 Bosw. 643, *affirmed*, 9 Bosw. 600, 23 How. Pr. 129,

[a] The indorsement on the execution, directing the sheriff what sum to levy, need not be set out. *Jones v. Cook*, 1 Cow. (N. Y.) 309.

[b] Where the declaration alleges a commitment, such allegation, at least after verdict, will be considered as including all facts necessary to make a legal commitment. *Atherton v. Gilmore*, 9 N. H. 185.

10. Ind.—*Hall v. Johnson*, 3 Blackf. 363. **Ky.**—*Barns v. Williams*, 2 Bibb 562. **N. Y.**—*Richtmeyer v. Remsen*, 38 N. Y. 206; *Cosgrove v. Bowe*, 10 Daly 353, 2 Civ. Proc. 61.

[a] An escape from the custody of a deputy sheriff may be declared on as an escape from the sheriff. *Skinner v. White*, 9 N. H. 204.

[b] An allegation that the prisoner departed and went without the prison rules, is not sufficient, notwithstanding the additional allegation that he did so contrary to the condition of the bond, whereby the bond was broken. *Barns v. Williams*, 2 Bibb (Ky.) 562.

[c] Voluntary Escape.—A complaint alleging that the sheriff "suffered and permitted such person to escape and go at large," states a voluntary and not a negligent escape. *Loosey v. Orser*, 4 Bosw. (N. Y.) 391.

11. See the title "Demurrer."

[a] Special Demurrer.—See State Treasurer v. Weeks, 4 Vt. 215; *Burley v. Griffith*, 8 Leigh (35 Va.) 442; and 6 STANDARD PROC. 934.

[b] Omission to state name of justice who issued the warrant of commitment not available on general demurrer. *Burley v. Griffith*, 8 Leigh (35 Va.) 442.

12. See the titles "Denials;" "Pleas," and titles dealing with particular pleas.

13. See the titles "Answers;" "Denials," and *Loosey v. Orser*, 4 Bosw. (N. Y.) 391; *Kingan v. Hall*, 23 U. C.

such pleadings. A plea stating the return of the prisoner into custody after the escape before action brought should show his detention by the officer down to the commencement of the action, or a legal discharge from that detention.¹⁴

3. Trial and Judgment. — Under a plea of general issue, a voluntary return cannot be shown,¹⁵ but a defense of fresh pursuit and recapture may be.¹⁶ In an action on the case for an escape from arrest on mesne process, a variance as to the amount of the debt alleged to be due by the prisoner is not material.¹⁷

Verdict. — A verdict for plaintiff need not expressly find that the escape was with the consent or through the negligence of defendant.¹⁸

Judgment. — The judgment in an action for an escape cannot be more rigorous than the terms of the original judgment.¹⁹ The sheriff cannot be committed until the sum is paid, though the original judgment contains such a provision.²⁰ Execution on the judgment will be stayed to allow the sheriff time to bring his action on the bond taken for the liberties of the prison.²¹

B. CRIMINAL CASES. — 1. Jurisdiction and Venue. — A state court has jurisdiction of a prosecution for escape from a county jail though the prisoner was in custody under a commitment from a federal court.²² A prosecution for escape should take place in the jurisdiction wherein the escape occurred.²³

2. Indictment and Information.²⁴ — *a. In General.* — Every element of the offense must be charged in the indictment or information.²⁵ As in other cases, it is sufficient to follow the language of the statute,²⁶

Q. B. 503; *Wilson v. Munro*, 20 U. C. Q. B. 18.

14. *Chambers v. Jones*, 11 East 406, 103 Eng. Reprint 1061; *Meriton v. Briggs*, 1 Ld. Raym. 39, 91 Eng. Reprint 922.

[a] How he was discharged should be averred. *Catherwood v. Fitler*, 2 Pa. L. J. 296, 1 Clark (Pa.) 314.

15. *Howland v. Squier*, 9 Cow. (N. Y.) 91.

16. *Whicker v. Roberts*, 32 N. C. 485.

17. *Smith v. Hart*, 2 Bay (S. C.) 395, 1 Brev. 146.

18. *Burley v. Griffith*, 8 Leigh (35 Va.) 442.

19. *Hoagland v. State*, 22 Ind. App. 204, 40 N. E. 931, 59 N. E. 336, 72 Am. St. Rep. 298.

[a] If the original judgment is payable in installments the sheriff should be given the benefit of the same condition and not be required to pay the entire sum at once. *Hoagland v. State*, 22 Ind. App. 204, 40 N. E. 931, 59 N. E. 336, 72 Am. St. Rep. 298.

20. *Hoagland v. State*, 22 Ind. App. 204, 40 N. E. 931, 59 N. E. 336, 72 Am. St. Rep. 298.

21. *McIntyre v. Woods*, 5 Johns. (N. Y.) 357.

22. *Com. v. Ramsey*, 1 Brewst. (Pa.) 422.

23. *Com. v. Ramsey*, 1 Brewst. (Pa.) 422.

24. See the title "Indictment and Information."

25. *Smith v. State*, 76 Ala. 69.

26. *Ala.*—*Hurst v. State*, 79 Ala. 55; *Smith v. State*, 76 Ala. 69. *Ark.*—*Dickens v. State*, 109 Ark. 425, 160 S. W. 218; *Haupt v. State*, 100 Ark. 409, 140 S. W. 294, Ann. Cas. 1913C, 690. *Ky.* *Hinkle v. Com.*, 23 Ky. L. Rep. 1988, 66 S. W. 816. *Mich.*—*People v. Murray*, 57 Mich. 396, 24 N. W. 118. *Mo.* *State v. Johnson*, 93 Mo. 317, 6 S. W. 77; *De Soto v. Brown*, 44 Mo. App. 148. *Nev.*—*State v. Angelo*, 18 Nev. 425, 4 Pac. 1080. *Pa.*—*Com. v. Ramsey*, 1 Brewst. 422. *Tex.*—*State v. Hedrick*, 35 Tex. 485; *Barthelow v. State*, 26 Tex. 175.

See 12 STANDARD PROC. 442.

[a] General terms, when defined by the statute may be used in the indictment without adding any additional details. *Porter v. State*, 34 Tex. Crim. 364, 30 S. W. 791.

provided every essential element of the offense is embraced therein.²⁷ The use of the words "feloniously or unlawfully" are unnecessary, unless they are used in the statute.²⁸

b. *Charging Prisoner With Escape.*²⁹—The indictment or information against a prisoner for escape should set forth facts showing an arrest and imprisonment,³⁰ and the subsequent escape³¹ from a lawful place of confinement.³²

c. *Against Officer for Suffering an Escape.*—In charging the officer with suffering an escape, facts should be alleged showing that the prisoner was in the legal custody of the defendant,³³ and escaped therefrom³⁴ through the fault of the officer.³⁵ It is not necessary to aver the particulars of the crime and arrest of the person who is charged

27. Fla.—*King v. State*, 42 Fla. 260, 28 So. 206. Kan.—*State v. Lawrence*, 43 Kan. 125, 23 Pac. 157. Mass.—*Com. v. Filburn*, 119 Mass. 297. Tex.—*Vaughan v. State*, 9 Tex. App. 563.

28. *Randall v. State*, 53 N. J. L. 488, 22 Atl. 46. See 12 STANDARD PROC. 404.

29. Attempt to escape, see *infra*, I, B, 2, e.

30. *Com. v. Ramsey*, 1 Brewst. (Pa.) 422.

[a] Not necessary to state the offense for which defendant was arrested. *Com. v. Ramsey*, 1 Brewst. (Pa.) 422.

[b] Where the offense was committed need not be alleged. *Com. v. Ramsey*, 1 Brewst. (Pa.) 422.

[c] That the court had jurisdiction to commit the prisoner need not be alleged, when it is charged that he was confined under the judgment and order of a particular court whose jurisdiction is defined by public statute. *State v. Whalen*, 98 Mo. 222, 11 S. W. 576.

[d] The length of the term for which he was convicted need not be alleged. *Harris v. Com.*, 23 Ky. L. Rep. 775, 64 S. W. 434.

31. *Com. v. Ramsey*, 1 Brewst. (Pa.) 422; *Carter v. State*, 29 Tex. App. 5, 14 S. W. 350.

[a] That the escape was without employer's consent need not be alleged in an information against a convict for escaping from his employer. *Carter v. State*, 29 Tex. App. 5, 14 S. W. 350.

32. *State v. Hollon*, 22 Kan. 580. See *People v. Ah Teung*, 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 190; *Daniel v. State*, 114 Ga. 533, 40 S. E. 805.

[a] The only reason for such an allegation (1) is that the pleading show on its face that the breaking away is a

crime (*Daniel v. State*, 114 Ga. 533, 40 S. E. 805); (2) consequently it is sufficient if the pleading charge that the accused "unlawfully" escaped. *Daniel v. State*, 114 Ga. 533, 40 S. E. 805. And see *Com. v. Ramsey*, 1 Brewst. (Pa.) 422.

[b] That the sheriff had a certified copy of the sentence or some other paper under which to hold the defendant must appear. *State v. Hollon*, 22 Kan. 580.

[c] The name of the officer from whose custody the prisoner escaped need not be set out. *State v. Shirley*, 233 Mo. 335, 135 S. W. 1.

33. *State v. Ritchie*, 107 N. C. 857, 12 S. E. 251; *State v. Baldwin*, 80 N. C. 390; *Weaver v. Com.*, 29 Pa. 445.

[a] That the keeper received the prisoner as such keeper need not be alleged. *Weaver v. Com.*, 29 Pa. 445.

34. Mo.—*State v. Shirley*, 233 Mo. 335, 135 S. W. 1. N. C.—*State v. Baldwin*, 80 N. C. 390. S. C.—*State v. Maberry*, 3 Strobb. 144.

[a] It is sufficient if the indictment allege that the prisoner did escape and go at large, without alleging that the officer "did permit" the prisoner to escape and go at large. *State v. Maberry*, 3 Strobb. (S. C.) 144. Compare *State v. Wright*, 81 Vt. 231, 69 Atl. 761.

35. *State v. McLain*, 104 N. C. 894, 10 S. E. 518.

[a] Charging the act to have been "negligently" done (1) is sufficient where the offense is negligent escape; it is not necessary to charge that it was wilfully or unlawfully done (*State v. McLain*, 104 N. C. 894, 10 S. E. 518), unless (2) it is sought to charge wilful escape. *Barthelow v. State*, 26 Tex. 175.

to have escaped,³⁶ the jurisdiction of the court in which the conviction was had,³⁷ that the officer had the prisoner in his custody by virtue of a sufficient warrant,³⁸ or that the officer had knowledge of the guilt of the prisoner.³⁹

Duplicity. — An indictment charging both a wilful and negligent escape, conjunctively, is bad for duplicity.⁴⁰

d. *Aiding an Escape.*⁴¹ — The indictment should allege sufficient facts showing that the prisoner was lawfully in custody,⁴² the acts done by the accused,⁴³ the means employed,⁴⁴ except where the statute makes it an offense to aid in escape, by any means whatever,⁴⁵ and that they were done with intent to aid in the escape of the prisoner,⁴⁶ unless the statute makes this latter allegation unnecessary.⁴⁷

e. *Attempt To Escape.* — In charging the prisoner with an attempt to escape, the pleading should state facts showing that the accused while lawfully confined⁴⁸ made an attempt to escape from such lawful

36. *State v. Hedrick*, 35 Tex. 485.

[a] **Except, perhaps, where voluntary escape** is the crime with which the officer is charged. *Com. v. Ramsey*, 1 Brewst. (Pa.) 422; 2 Hawk. P. C. (Eng.), §14.

37. *Daniel v. State*, 114 Ga. 533, 40 S. E. 805; *State v. Whalen*, 98 Mo 222, 11 S. W. 576. But see *Martin v. State*, 32 Ark. 124, holding that when the escape was while a prisoner was being held on a warrant, the indictment must show the authority of the officer issuing the warrant.

38. *State v. Sparks*, 78 Ind. 160, nor need the warrant be set out.

39. *Weaver v. Com.*, 29 Pa. 445.

40. *State v. Dorsett*, 21 Tex. 656. But see *State v. McLain*, 104 N. C. 894, 10 S. E. 518, holding that under an indictment charging an unlawful and negligent escape, there may be a conviction for a negligent escape.

41. See also the title "Rescue."

42. *State v. Jones*, 78 N. C. 420.

[a] **An allegation that the prisoner was lawfully detained** in the stated place of confinement is sufficient. *State v. Daly*, 41 Ore. 515, 70 Pac. 706.

[b] **Whether for a felony or a misdemeanor** (1) must be stated, when such fact affects the gravity of the offense (*Trammel v. State*, 111 Ala. 77, 20 So. 631; *Kyle v. State*, 10 Ala. 236. See also *Oleson v. State*, 20 Wis. 58). (2) but the particular felony with which he was charged need not be alleged. *State v. Adcock*, 65 Mo. 590.

[c] **No allegation as to the guilt of the prisoner necessary.** *State v. Daly*, 41 Ore. 515, 70 Pac. 706.

[d] **The particular court in which the conviction was had** need not be set out. *De Soto v. Brown*, 44 Mo. App. 148.

[e] **Where the prisoner was in charge of a posse**, the individual names of those comprising the posse need not be set out. *Perry v. State*, 63 Ga. 402.

[f] **The original indictment or information** need not be set forth. *Gunyon v. State*, 68 Ind. 79.

43. *Jenkins v. State*, 49 Tex. Crim. 470, 93 S. W. 554.

44. *Walker v. State*, 91 Ala. 32, 10 So. 30; *Hurst v. State*, 79 Ala. 55; *Ramsey v. State*, 43 Ala. 404.

[a] **Where the statute limits the offense to conveying into jail** (1) certain enumerated articles, an indictment is insufficient which charges that they were conveyed "unto" the jail (*People v. Rathbun*, 105 Mich. 699, 63 N. W. 973), or (2) were furnished. *Francis v. State*, 21 Tex. 280.

45. *Holloway v. Reg.*, 17 Q. B. 317, 2 Den. C. C. 287, 15 Jur. 825, 79 E. C. L. 317, 117 Eng. Reprint 1300.

46. *Johnson v. State*, 7 Ala. App. 88, 60 So. 973; *Jenkins v. State*, 49 Tex. Crim. 470, 93 S. W. 554.

47. *Marshall v. State*, 120 Ala. 390, 25 So. 208.

48. *State v. Angelo*, 18 Nev. 425, 4 Pac. 1080.

[a] **No warrant or commitment** authorizing the prisoner's incarceration need be alleged. *State v. Angelo*, 18 Nev. 425, 4 Pac. 1080.

[b] **That a certified copy of the judgment** against the accused had been delivered to the warden of the prison

confinement.⁴⁹ If it is sought to charge a third person with aiding the prisoner in the attempt, facts as to the prisoner's lawful custody should appear,⁵⁰ and also that the accused had knowledge of such custody, where that is necessary to show intent,⁵¹ but not otherwise.⁵²

3. Trial. — a. *Time for Holding Trial.* — A prisoner may be tried for an escape, although his original term of imprisonment has not expired,⁵³ and on recapture a prisoner may be held after his original sentence has been fulfilled, until a prosecution for the escape can be instituted.⁵⁴

b. *Proof and Variance.* — The general rules as to proof and variance are applied to prosecutions relating to escape.⁵⁵

c. *Questions for Jury.* — On the trial of a prosecution for aiding an escape, the fact of custody is for the jury,⁵⁶ as is also the legality of that particular custody.⁵⁷ When there is evidence that the officer in good faith tried to prevent the escape, the questions of good faith and diligence are for the jury.⁵⁸

d. *Instructions.* — The court should instruct the jury as to the rules of law enabling them to distinguish legal from illegal custody,⁵⁹ and as to the nature of the care required of the sheriff.⁶⁰ When the

need not be charged. *State v. Angelo*, 18 Nev. 425, 4 Pac. 1080.

49. *State v. Angelo*, 18 Nev. 425, 4 Pac. 1080.

[a] A criminal intent is sufficiently charged by the allegation that the accused attempted to escape. *State v. Clark*, 32 Nev. 145, 104 Pac. 593, Ann. Cas. 1912C, 754.

[b] But in charging the prisoner with having aided in an attempt to escape, it is not necessary to allege that he did attempt to escape. *Rex v. Tilley*, 2 Leach Cr. Cas. (Eng.) 662.

50. *Newberry v. State*, 15 Ohio Cir. Ct. 208, 7 Ohio Cir. Dec. 622.

51. *Fla.—King v. State*, 42 Fla. 260, 28 So. 206. *Kan.—State v. Lawrence*, 43 Kan. 125, 23 Pac. 157. *Mass. Com. v. Filburn*, 119 Mass. 297. *Tex. Vaughan v. State*, 9 Tex. App. 563.

52. *Wilson v. State*, 61 Ala. 151, *Newberry v. State*, 15 Ohio Cir. Ct. 208, 7 Ohio Cir. Dec. 622. See also *Rex v. Shaw, R. & R.* (Eng.) 526.

53. *Hays v. Stewart*, 7 Idaho 193, 61 Pac. 591.

54. *Ex parte Clifford*, 29 Ind. 106.

55. See 12 STANDARD PROC. 563, and the title "Variance and Failure of Proof."

[a] An indictment for a voluntary escape is sufficient to authorize a conviction for a negligent escape, but there is some doubt whether proof of a voluntary escape can be made under an indictment charging a negligent escape. *Kavanaugh v. State*, 41 Ala

399. And see *Nall v. State*, 34 Ala 262.

[b] *Attempt.* — Where the statute makes it an offense to set a prisoner at liberty or attempt to do so, and also makes the conveying into jail of any tool or instrument to aid in an escape, a separate crime, an attempt to do the latter is not punishable under an indictment for the former offense. *Patrick v. People*, 132 Ill. 529, 24 N. E. 619.

[c] *Variance in Description of Process.* — It is no variance that the indictment described the process on which the arrest was made as issuing upon an indictment against two persons as to whom it was returned, instead of against three persons, that being its form when submitted to the grand jury. *State v. McLain*, 104 N. C. 894, 10 S. E. 518.

56. *Habersham v. State*, 56 Ga. 61.

57. *Habersham v. State*, 56 Ga. 61. Compare *People v. Hochstim*, 76 App. Div. 25, 78 N. Y. Supp. 638, 986, 17 N. Y. Crim. 117.

58. *State v. Blackley*, 131 N. C. 726, 42 S. E. 569.

59. *Habersham v. State*, 56 Ga. 61.

[a] An instruction that certain documents were sufficient proof of lawful custody is a proper explanation of the legal effect of the evidence and not an instruction on the weight of evidence. *Broxton v. State*, 9 Tex. App. 97.

60. *Garver v. Territory*, 5 Okla. 342, 49 Pac. 470.

indictment alleges that defendant aided and assisted a prisoner to escape by aid given in a particular manner, it is error to instruct the jury that they must convict if they find the defendant aided in the escape in any manner.⁶¹ The instructions must relate to the particular offense charged.⁶²

e. *Verdict*.—The verdict must follow the indictment with respect to the crime charged.⁶³

II. PROCEEDINGS BY AND AGAINST CONVICTS.—A. CIVIL PROCEEDINGS.—1. *In General*.—Unless, as at common law, conviction of a felony works a forfeiture of the convict's civil rights,⁶⁴ he is not incapacitated to sue⁶⁵ or be sued.⁶⁶

61. *White v. State*, 13 Tex. 133.

62. *Mason v. State*, 7 Tex. App. 623.

63. *Westbrook v. State*, 52 Miss. 777, verdict for negligently permitting escape is improper under a charge of aiding an escape.

64. *Beck v. Beck*, 36 Miss. 72.

[a] Even though he escape, the convict is incapacitated to sue during the continuation of his term. *Beck v. Beck*, 36 Miss. 72.

65. *Del.*—*Cannon v. Windsor*, 1 *Houst.* 143. *Fla.*—*Willingham v. King*, 23 *Fla.* 478, 2 *So.* 851. *Ga.*—*Dade Coal Co. v. Haslett*, 83 *Ga.* 549, 10 *S. E.* 435. *Kan.*—*New v. Smith*, 73 *Kan.* 174, 84 *Pac.* 1030. *R. I.*—*Kenyon v. Saunders*, 18 *R. I.* 590, 30 *Atl.* 470, 26 *L. R. A.* 232.

[a] When a convict has been subjected to indignities by prison officials an action may be maintained against them, but not the municipality. *Bartlett v. Paducah*, 28 *Ky. L. Rep.* 1174, 91 *S. W.* 264.

[b] Conviction and sentence in another state does not affect the convicted person's right to sue in the forum. *Wilson v. King*, 59 *Ark.* 32, 26 *S. W.* 18, 23 *L. R. A.* 802.

66. *Cal.*—*Coffee v. Haynes*, 124 *Cal.* 561, 57 *Pac.* 482, 71 *Am. St. Rep.* 99; *Brown v. Mann*, 68 *Cal.* 517, 9 *Pac.* 545; *In re Nerac's Estate*, 35 *Cal.* 392, 95 *Am. Dec.* 111; *Castera v. Superior Court Los Angeles County*, 29 *Cal. App.* 694, 159 *Pac.* 735. *Del.*—*Cannon v. Windsor*, 1 *Houst.* 143. *Ky.*—*Woolbridge v. Lucas*, 7 *B. Mon.* 49. *Mo.* *Gray v. Gray*, 104 *Mo. App.* 520, 79 *S. W.* 505. *Nev.*—*Maxwell v. Rives*, 11 *Nev.* 213. *N. J.*—*Dunham v. Drake*, 1 *N. J. L.* 315. *N. Y.*—*Bowles v. Haberman*, 95 *N. Y.* 246; *Davis v. Duffe*, 1 *Abb. Dec.* 486, 3 *Keyes* 606, 3

Transer. App. 54, 4 *Abb. Pr.* (N. S.) 478; *Stephani v. Stephani*, 75 *Hun* 188, 26 *N. Y. Supp.* 1039, 58 *N. Y. St.* 185; *Bonnell v. Rome*, W. & O. R. Co., 12 *Hun* 218; *Wreckman v. Wreckman*, 4 *Civ. Proc.* 146; *Morris v. Walsh*, 9 *Bosw.* 636, 14 *Abb. Pr.* 387. And see *Avery v. Everett*, 110 *N. Y.* 317, 18 *N. E.* 148, 6 *Am. St. Rep.* 368, 1 *L. R. A.* 264. But compare *O'Brien v. Hagan*, 1 *Duer* 664; *Graham v. Adams*, 2 *Johns. Cas.* 408. *Okla.*—*Byers v. Sun Sav. Bank*, 41 *Okla.* 728, 139 *Pac.* 948, *Ann. Cas.* 1916D, 222, 52 *L. R. A.* (N. S.) 320. *Pa.*—*Smith v. Hooton*, 3 *Pa. Dist.* 250. *Va.*—*Guarantee Co. v. First Nat. Bank*, 95 *Va.* 480, 28 *S. E.* 909. And see *Merchant's Admr. v. Shry*, 116 *Va.* 437, 82 *S. E.* 106, *Ann. Cas.* 1916D, 1293.

[a] Confinement in a state prison does not change the residence of a convict and his confinement in a state other than that in which he resided prior to his incarceration does not change either his citizenship or his residence; therefore suit may be brought in the jurisdiction of his residence regardless of where he is confined. *Guarantee Co. v. First Nat. Bank*, 95 *Va.* 480, 28 *S. E.* 909.

[b] Though civil death abates an action for personal tort, an answer setting up that defendant is civilly dead is inconsistent, and is bad on demurrer. *Freeman v. Frank*, 10 *Abb. Pr.* (N. Y.) 370.

[c] A person under sentence of death is not thereby rendered incapable of managing his property. The rules affecting those confined for a period less than life or for life do not apply and he may defend an action brought against him. *Gray v. Stewart*, 70 *Kan.* 429, 78 *Pac.* 852, 109 *Am. St. Rep.* 461.

2. Parties. — The convict sues and is issued in his own name,⁶⁷ unless by statute a trustee is authorized to take charge of his property and in consequence to represent him as plaintiff,⁶⁸ or defendant.⁶⁹

3. Service of Process on Convicts.⁷⁰ — In the absence of a prohibitory statute service of process may be made on a convict in the prison where he is confined,⁷¹ and service on the keeper or warden of the prison has been held sufficient.⁷² Service by leaving process at the prisoner's place of residence with an adult member of his family is authorized by some statutes.⁷³

4. Trial of Action. — When there is an action pending at the time of a conviction, in which the prisoner is plaintiff, the defendant therein is entitled to a speedy trial thereof, notwithstanding plaintiff's incarceration.⁷⁴

B. PROSECUTIONS FOR OTHER CRIMES.⁷⁵ — **1. Offenses Prior to Conviction.** — The doctrine of some early authorities that a conviction of a person prevented his being prosecuted for any other offense committed by him prior to his conviction,⁷⁶ has been changed by statute in England,⁷⁷ and in general does not prevail in this country.⁷⁸ The

67. *Willingham v. King*, 23 Fla. 478. 2 So. 851.

[a] *Prochein ami* not necessary or proper in case of adult convict. *Willingham v. King*, 23 Fla. 478, 2 So. 851.

[b] *In name of trustee alone and not in their joint names.* *New v. Smith*, 73 Kan. 174, 84 Pac. 1030.

68. *New v. Smith*, 73 Kan. 174, 84 Pac. 1030.

69. *Kan.*—Board of Comrs. *v. Lawrence*, 29 Kan. 158. *Mo.*—*McLaughlin v. McLaughlin*, 228 Mo. 635, 129 S. W. 21, 137 Am. St. Rep. 680. *N. Y.* *Bowles v. Haberman*, 95 N. Y. 246; *Stephani v. Stephani*, 75 Hun 188, 26 N. Y. Supp. 1039, 58 N. Y. St. 185. *Va.*—*Merchant's Admr. v. Shry*, 116 Va. 437, 82 S. E. 106, Ann. Cas. 1916D, 1203.

[a] *In foreclosure proceedings* a trustee need not be appointed, as such appointment would not dispense with the necessity of making the convict a party to the action. *Davis v. Duffie*, 8 Bosw. (N. Y.) 617.

[b] *Divorce proceedings* constitute an exception to this rule. See Board of Comrs. *v. Lawrence*, 29 Kan. 158; *McLaughlin v. McLaughlin*, 228 Mo. 635, 129 S. W. 21, 137 Am. St. Rep. 680.

[c] *No valid judgment* can be entered until a trustee has been appointed. *McLaughlin v. McLaughlin*, 228 Mo. 635, 129 S. W. 21, 137 Am. St. Rep. 680. And see *Cobb v. Gar-*

lington, 100 S. C. 51, 84 S. E. 302; *Merchant's Admr. v. Shry*, 116 Va. 437, 82 S. E. 106, Ann. Cas. 1916D, 1203.

70. See generally the title "*Service of Process and Papers.*"

71. Board of Control of State Home *v. Mulertz*, 60 Colo. 468, 154 Pac. 742; *Davis v. Duffie*, 8 Bosw. (N. Y.) 617; *Phelps v. Phelps*, 7 Paige (N. Y.) 150.

72. *Johnson v. Johnson*, Walk. Ch. (Mich.) 309; *Newenham v. Pemberton*, 2 Coll. 54, 9 Jur. 637, 63 Eng. Reprint 634.

73. See the statutes, and also *Smith v. Hooton*, 3 Pa. Dist. 250.

74. *Castera v. Superior Court Los Angeles County*, 29 Cal. App. 694, 159 Pac. 735.

75. *For failure to perform convict labor contract*, see *infra*, III, A.

76. *Crenshaw v. State*, Mart. & Y. (Tenn.) 122, 17 Am. Dec. 788; *Armstrong v. L'Isle*, 12 Mod. 109, 88 Eng. Reprint 1199; *Stone's Case*, 2 Dyer 214b, 73 Eng. Reprint 474; 4 Bl. Com. 336; 2 Hawk. P. C. 532.

[a] *This rule only applied* when the offense for which the conviction was had was of such character that there was a corruption of blood and forfeiture of lands. 2 Hawk. P. C. 534.

77. 7 & 8 Geo. IV., ch. 28, §4.

78. *Ala.*—*Hawkins v. State*, 1 Port. 475, 27 Am. Dec. 641. *Cal.*—*People v. Majors*, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295, 5 Am. Crim. Rep. 486. *Ga.*—*Flagg v. State*, 11 Ga. App. 37,

defendant's right to a speedy trial is not affected by his imprisonment,⁷⁹ and statutes requiring any defendant to be brought to trial within a period designated in the statute, apply as well to persons under confinement as to other persons.⁸⁰

2. Crimes Committed While Prisoner.—One who commits a crime while under sentence for a crime previously committed may be prosecuted therefor regardless of his previous conviction and sentence.⁸¹

Jurisdiction and Venue.—A prisoner may be tried for an offense committed by him while a prisoner, in the county where the prison is situated, though the crime may have been committed by him in another county.⁸²

Indictment or Information.—The indictment is in the common form, without allegations as to the former trial, conviction or sentence.⁸³

Sentence.—In some jurisdictions the sentence in such case runs from the time of the expiration of his previous term, in other words the punishment is cumulative.⁸⁴ In others the sentences are con-

74 S. E. 562. **Ill.**—*Peri v. People*, 65 Ill. 17. **Md.**—*Rigor v. State*, 101 Md. 465, 61 Atl. 631. **Nev.**—*State v. Trammer*, 39 Nev. 142, 154 Pac. 80; *Ex parte Trammer*, 35 Nev. 56, 126 Pac. 337, 41 L. R. A. (N. S.) 1095. **Pa.**—*Com. v. Ross*, 28 Pa. Co. Ct. 276. See *Com. v. Ramunno*, 219 Pa. 204, 68 Atl. 184, 123 Am. St. Rep. 653, 14 L. R. A. (N. S.) 209. **S. C.**—*State v. Rodgers*, 100 S. C. 77, 84 S. E. 304; *State v. McCarty*, 1 Bay 334. **Tenn.**—*Arrowsmith v. State*, 131 Tenn. 480, 175 S. W. 545, L. R. A. 1915E, 363. **Tex.**—*Brown v. State*, 50 Tex. Crim. 114, 95 S. W. 1039; *Gaines v. State* (Tex. Crim.), 53 S. W. 623; *Coleman v. State*, 35 Tex. Crim. 404, 33 S. W. 1083. **Wash.**—*Clifford v. Dryden*, 31 Wash. 545, 72 Pac. 96. **W. Va.**—*Dudley v. State*, 55 W. Va. 472, 47 S. E. 285. **Wyo.**—*State v. Keefe*, 17 Wyo. 227, 98 Pac. 122, 22 L. R. A. (N. S.) 896.

But see *State v. Bell*, 212 Mo. 130, 111 S. W. 29; *State v. Buck*, 120 Mo. 479, 25 S. W. 573; *Ex parte Meyers*, 44 Mo. 279, that the prosecution cannot be maintained until the sentence has been served or the judgment of conviction is set aside or reversed.

79. **Ga.**—*Flagg v. State*, 11 Ga. App. 37, 74 S. E. 562. **N. Y.**—*People v. Smith*, 2 N. Y. Crim. 45. **S. C.**—*State v. Stalnaker*, 2 Brev. 44. **Tenn.**—*Arrowsmith v. State*, 131 Tenn. 480, 175 S. W. 545, L. R. A. 1915E, 363. **Tex.** See *Gaines v. State* (Tex. Crim.), 53 S. W. 623. **Utah.**—See *People v. Flynn*, 7 Utah 378, 26 Pac. 1114. **Wyo.** *State v. Keefe*, 17 Wyo. 227, 98 Pac.

122, 22 L. R. A. (N. S.) 896.

[a] Defendant must demand trial or he waives the right. *Ex parte Trammer*, 35 Nev. 56, 126 Pac. 337, 41 L. R. A. (N. S.) 1095.

80. **Ga.**—*Flagg v. State*, 11 Ga. App. 37, 74 S. E. 562. **W. Va.**—*Dudley v. State*, 55 W. Va. 472, 47 S. E. 285. **Wyo.**—*State v. Keefe*, 17 Wyo. 227, 98 Pac. 122, 22 L. R. A. (N. S.) 896.

But see *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250; *State v. Brophy*, 8 Ohio Dec. 698.

81. **Ind.**—*Kennedy v. Howard*, 74 Ind. 87. **Ky.**—*Huffaker v. Com.*, 124 Ky. 115, 98 S. W. 331. **Miss.**—*Singleton v. State*, 71 Miss. 782, 16 So. 295, 42 Am. St. Rep. 488. **Mo.**—*Ex parte Allen*, 196 Mo. 226, 95 S. W. 415. **Ohio.**—*Henderson v. James*, 52 Ohio St. 242, 39 N. E. 805, 27 L. R. A. 290. **Utah.**—*People v. Flynn*, 7 Utah 378, 26 Pac. 1114. **Wash.**—*Clifford v. Dryden*, 31 Wash. 545, 72 Pac. 96. **Wyo.**—*State v. Keefe*, 17 Wyo. 227, 98 Pac. 122, 22 L. R. A. (N. S.) 896.

[a] **Second Crime Committed During an Escape.**—*People v. Flynn*, 7 Utah 378, 26 Pac. 1114.

82. *Ruffin v. Com.*, 21 Gratt. (62 Va.) 790.

83. *Flagg v. State*, 11 Ga. App. 37, 74 S. E. 562; *State v. Brown*, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200. See also *State v. Johnson*, 93 Mo. 73, 5 S. W. 699.

[a] But if such facts are set out in the indictment, it is not for that reason subject to demurrer. *Williams v. State*, 130 Ala. 31, 30 So. 336.

84. *Ex parte Allen*, 196 Mo. 226, 95

current.⁸⁵ If the later crime be a capital offense, the convict may be sentenced to death and executed.⁸⁶

III. CONTRACT LABOR. — **A. CRIMINAL PROSECUTIONS.** — When a contract to labor in consideration of payment of a fine and costs is entered into, the failure of the prisoner to perform the labor contracted for may be punished by imprisonment.⁸⁷ Minority of the prisoner is not a defense to such a prosecution.⁸⁸

The person in charge of convict laborers is amenable to criminal prosecution under some statutes, for wilfully allowing one under his care and control to escape.⁸⁹

B. ACTIONS RESPECTING CONTRACT LABOR. — **1. In General.** — No action can be maintained against a public officer personally to enforce a contract made for the hire of convict laborers.⁹⁰ Under some statutes the superintendent or warden of a penitentiary may sue in his own name to recover damages on account of the loss of convicts who were permitted to escape,⁹¹ and the official in whose name a contract is made may maintain an action for breach thereof.⁹² Under others the action must be brought in the name of the county.⁹³ The prisoner may maintain an action against the contractor for injuries negligently inflicted by the latter.⁹⁴

S. W. 415; *Henderson v. James*, 52 Ohio St. 242, 39 N. E. 805, 27 L. R. A. 290.

85. *Kennedy v. Howard*, 74 Ind. 87.

86. *Ala.*—*Johnson v. State*, 183 Ala. 79, 63 So. 163. See *Williams v. State*, 130 Ala. 31, 30 So. 336. *Cal.*—*People v. Oppenheimer*, 156 Cal. 733, 106 Pac. 74; *People v. Carson*, 155 Cal. 164, 99 Pac. 970; *People v. Majors*, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295, 5 Am. Crim. Rep. 486. And see *People v. Hong Ah Duck*, 61 Cal. 387. *Ga.* See *Perry v. State*, 110 Ga. 234, 36 S. E. 781. *Ill.*—*Peri v. People*, 65 Ill. 17. *Ind.*—See *Kennedy v. Howard*, 74 Ind. 87. *Ky.*—See *Huffaker v. Com.*, 124 Ky. 115, 98 S. W. 331. *Miss.* *Singleton v. State*, 71 Miss. 782, 16 So. 295, 42 Am. St. Rep. 488. *Mo.*—*State v. Connell*, 49 Mo. 282. *N. Y.*—*Thomas v. People*, 67 N. Y. 218. *Tex.*—*Brown v. State*, 50 Tex. Crim. 114, 95 S. W. 1039.

87. *Winslow v. State*, 97 Ala. 68, 12 So. 423. And see *McQueen v. State*, 141 Ala. 100, 37 So. 360.

[a] Nothing but the original fine and costs can be included, and the failure to repay other advances to the surety will not subject the prisoner to such imprisonment. *Winslow v. State*, 97 Ala. 68, 12 So. 423; *Wynn v. State*, 82 Ala. 55, 2 So. 630; *Smith v. State*, 82 Ala. 40, 2 So. 629.

[b] The indictment or information

must allege among other things directly and not inferentially the imposition of the fine, the signing of the contract in open court and its approval by the judge presiding and a description of the act or service which defendant agreed by the contract to do or perform. *Giles v. State*, 89 Ala. 50, 8 So. 121. And see *McQueen v. State*, 141 Ala. 100, 37 So. 360.

88. *Wynn v. State*, 82 Ala. 55, 2 So. 630.

89. *State v. Sneed*, 94 N. C. 806.

90. *Comer v. Bankhead*, 70 Ala. 493; *Neal v. Suber*, 56 S. C. 298, 33 S. E. 463.

91. *Lipscomb v. Seegers*, 19 S. C. 425.

92. *Johnson v. Johnson* (Tex. Civ. App.), 33 S. W. 682; *Day v. Johnson* (Tex. Civ. App.), 33 S. W. 675.

93. *Pike v. Hanchey*, 119 Ala. 36, 24 So. 751; *Trammell v. Lee*, 94 Ala. 194, 10 So. 213.

94. *U. S.*—*Dalheim v. Lemon*, 45 Fed. 225. *Ark.*—*St. Louis, I. M. & S. R. Co. v. Hydrick*, 109 Ark. 231, 160 S. W. 196. *Ga.*—*Dade Coal Co. v. Haslett*, 83 Ga. 549, 10 S. E. 435. Compare *Mason v. Hamby*, 6 Ga. App. 131, 64 S. E. 569. *N. Y.*—*Hartwig v. Bay State Shoe & Leather Co.*, 43 Hun 425, 6 N. Y. St. 712. *Tex.*—*San Antonio & A. P. R. Co. v. Gonzales*, 31 Tex. Civ. App. 321, 72 S. W. 213.

But see *Rayborn v. Patton*, 11 Ohio

An action on a bond of a contractor for convict labor is maintainable in accordance with the general rules in respect to actions on bonds.⁹⁵

A recovery for a statutory penalty may be had against a contractor or lessee who suffers the convict to escape.⁹⁶

2. Pleading.—In an action for breach of the condition to pay the hire of a convict laborer, the condition of the bond must be set out.⁹⁷

Set-off and Counterclaim.⁹⁸—The lessee or contractor may, in an action to recover for the wages of convict laborers, set off any or all damage sustained by him by reason of the failure of the state to perform its stipulations to keep the convicts under good discipline and to keep them at diligent and faithful labor.⁹⁹ He may also set off damages sustained by him because of interference with and interruption of his work, in order that repairs and improvements might be made to the state prison.¹ When the convicts commit a wanton and malignant mischief not in the course of their employment, causing injury to the contractor's property, such damage cannot be set off against a claim under the contract.²

Dec. (Reprint) 100, 24 Wkly. L. Bul. 434.

[a] When relief has been granted to the convict by the state on his petition, he cannot afterwards maintain an action for his injuries against the contractor. *Metz v. Soule*, *Kretzinger & Co.*, 40 Iowa 236.

[b] Doctrine of assumption of risk not applicable. *Chattahoochee Brick Co. v. Braswell*, 92 Ga. 631, 18 S. E. 1015. See also *Capital Gas & Elec. L. Co. v. Davis' Admr.*, 138 Ky. 628, 128 S. W. 1062.

95. See 4 STANDARD PROC. 496, et seq.

[a] For a negligent escape of con-

vict. *Penitentiary Co. No. 2 v. Gordon*, 85 Ga. 159, 11 S. E. 584; *Lipscomb v. Seegers*, 19 S. C. 425.

96. *Lipscomb v. Seegers*, 19 S. C. 425.

97. *Pike v. Hanchey*, 119 Ala. 36, 24 So. 751. See also 4 STANDARD PROC. 503.

98. See the title "**Set-Off, Counterclaim and Recoupment.**"

99. *In re Southwestern Car Co.*, 9 Biss. 76, 22 Fed. Cas. No. 13,192.

1. *Com. v. Todd*, 9 Bush (Ky.) 708, although he became the contractor for such repairs and improvements.

2. *Austin v. Foster*, 9 Pick. (Mass.) 341.

PRIVATE AND TOLL ROADS

By the Editorial Staff.

I. PRIVATE ROADS, 611

- A. *Defined*, 611
- B. *Establishment*, 611
 - 1. *Review of Proceedings*, 611
 - a. *By Appeal*, 611
 - b. *By Certiorari*, 612
 - 2. *Recovery of Damages Awarded*, 613
- C. *Obstructing or Encroaching Upon Private Road*, 613
 - 1. *Civil Remedies*, 613
 - 2. *Criminal Prosecutions*, 613
- D. *Review of Proceeding To Vacate*, 613
- E. *Actions for Injuries*, 613
- F. *Collateral Attack on Road Proceedings*, 614

II. TOLL OR TURNPIKE ROADS, 614

- A. *Definition*, 614
- B. *Collection and Enforcement of Toll Charges*, 614
- C. *Actions for Injuries*, 614
 - 1. *In General*, 614
 - 2. *Declaration or Complaint*, 615
 - 3. *Trial*, 615
- D. *Actions for Penalties*, 616
- E. *Mandamus to Turnpike and Toll-Road Companies*, 616
- F. *Proceedings To Enforce Abandonment or Forfeiture of Toll-Road Franchise*, 617

CROSS-REFERENCES:

Easements; Highways, Streets and Bridges.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PRIVATE ROADS.—A. DEFINED.—A private road is one laid out by the public authorities at the expense and for the accommodation of individuals.¹ It is distinguished from a public road by the fact that it is established and maintained at the expense of individuals instead of the public.²

B. ESTABLISHMENT.—1. **Review of Proceedings.**—a. *By Appeal.* Proceedings to establish a private road are usually reviewable by appeal,³ to the same extent and in the same manner as those in reference to public roads.⁴ The appeal, as in other cases, must be from a final decision,⁵ and must be taken by one having an appealable interest,⁶ and to the tribunal authorized by statute to entertain the same.⁷ Where a trial de novo is had⁸ it is upon the then state of

1. *Clark v. Boston, C. & M. R. R.*, 24 N. H. 114.

[a] For other definitions, see: *Cal. Monterey v. Cushing*, 83 Cal. 507, 23 Pac. 700; *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879. **La.**—*Morgan v. Livingston*, 6 Mart. (O. S.) 19, 231. **Mo.** *Sarcoux v. Wild*, 64 Mo. App. 403. **N. Y.**—*Whiting v. Dudley*, 19 Wend. 373. **Ore.**—*Witham v. Osburn*, 4 Ore. 318, 18 Am. Rep. 287. **Pa.**—*Kister v. Reeser*, 98 Pa. 1, 42 Am. Rep. 608. **S. C.**—*Singleton v. Comr. of Roads*, 2 Nott & McC. 526.

[b] A neighborhood way is a private road. *Dickey v. Tension*, 27 Mo. 373; *State v. Mobley*, 1 McMul. (S. C.) 44; *Ex parte Withers*, 3 Brev. (S. C.) 83. But see *Kissinger v. Hanselman*, 33 Ind. 80.

2. *Madera County v. Raymond Granite Co.*, 139 Cal. 128, 72 Pac. 915, 989; *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577. See also *Welton v. Dickson*, 38 Neb. 767, 57 N. W. 559, 41 Am. St. Rep. 771, 22 L. R. A. 496.

[a] Private ways and highways distinguished by the method of their establishment. *Butchers' S. & M. Assn. v. Boston*, 139 Mass. 290, 30 N. E. 94.

3. **Ala.**—See *Ballard v. Cook*, 166 Ala. 105, 52 So. 147. **Idaho.**—*Latah County v. Hasfurther*, 12 Idaho 797, 88 Pac. 433. **Ia.**—*Bankhead v. Brown*, 25 Iowa 540. **Ky.**—*Freeman v. Cook*, 113 Ky. 461, 68 S. W. 410; *Rout v. Mountjoy*, 3 B. Mon. 300. **Md.**—*Arnsperger v. Crawford*, 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497. **Mo.**—*State ex rel. United Rys. Co. v. Wiethaupt*, 238 Mo. 155, 142 S. W. 323; *Moore v. Bailey*, 8 Mo. App. 156. **N. Y.** *People ex rel. Keenholts v. Robinson*, 29 Barb. 77, 17 How. Pr. 534. **N. C.** *Burden v. Harman*, 52 N. C. 354; *Ladd*

v. Hairston, 12 N. C. 368; *Wood v. Wood*, 4 N. C. 126. **Pa.**—*In re Rea-riek's Private Road*, 7 Pa. Super. 548.

4. See the title "**Highways, Streets and Bridges.**"

[a] From a decision denying the application to establish a private road an appeal lies as well as from a favorable decision. *Karnes v. Drake*, 103 Ky. 134, 44 S. W. 444.

5. *Exall v. Holland*, 166 Ky. 315, 179 S. W. 241.

[a] From an order setting aside the viewer's report, no appeal lies. *Exall v. Holland*, 166 Ky. 315, 179 S. W. 241; *In re Perry's Road*, 36 Pa. Super. 131.

6. *Rout v. Mountjoy*, 3 B. Mon. (Ky.) 300.

[a] One who is not a party to the proceedings to establish a private road and who would not be affected by the result cannot appeal. *Rout v. Mountjoy*, 3 B. Mon. (Ky.) 300.

7. *Arnsperger v. Crawford*, 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497.

[a] To Court Named by Statute. Where the statute provides for an appeal to a specified court a further appeal to a higher appellate court will not be permitted. *Arnsperger v. Crawford*, 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497.

8. **Ala.**—*Ballard v. Cook*, 166 Ala. 105, 52 So. 147. **Idaho.**—*Latah County v. Hasfurther*, 12 Idaho 797, 88 Pac. 433. **Ky.**—*Exall v. Holland*, 166 Ky. 315, 179 S. W. 241. **Minn.**—*Johnson v. Town of Chisago Lake*, 122 Minn. 134, 141 N. W. 1115. **Mo.**—*State ex rel. United Rys. Co. v. Wiethaupt*, 238 Mo. 155, 142 S. W. 323; *Allen v. Welch*, 125 Mo. App. 278, 102 S. W. 665; *Moore v. Bailey*, 8 Mo. App. 156. **N. C.**—*Cook v. Vickers*, 141 N. C. 101, 53 S. E. 740.

facts,⁹ and in some jurisdictions may be before a jury.¹⁰ On such trial *de novo* all the rights of the parties must be determined.¹¹ If the proceedings on appeal are revisory merely, the review is confined to the questions presented.¹² The highway commissioner's exercise of discretion will not be disturbed¹³ unless palpably abused and substantial injury has resulted.¹⁴

b. *By Certiorari*.—Certiorari within its proper limitations¹⁵ is available to review proceedings to establish private roads to the same extent as in public road proceedings.¹⁶ The writ is not proper where an adequate remedy by appeal exists,¹⁷ and the review thereon extends only to the regularity of the proceedings before the highway tribunal.¹⁸

9. *Johnson v. Town of Chisago Lake*, 122 Minn. 134, 141 N. W. 1115.

10. *Ballard v. Cook*, 166 Ala. 105, 52 So. 147; *State ex rel. United Rys. Co. v. Wiethaupt*, 238 Mo. 155, 142 S. W. 323.

11. *State ex rel. United Rys. Co. v. Wiethaupt*, 238 Mo. 155, 142 S. W. 323.

[a] The establishment of the road must be provided for; and a mere judgment awarding damages and remanding for further proceedings is insufficient. *State ex rel. United Rys. Co. v. Wiethaupt*, 238 Mo. 155, 142 S. W. 323; *Allen v. Welch*, 125 Mo. App. 278, 102 S. W. 665.

12. *Long v. Butler County Comrs.* Court, 18 Ala. 482.

[a] Only the record proper in some jurisdictions may be considered by the appellate court when the lower tribunal and its proceedings are regular on their face. *In re Roche's Private Road*, 10 Pa. Super. 87.

[b] The amount of damages to which he is entitled is the only question to be considered upon appeal by the landowner dissatisfied with the value placed upon his land. Such questions as the necessity for the road and whether or not the viewer's report should be set aside are not before the court. *Ballard v. Cook*, 166 Ala. 105, 52 So. 147; *Cleckler v. Morrow*, 150 Ala. 524, 43 So. 784.

13. *In re Perry's Road*, 36 Pa. Super. 131.

14. *In re Keeling's Road*, 59 Pa. 358.

[a] **Grounds of Reversal**.—(1) The proceedings of the lower tribunal will be set aside for the omission of a material and essential fact from the petition, such as a failure to set forth a description of the road showing its

termini (*In re Keeling's Road*, 59 Pa. 358), or (2) a failure to show the necessity of the road (*Colville v. Judy*, 73 Mo. 651); (3) also for failure of the lower tribunal to act in accordance with the statute in some essential particular, such as neglecting to fix the width of the road as required by statute (*In re Boyer's Road*, 37 Pa. 257), or (4) where the road was ordered opened, as shown by the record, before the payment of the assessed damages, when this is necessary. *In re Clowes' Private Road*, 31 Pa. 12.

15. See the title "*Certiorari*," 4 STANDARD PROC. 881.

16. See the title "*Highways, Streets and Bridges*," 11 STANDARD PROC. 54, 61, 91.

17. *Moore v. Bailey*, 8 Mo. App. 156.

[a] The owner of the land (1), whose title was acquired before the final order was made, but who has lost the right of appeal without fault or negligence on his part, is entitled to the writ (*Roberts v. Williams*, 15 Ark. 43), but (2) not after an unsuccessful action for damages and to reverse the order of confirmation. *In re Weaver's Road*, 45 Pa. 405.

18. *In re Keller's Private Road*, 154 Pa. 547, 25 Atl. 814.

[a] **Grounds of Reversal**.—(1) The proceedings of the highway tribunal will be reversed upon a finding of any material defect therein, such as a failure of the applicant's petition for the road to show or aver no other way of access to his land (*Hall v. Pettit*, 88 Mich. 158, 50 N. W. 117); (2) failure to serve the statutory notice on the owner of the land (*Hall v. Pettit*, 88 Mich. 158, 50 N. W. 117; *In re Shawhan*, 4 Sad. [Pa.] 181,

2. Recovery of Damages Awarded.—If the damages awarded or assessed by the highway tribunal are not paid, the owner of the land may recover them in an action of assumpsit.¹⁹

C. OBSTRUCTING OR ENCROACHING UPON PRIVATE ROAD.—1. Civil Remedies.—Any one for whom a private road is established or maintained may recover damages in an action at law for an illegal encroachment or obstruction,²⁰ and where an action at law is inadequate a suit in equity to restrain further or continued encroachment or obstruction will lie.²¹

2. Criminal Prosecutions.—Obstructing a private road is sometimes made an offense by statute.²² The indictment, therefore, is ordinarily sufficient if it follows the language of the statute.²³

D. REVIEW OF PROCEEDING TO VACATE.—Only the regularity of the proceedings to vacate a private road will be considered on appeal,²⁴ but the statutory requirements as to jurisdiction of the highway tribunal must be strictly followed or the proceedings will be set aside.²⁵

E. ACTIONS FOR INJURIES.—An action for an injury received through a defect or obstruction in a private road may be maintained by one lawfully using such road against the party whose duty it is to keep it in repair.²⁶

7 Atl. 97), or (3) occupant (*Hall v. Pettit*, 88 Mich. 158, 50 N. W. 117), or (4) payment of more than the legal fees to the surveyors. *Parmley v. White*, 35 N. J. L. 203.

[b] **Remittitur.**—In some jurisdictions where a simple mistake which may be easily corrected has been made, such as exceeding in width the statutory provisions for the width of a private road, the proceeding may be remitted, or when permitted by statute, amended forthwith on application of defendant. *Gruner v. Hartman*, 66 N. J. L. 189, 48 Atl. 522.

19. *Baker v. Braman*, 6 Hill (N. Y.) 47, 40 Am. Dec. 387. See also *Fernald v. Palmer*, 83 Me. 244, 22 Atl. 467. See generally the title "Assumpsit."

20. *Herrick v. Stover*, 5 Wend. (N. Y.) 580.

21. *Downing v. Corcoran*, 112 Mo. App. 645, 87 S. W. 114.

As to encroachment on public highway, see the title "Highways, Streets and Bridges."

22. *State v. Combs*, 120 N. C. 607, 27 S. E. 30.

[a] In the absence of a statute, it has been held that obstructing a private road is not indictable. *Gilbert v. People*, 121 Ill. App. 423. See *State v. Randall*, 1 Strobb. (S. C.) 110, 47 Am. Dec. 548.

23. *State v. Combs*, 120 N. C. 607, 27 S. E. 30. See generally 12 STANDARD PROC. 442.

[a] **Alleging Establishment of Road.** When a statute makes it an offense to maliciously injure a private road laid out by authority of law, an indictment should aver or allege facts showing the establishment of the road by such authority. *Territory v. Richardson*, 8 Ariz. 336, 76 Pac. 456.

24. *In re Glenfield Borough Road*, 5 Pa. Super. 222.

25. *State v. Allen*, 11 N. J. L. 103.

[a] **Showing Location of Road.**—If neither the published notice nor the surveyor's return shows the location of the road in the township of the highway tribunal, the proceedings will be set aside. *State v. Allen*, 11 N. J. L. 103.

26. *Coles v. Boston & M. R. R.*, 223 Mass. 408, 111 N. E. 893; *Cavanaugh v. Block*, 192 Mass. 63, 77 N. E. 1027, 116 Am. St. Rep. 220, 6 L. R. A. (N. S.) 310; *Benson v. Hudson River Water Power Co.*, 72 App. Div. 270, 76 N. Y. Supp. 42.

Actions for injuries from defects in a public highway or street, see 11 STANDARD PROC. 198.

[a] **Against Municipal Corporation.** *Ga.*—See *Mitchell County v. Dixon*, 20 Ga. App. 21, 92 S. E. 405. *Mass.* *Warner v. Holyoke*, 112 Mass. 362;

F. **COLLATERAL ATTACK ON ROAD PROCEEDINGS.**²⁷ — The decision of a highway tribunal cannot be attacked collaterally,²⁸ unless void for want of jurisdiction.²⁹

II. **TOLL OR TURNPIKE ROADS.** — A. **DEFINITION.** — A toll road or turnpike road is a public highway established and maintained by individuals under the state's authority for the use of the public upon payment of a toll.³⁰

B. **COLLECTION AND ENFORCEMENT OF TOLL CHARGES.** — An action for toll charges will lie³¹ at the instance of any one entitled to them.³²

C. **ACTIONS FOR INJURIES.** — 1. **In General.** — For any injury resulting from defects in a toll road, an action for damages³³ may be maintained against the company or individual owning or operating

Baker v. Dedham, 16 Gray 393. **N. H.** *Brown v. Brown*, 50 N. H. 538; *Proctor v. Andover*, 42 N. H. 348. **Vt.** *Loveland v. Berlin*, 27 Vt. 713.

27. See generally 15 **STANDARD PROC.** 377.

28. *Jones v. Smith* (Mo. App.), 186 S. W. 1088; *Brown v. Brown*, 50 N. H. 538.

In proceedings involving a public highway, see 11 **STANDARD PROC.** 56, 113, 128; 15 **STANDARD PROC.** 410.

[a] That the land was within the township whose board acted in the matter, presumed. *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. 656.

[b] That no formal judgment entered on the commissioner's report, immaterial. *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. 656.

29. *Proctor v. Andover*, 42 N. H. 348; *Berridge v. Shults*, 32 Misc. 444, 66 N. Y. Supp. 204.

[a] The record must affirmatively show that the tribunal had jurisdiction. *Belk v. Hamilton*, 130 Mo. 292, 32 S. W. 656.

30. **Colo.** — *Virginia Canon Toll Road Co. v. People*, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711. **Mo.** — *State v. Hannibal & R. C. Gravel Rd. Co.*, 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457. **N. J.** — *Jersey City & B. P. Plank Rd. Co. v. Haight*, 30 N. J. L. 443. **N. Y.** — *Bradshaw v. Rodgers*, 20 Johns. 103.

[a] **Turnpike Road Includes Gravel Roads and Plank Roads.** — *State v. Hannibal & R. C. Gravel Rd. Co.*, 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457.

[b] **Not public roads in larger sense**, that is, in the sense that public roads are completely under legislative con-

trol. *Shelby v. Castetter*, 7 Ind. App. 309, 33 N. E. 986, 34 N. E. 687.

[c] **Origin of word turnpike**, see *Northam Bridge & R. Co. v. London*, etc. Ry. Co., 6 M. & W. (Eng.) 428.

31. *Boyer v. Burton*, 79 Ore. 662, 149 Pac. 83, 156 Pac. 281.

[a] **Assumpsit**, a proper remedy. **N. J.** — *Nicholson v. Williamstown & G. I. Tpk. Co.*, 28 N. J. L. 142; *Ayres v. Trenton & N. B. Turnpike Co.*, 9 N. J. L. 33. **Pa.** — *Beeler v. Pittsburgh Farmers' & Mechanics' Tpk. Rd. Co.*, 14 Pa. 162; *Dorman v. Pittsburgh & S. Tpk. Rd. Co.*, 3 Watts 126; *Susquehanna & Y. B. Tpk. Co. v. Hauser*, 20 Pa. Dist. 11. **Va.** — See *Graham Bros. v. Carroll*, 27 W. Va. 790. **Eng.** *Seward v. Baker*, 1 T. R. 616, 99 Eng. Reprint 1283.

[b] **In an inferior court**, where the action is brought under a statute providing express limitations, the record should show that the action in every respect complies with the statute. *Susquehanna & Y. B. Tpk. Co. v. Hauser*, 20 Pa. Dist. 11.

[c] **In the county or township** where the defendant resides. *Morton Gravel Rd. Co. v. Wyson*, 51 Ind. 4.

32. *Beeler v. Pittsburgh Farmers' & Mechanics' Tpk. Rd. Co.*, 14 Pa. 162.

[a] **A lessee of a toll gate.** *Chesley v. Smith*, 1 N. H. 20.

[b] **A state officer in charge of a road.** *Hopkins v. Stockton*, 2 Watts & S. (Pa.) 163.

33. **Conn.** — *Goshen & Sharon Tpk. Co. v. Sears*, 7 Conn. 86. **Md.** — *Baltimore & Y. Tpk. R. v. Parks*, 74 Md. 282, 22 Atl. 399; *Baltimore & Y. Turnpike Co. v. Crowther*, 63 Md. 558, 1 Atl. 279. **Mass.** — *Williams v. Hing-*

it by any one liable to pay toll for use of the road at the time the injury occurs.³⁴

2. Declaration or Complaint.³⁵ — The plaintiff should set forth facts showing a duty owing by the defendant toward the injured party,³⁶ defendant's negligence in the exercise thereof,³⁷ and the resulting damage.³⁸ In some jurisdictions the plaintiff must negative contributory negligence.³⁹

3. Trial.⁴⁰ — **Questions of Law and Fact.** — Under conflicting evidence it is for the jury to determine whether the road was in a safe condition,⁴¹ and whether the injured party was guilty of contributory negligence.⁴²

ham & Q. B. & T. C. Corp., 4 Pick. 341. **Mich.**—Carver *v.* Detroit & S. Plank Rd. Co., 61 Mich. 584, 28 N. W. 721. **Mo.**—Ashley *v.* Elsberry & N. H. Gravel Rd. Co., 99 Mo. App. 178, 73 S. W. 229. **N. J.**—Ward *v.* Newark & P. Tpk. Co., 20 N. J. L. 323. **N. Y.**—Wilson *v.* Susquehanna Tpk. Rd. Co., 21 Barb. 68. **Pa.**—Born *v.* Allegheny & P. Plank Rd. Co., 101 Pa. 334. **Tenn.**—Murfreesboro & W. Tpk. Co. *v.* Barrett, 2 Coldw. 508. **Vt.**—Davis *v.* Lamoille County Plank Rd. Co., 27 Vt. 602; Mathews *v.* Winooski Tpk. Co., 24 Vt. 480; Richardson *v.* Royalton & W. Tpk. Co., 6 Vt. 496, 5 Vt. 580.

34. Mass.—Williams *v.* Hingham & Q. B. & T. C. Corp., 4 Pick. 341. **Mo.**—Mabrey *v.* Cape Girardeau & J. G. Rd. Co., 92 Mo. App. 596, 69 S. W. 394. **Pa.**—Lancaster Ave. Imp. Co. *v.* Rhoads, 116 Pa. 377, 9 Atl. 852, 2 Am. St. Rep. 608. **Vt.**—Brown *v.* Winooski Tpk. Co., 23 Vt. 104.

See also 11 STANDARD PROC. 198, et seq.

35. See generally the title "Declaration and Complaint."

36. Bank Lick Tpk. Co. *v.* Broadus, 22 Ky. L. Rep. 827, 58 S. W. 778; Williams *v.* Hingham & Q. B. & T. C. Corp., 4 Pick. (Mass.) 341.

[a] The liability to pay toll (1) should appear from the facts stated. Williams *v.* Hingham & Q. B. & T. C. Corp., 4 Pick. (Mass.) 341. (2) An averment that the plaintiff was lawfully using the road is sufficient without a statement that he had paid the toll. Evans *v.* New Brunswick & C. T. Co., 59 N. J. L. 3, 34 Atl. 985.

37. Baltimore & H. Tpk. Co. *v.* Bateman, 68 Md. 389, 13 Atl. 54, 6 Am. St. Rep. 449; Hydes Ferry Tpk. Co. *v.* Yates, 108 Tenn. 428, 67 S. W. 69. See also **Ind.**—Speer *v.* Green-

castle & C. G. R. Co., 4 Ind. App. 525, 31 N. E. 381. **Ky.**—Canton, C. & H. Tpk. Co. *v.* McIntire, 105 Ky. 185, 48 S. W. 980. **Mich.**—Monyhan *v.* Detroit & S. P. Rd. Co., 129 Mich. 549, 89 N. W. 372. **N. Y.**—Wilson *v.* Susquehanna Tpk. Rd. Co., 21 Barb. 68.

[a] The particular place where the injury occurred on the road should be set out when the circumstances of the case make it necessary to do so, but a failure to make such an allegation is generally cured by the verdict. Noyes *v.* White River Tpk. Co., 11 Vt. 531. See generally the title "Negligence."

38. Bank Lick Tpk. Co. *v.* Broadus, 22 Ky. L. Rep. 827, 58 S. W. 778. See generally the title "Injuries to Persons and Property."

39. Sale *v.* Aurora & L. T. Co., 147 Ind. 324, 46 N. E. 669; Wilson *v.* Trafalgar & B. C. G. Rd. Co., 83 Ind. 326. See the title "Negligence."

40. See generally the title "Trial."

41. **Conn.**—Weeks *v.* Connecticut & R. I. Tpk. Co., 20 Conn. 134. **Md.**—Baltimore & R. Tpk. Rd. Co. *v.* State, 71 Md. 573, 18 Atl. 884. **Mich.**—Carver *v.* Detroit & S. Plank Rd. Co., 69 Mich. 616, 25 N. W. 183. **Mo.**—Mabrey *v.* Cape Girardeau & J. G. Rd. Co., 92 Mo. App. 596, 69 S. W. 394. **Pa.**—Born *v.* Allegheny & P. Plank Rd. Co., 101 Pa. 334; Stewart *v.* Chester & D. T. Rd. Co., 3 Pa. Super. 86.

42. **Conn.**—Weeks *v.* Connecticut & R. I. Tpk. Co., 20 Conn. 134. **Md.**—Baltimore & R. Tpk. Rd. Co. *v.* State, 71 Md. 573, 18 Atl. 884. **Mass.**—Coles *v.* Boston & M. R. R., 223 Mass. 408, 111 N. E. 893. **Mich.**—Carver *v.* Detroit & S. Plank Rd. Co., 69 Mich. 616, 25 N. W. 183.

Instructions. — The court should instruct the jury in respect to the defendant's duty under the facts disclosed.⁴³

D. ACTIONS FOR PENALTIES.⁴⁴ — Statutes in some jurisdictions provide that an action for a penalty in a specified sum may be maintained against a toll road company or toll-gatherer for demanding and receiving an excessive toll,⁴⁵ and also that such an action may be maintained by the company or toll-gatherer⁴⁶ against any one who, in order to avoid the payment of a legal toll, forcibly or otherwise goes through or around a toll gate.⁴⁷ In such cases the general rules of pleading and practice apply to the statement of the cause of action,⁴⁸ plea or answer,⁴⁹ proof,⁵⁰ and the determination of questions of law and fact.⁵¹

E. MANDAMUS TO TURNPIKE AND TOLL-ROAD COMPANIES.⁵² — As a general rule, when no other remedy is provided,⁵³ mandamus will lie

43. *Henderson & C. G. R. Co. v. Crosby*, 103 Ky. 182, 44 S. W. 639. See the title "Instructions."

[a] **With respect to the defect causing the injury.** *Henderson & C. G. R. Co. v. Crosby*, 103 Ky. 182, 44 S. W. 639; *Baltimore & R. Tpk. Rd. Co. v. State*, 71 Md. 573, 18 Atl. 884.

[b] **Instructions Not To Be Misleading.**—*Baltimore & L. Tpk. Co. v. Cassell*, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175.

44. See generally the title "Penalties, Forfeitures and Fines."

45. *Culbertson v. Kinevan*, 73 Cal. 68, 14 Pac. 364.

[a] **Applicable to Plankroads and Turnpikes.**—*Marselis v. Seaman*, 21 Barb. (N. Y.) 319.

[b] **Only Where Wrongful.**—*Fox v. Francher*, 66 Mich. 536, 33 N. W. 416.

[c] **Where party exempt from paying toll**, statutes do not apply. *Cal. Culbertson v. Kinevan*, 73 Cal. 68, 14 Pac. 364. *Mich.*—*Van Buren v. Wylie*, 56 Mich. 501, 23 N. W. 195. *N. J.* *Evans v. Newkirk*, 3 N. J. L. 433. *Contra*, *Skinner v. Anderson*, 12 Barb. (N. Y.) 648.

46. *Mich.*—*Canal St. Gravel Road Co. v. Paas*, 95 Mich. 372, 54 N. W. 907. *N. Y.*—*Monterey P. R. Co. v. Chamberlain*, 32 N. Y. 659, 33 N. Y. 46. *Pa.*—*Com. ex rel. Ernst v. Metzger*, 6 Kulp 408.

47. *Ind.*—*Wayne Pike Co. v. Bosworth*, 91 Ind. 210; *Mt. Carmel & J. F. Tpk. Co. v. Loos*, 53 Ind. App. 6, 101 N. E. 116. *Ky.*—*Rives v. Wood*, 12 Ky. L. Rep. 691, 15 S. W. 131. *Md.* *Hagerstown & Cross Roads Turnpike Co. v. Evers*, 130 Md. 8, 99 Atl. 980, L. R. A. 1917D, 333. *Tenn.*—*Gourley*

v. Nashville & G. Tpk. Co., 104 Tenn. 305, 56 S. W. 855. *Vt.*—*Centre Turnpike Co. v. Vandusen*, 10 Vt. 197. *Can. Reg. v. Haystead*, 7 U. C. Q. B. 9.

48. See generally the titles "Declaration and Complaint;" "Penalties, Forfeitures and Fines."

[a] **Passing through the gate is not an essential fact to be alleged if it is not necessary to the collection of the toll.** *Hunter v. Burnsville Tpk. Co.*, 56 Ind. 213.

49. See the titles "Answers;" "Denials;" "Pleas."

[a] **Want of repair as a bar to recovery for avoiding payment of toll** may be pleaded under some statutes, but where the action is commenced before a justice of the peace this defense may be relied upon without special plea. *Mt. Carmel & J. F. Tpk. Co. v. Loos*, 53 Ind. App. 6, 101 N. E. 116; *Aurora & L. Tpk. Co. v. Neibrugge*, 25 Ind. App. 567, 58 N. E. 864.

50. *Stipp v. Spring Mill & W. C. G. Rd. Co.*, 54 Ind. 16; *Gourley v. Nashville & G. Tpk. Co.*, 104 Tenn. 305, 56 S. W. 855.

51. See *Dexter & L. Plank Rd. Co. v. Allen*, 16 Barb. (N. Y.) 15; *Gourley v. Nashville & G. Tpk. Co.*, 104 Tenn. 305, 56 S. W. 855; and the title "Province of Judge and Jury."

52. See generally the title "Mandamus."

53. *State ex rel. Morgan v. Monmouth Plank Rd. Co.*, 26 N. J. L. 99 (a case in which toll could not be collected while road was out of repair); *Reg. v. Oxford & W. Tpk. Rds.*, 12 Ad. & El. 427, 6 Jur. 216n, 4 P.

to compel a company owning or operating a toll road, plank road, or turnpike, to perform the duties imposed upon it by law,⁵⁴ but not to enforce purely contract obligations not involving a trust.⁵⁵

F. PROCEEDINGS TO ENFORCE ABANDONMENT OR FORFEITURE OF TOLL ROAD FRANCHISE.—Under some statutes a toll road may be abandoned to the public without a judicial determination of abandonment,⁵⁶ but when a determination of forfeiture for nonuser or misuser is desired or is necessary an appropriate proceeding, such as *scire facias*,⁵⁷ or *quo warranto*,⁵⁸ should be instituted by or on behalf of the state.⁵⁹ Where the remedy of *quo warranto* is inadequate the state,⁶⁰ or the county, under certain circumstances,⁶¹ may enjoin the collection of tolls. The existence of one remedy, however, as a rule does not preclude resort to another,⁶² but when the proceeding may be for either a penalty or forfeiture the former is preferred.⁶³ The

& D. 154, 40 E. C. L. 215, 113 Eng. Reprint 873.

54. Reg. v. Rochdale & H. Tpk. Rd., 12 Q. B. 448, 64 E. C. L. 448, 116 Eng. Reprint 935.

[a] **Forbidding Use of Toll Road to Automobiles.**—*Bertles v. Laurel Run Tpk. Co.*, 15 Pa. Dist. 94.

[b] **To Remove Idle Tollhouse.**—Reg. v. Greenlaw Rd. Trustees, 4 Q. B. D. 447, 48 L. J. Q. B. 409, 40 L. T. N. S. 555, 27 Wkly. Rep. 800.

55. State v. Zanesville & M. T. Rd. Co., 16 Ohio St. 308.

56. Conn.—*Lee v. Barkhamsted*, 46 Conn. 213. Ind.—*Western Plank Rd. Co. v. Central Union Tel. Co.*, 146 Ind. 229, 18 N. E. 14. N. Y.—*People v. Fishkill & B. P. Rd. Co.*, 27 Barb. 445. Pa.—*West Philadelphia Pass. Ry. Co. v. Philadelphia & W. C. Tpk. Rd. Co.*, 186 Pa. 459, 40 Atl. 787.

57. Ala.—*State v. Moore*, 19 Ala. 514. Md.—*Washington & B. Tpk. Rd. v. State*, 19 Md. 239. Tenn.—*State v. Scott*, 2 Swan 332.

58. Ark.—*Darnell v. State*, 48 Ark. 321, 3 S. W. 365. Ind.—*Covington, etc. Plank Rd. Co. v. Van Sickle*, 18 Ind. 244. Mo.—*State v. Louisiana, B. & G. & A. G. Rd. Co.*, 116 Mo. App. 175, 92 S. W. 153. Wis.—*State ex rel. Mengel v. Steber*, 154 Wis. 505, 143 N. W. 156.

See the title "*Quo Warranto*."

59. Ind.—*Western Plank Rd. Co. v. Central Union Tel. Co.*, 116 Ind. 229, 18 N. E. 14. Ky.—*Kennedy v. Crum*, 16 Ky. L. Rep. 257, 26 S. W. 190. Mich.—*Bridge St. & A. Gravel Rd. Co. v. Hogadone*, 150 Mich. 638, 114 N. W.

917; *Detroit v. Detroit & H. Plank Rd. Co.*, 43 Mich. 140, 5 N. W. 275. Mo.—*State v. Louisiana, B. & G. & A. G. Rd. Co.*, 116 Mo. App. 175, 92 S. W. 153. Ohio.—See *Salt Creek Val. Tpk. Co. v. Parks*, 50 Ohio St. 568, 35 N. E. 304, 28 L. R. A. 769. Ore.—*Boyer v. Burton*, 79 Ore. 662, 149 Pac. 83, 156 Pac. 281. Va.—See *New Market & S. T. Co. v. Keyser*, 119 Va. 165, 89 S. E. 251. W. Va.—*Moore v. Schoppert*, 22 W. Va. 282.

[a] **By Resisting Collection of Tolls.**—The right to collect tolls is a franchise which cannot be forfeited by a third person in a collateral proceeding. *Boyer v. Burton*, 79 Ore. 662, 149 Pac. 83, 156 Pac. 281. *Contra*, *Montgomery County v. C. & R. Tpk. Co.*, 120 Tenn. 76, 109 S. W. 1152.

60. State v. Louisiana, B. & G. & A. G. Rd. Co., 116 Mo. App. 175, 92 S. W. 153.

61. *Montgomery County v. Clarks-ville & R. Tpk. Co.*, 120 Tenn. 76, 109 S. W. 1152, where county has been given supervision of its highways and the franchise to collect tolls has expired.

62. Ala.—*State v. Moore*, 19 Ala. 514. Ky.—*Daviess County v. Daviess County Gravel Rd. Co.*, 23 Ky. L. Rep. 711, 63 S. W. 752. Md.—*Washington & B. Tpk. Rd. v. State*, 19 Md. 239. Mo.—*State v. Louisiana, B. & G. & A. G. Rd. Co.*, 116 Mo. App. 175, 92 S. W. 153. Vt.—*State v. Pasumpsic Tpk. Co.*, 3 Vt. 178.

63. Com. v. Newport L. & A. Tpk. Co., 29 Ky. L. Rep. 1285, 97 S. W. 375, 30 Ky. L. Rep. 1235, 100 S. W. 871.

general rules of pleading apply to all such actions.⁶⁴

64. See the following cases: **Ky.** | **Mich.**—People *v.* Jackson & M. Plank
Com. *v.* Newport L. & A. Tpk. Co., 29 | Rd. Co., 9 Mich. 285. **Vt.**—State *v.*
Ky. L. Rep. 1285, 97 S. W. 375, 30 | Pasumpsic Tpk. Co., 3 Vt. 178.
Ky. L. Rep. 1235, 100 S. W. 871. |

PRIVATE INTERNATIONAL LAW. — See **Remedy.**

PRIVATE PROSECUTOR. — See **Grand Jury; Indictment and Information.**

Vol. XXI

PRIVILEGE

By the Editorial Staff.

I. WHO PRIVILEGED, 621

A. *From Arrest*, 621

1. *Under Criminal Process*, 621

- a. *Members of Congress and Legislatures*, 621
- b. *Federal Officers and Employees*, 621
- c. *Foreign Ministers, Legation Officers, and Consuls*, 621
- d. *Election Officers and Electors*, 621
- e. *Persons Illegally Brought Within Jurisdiction*, 621
- f. *Parties and Witnesses*, 622

2. *In Civil Actions*, 622

- a. *Members of Congress and State Legislatures*, 622
- b. *Federal Officers*, 622
- c. *Ambassadors and Consuls*, 623
- d. *Judges*, 623
- e. *Jurors*, 623
- f. *Clerk of Court*, 623
- g. *Sheriffs and Other Peace Officers*, 623
- h. *Electors*, 623
- i. *Parties*, 623
 - (I.) *Generally*, 623
 - (II.) *Defendant in criminal Proceeding*, 624
- j. *Attorneys*, 624
- k. *Witnesses*, 625
- l. *Freeholders*, 625
- m. *Women*, 625
- n. *Persons Forcibly or Fraudulently Brought Within Jurisdiction*, 625
 - (I.) *Generally*, 625
 - (II.) *Persons Brought Into State by Extradition Proceedings*, 625
- o. *Privileged Person's Co-Party*, 625

B. *From Service of Civil Process*, 626

- 1. *Members of Congress and Legislatures*, 626

2. *Ambassadors, Ministers and Consuls*, 626
3. *Judges and Jurors*, 626
4. *Attorneys*, 627
5. *Parties*, 627
 - a. *Generally*, 627
 - b. *Non-Resident Parties*, 627
 - c. *Defendant in Criminal Proceeding*, 629
6. *Witnesses*, 630
 - a. *In General*, 630
 - b. *Reason and Source of Rule*, 633
 - c. *Growth and Extent of Rule*, 633
 - d. *Duration of Privilege*, 634
 - e. *Necessity of Subpoena*, 635
7. *Miscellaneous Persons*, 635

II. NECESSITY FOR CLAIMING PRIVILEGE AND WAIVER, 635

- A. *Generally*, 635
- B. *Must Be Claimed at First Opportunity*, 636

III. MANNER OF CLAIMING PRIVILEGE, 637

- A. *From Arrest*, 637
- B. *From Service of Process*, 637

IV. REMEDY FOR VIOLATION OF PRIVILEGE, 637

CROSS-REFERENCES:

Service of Process and Papers.

Privilege of soldiers and sailors from arrest, see the title "Navy and Army."

Privilege from service of process while in attendance on justice's courts, see 17 STANDARD PROC. 1024.

Privilege of witnesses from testifying, see 14 ENCY. OF EV. 632.

Plea of privilege in actions for libel and slander, see the title "Libel and Slander."

For forms, see 9 STANDARD PROC. 1000.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. WHO PRIVILEGED. — A. FROM ARREST. — 1. **Under Criminal Process.** — a. *Members of Congress and Legislatures.* — The provision of the federal constitution exempting members of congress from arrest in all cases "except treason, felony, and breach of peace" during attendance at a session of congress and in going to and returning from the same,¹ is merely a privilege from arrest in civil cases and does not exempt them from arrest on criminal process.² A constitutional privilege of legislators from arrest in all cases except treason, felony and breach of the peace gives immunity in cases which were not felonies at the time the constitution was adopted but have been since made felonies by statute.³

b. *Federal Officers and Employees.* — An employee of the United States is not, by reason of being such, privileged from arrest on criminal process.⁴

c. *Foreign Ministers, Legation Officers, and Consuls.* — An ambassador or public minister of a foreign state is not subject to arrest on criminal process;⁵ and this privilege is held to extend to the family and servants of a foreign minister.⁶ A foreign consul, however, is not privileged from prosecution for a crime committed by him.⁷

d. *Election Officers and Electors.* — Except for treason, felony, or a breach of the peace, an election officer is privileged from arrest on election day both at the polls and in going to or returning therefrom.⁸ The same privilege extends to electors during attendance on elections and in going to and returning therefrom.⁹

e. *Persons Illegally Brought Within Jurisdiction.* — Generally the fact that a person has been illegally brought within a jurisdiction does not exempt him from arrest for a criminal offense,¹⁰ though a contrary

1. United States Const., art. 1, §6, cl. 1.

2. *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. ed. 278; *United States v. Wise*, 1 Hayw. & H. 82, 28 Fed. Cas. No. 16,746a, holding that a congressman is subject to arrest on a warrant charging him to be about to commit a breach of peace by fighting a duel.

3. *State v. Polacheck*, 101 Wis. 427, 77 N. W. 708.

4. *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278.

[a] **Even though engaged in carrying mail** at the time of his arrest. *United States v. Hart*, Pet. C. C. 390, 26 Fed. Cas. No. 15,316, 3 Wheel. Cr. (N. Y.) 304 (for driving through crowded streets at a dangerous rate of speed); *Penny v. Walker*, 64 Me. 430, 18 Am. Rep. 269.

5. *State v. De La Foret*, 2 Nott & McC. (S. C.) 217. See *Ex parte Cabrera*, 1 Wash. C. C. 232, 4 Fed. Cas. No. 2,278; *United States v. La Fon-*

taine, 4 Cranch C. C. (U. S.) 173, 26 Fed. Cas. No. 15,550.

6. *United States v. La Fontaine*, 4 Cranch C. C. (U. S.) 173, 26 Fed. Cas. No. 15,550.

[a] **Secretary of a foreign legation** held entitled to protection from criminal process, see *Ex parte Cabrera*, 1 Wash. C. C. (U. S.) 232, 4 Fed. Cas. No. 2,278.

7. *State v. De La Foret*, 2 Nott & McC. (S. C.) 217. See also *Com. v. Kosloff*, 5 Serg. & R. (Pa.) 545, 2 Wheeler Cr. Cas. 622, holding that a consul general is not protected from a prosecution for rape, but the state courts have no jurisdiction in such case; the exclusive jurisdiction is vested in the courts of the United States.

8. *In re Application by Election Officers for Advice*, 1 Brewst. (Pa.) 182.

9. *Thomas v. Henderson*, 125 La. 292, 51 So. 202.

10. **U. S.**—*Ex parte Ker*, 18 Fed. 167. **Ill.**—*Ker v. People*, 110 Ill. 627,

rule is recognized in some jurisdictions.¹¹

f. *Parties and Witnesses.* — Witnesses in attendance on court are not privileged from arrest for a criminal offense;¹² though a witness coming into a state in obedience to a subpoena from a federal court has been held privileged from arrest on state criminal process.¹³ Neither is the accused privileged from arrest under a statute exempting "any party or witness in any cause;" such statute applies only to parties in civil suits.¹⁴

2. *In Civil Actions.* — a. *Members of Congress and State Legislatures.* — Members of congress are privileged from civil arrest while attending and while going to and from a session of congress.¹⁵ So, also, members of state legislatures are privileged from arrest on civil process while attending and while going to and from a session of the legislature.¹⁶

b. *Federal Officers.*¹⁷ — Neither a customs officer of the United

51 Am. Rep. 706. **Ia.**—*State v. Day*, 58 Iowa 678, 12 N. W. 733; *State v. Ross*, 21 Iowa 467. **N. Y.**—*People v. Rowe*, 4 Park. Cr. 253; *Lagrange's Case*, 14 Abb. Pr. (N. S.) 333. **Pa.**—*In re Dows*, 18 Pa. 37, 1 Phila. 234. **S. C.** *State v. Smith*, 1 Bailey 283, 19 Am. Dec. 679. **Vt.**—*In re Durant*, 60 Vt. 176, 12 Atl. 650.

11. *State v. Simmons*, 39 Kan. 262, 18 Pac. 177, holding that the court has no such jurisdiction as will authorize rendition of judgment against a defendant in a criminal case where the court has jurisdiction of the defendant only by means of the service of process in the state procured by the illegal arrest of the defendant in another state. *Kendall v. Aleshire*, 28 Neb. 707, 45 N. W. 167, 26 Am. St. Rep. 367. See also *In re Cannon*, 47 Mich. 481.

[a] "Ample provisions are made for the arrest and return of a person accused of crime, who has fled to a sister state, by extradition warrants issued by the executives of the states. There is no excuse for a citizen or officer arresting, without authority of law, a fugitive, and taking him forcibly and against his will into the jurisdiction of the state for the purpose of prosecution. We cannot sanction the method adopted to bring the petitioner into the jurisdiction of this state . . . and his detention is unlawful." *In re Robinson*, 29 Neb. 135, 45 N. W. 267, 26 Am. St. Rep. 378, 8 L. R. A. 398.

12. *Ex parte Levi*, 28 Fed. 651; *United States v. Jaca*, 26 Phil. Isl. 100, 110.

13. *United States v. Baird*, 85 Fed.

633, if so arrested he will be released on habeas corpus and safely conducted from the state by the marshal.

14. *Scott v. Curtis*, 27 Vt. 762.

15. **U. S.**—*Miner v. Markham*, 28 Fed. 387 (slight deviation from most direct route in going to attend a session of congress will not affect privilege); *Kimberly v. Butler*, 14 Fed. Cas. No. 7,777. **D. C.**—*Merrick v. Giddings*, McA. & M. 55. **N. Y.**—*Lewis v. Elmen-dorf*, 2 Johns. Cas. 222. **Pa.**—*Dun-ton v. Halstead*, 2 Clark 450. **R. I.**—*Hop-pin v. Jenckes*, 8 R. I. 453, 5 Am. Rep. 597, privilege limited to reasonable time for going and returning. **Wis.** *Doty v. Strong*, 1 Pin. 84.

[a] Privilege applies to delegates from territories as well as members from the states. *Doty v. Strong*, 1 Pin. (Wis.) 84.

16. **Kan.**—*Cook v. Senior*, 3 Kan. App. 278, 45 Pac. 126. **Ky.**—*Catlett v. Morton*, 4 Litt. 122. **Mass.**—*Hiss v. Bartlett*, 3 Gray 468, 63 Am. Dec. 768. **Minn.**—*Rhodes v. Walsh*, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632. **N. Y.** *Colvin v. Morgan*, 1 Johns. Cas. 415, but not privileged after return home though time allowed by statute to return home has not expired. **Tex.**—*Gentry v. Griffith*, 27 Tex. 461. **Va.**—See *Prentiss v. Com.*, 5 Rand. (26 Va.) 697, 16 Am. Dec. 782. **Wis.**—*State v. Pola-check*, 101 Wis. 427, 77 N. W. 708; *Anderson v. Rountree*, 1 Pin. 115.

[a] After being expelled from the legislature the member is no longer privileged. *Hiss v. Bartlett*, 3 Gray (Mass.) 468, 63 Am. Dec. 768.

17. Judges, see *infra*, I, A, 2, d.

States,¹⁸ nor a United States marshal,¹⁹ is privileged from arrest in civil cases because of his office.

c. *Ambassadors and Consuls.*—All persons associated in the performance of the duties of a foreign embassy are privileged from arrest on civil process.²⁰ But a foreign consul has been held liable to arrest in an action to recover money received in a fiduciary capacity.²¹

d. *Judges* are exempt from arrest on civil process during their attendance on court.²²

e. *Jurors* are privileged from arrest on civil process while in attendance on court and in going to and from court.²³

f. *The clerk of the court* has been held privileged from arrest on civil process during the sitting of the court.²⁴

g. *Sheriffs and Other Peace Officers.*—In the absence of statute, a sheriff is not generally privileged from arrest on civil process.²⁵ Under a statute exempting sheriffs from arrest on civil process, deputy sheriffs are not privileged.²⁶ Members of municipal police forces are privileged from arrest in some states while on duty.²⁷

h. *Electors* in attendance upon an election are generally privileged.²⁸

i. *Parties.*—(I.) *Generally.*—Parties to litigation²⁹ are generally privileged from arrest on civil process while in attendance on court,

18. *Ex parte* Murray, 35 Fed. 496, not exempt by reason of a statute prohibiting any one from forcibly assaulting, resisting, opposing, preventing, impeding, or interfering with any officer of the customs.

19. *Parsons v. Stanton*, 2 Day (Conn.) 300.

20. *United States v. Benner*, Baldw. 234, 24 Fed. Cas. No. 14,568; *Ex parte* Cabrera, 1 Wash. C. C. 232, 4 Fed. Cas. No. 2,278 (secretary of legation is privileged); *In re* Anfrye, 3 Wkly. N. C. (Pa.) 188, attache of foreign legation held privileged.

21. *McKay v. Garcia*, 6 Ben. 556, 16 Fed. Cas. No. 8,844.

22. **U. S.**—*Lyell v. Goodwin*, 4 McLean 29, 15 Fed. Cas. No. 8,616. **Del.** *Brooks v. State ex rel. Richards*, 3 Boyce 1, 79 Atl. 790, Ann. Cas. 1915A, 1133, 51 L. R. A. (N. S.) 1126. **Ga.** *Elam v. Lewis*, 19 Ga. 608. **N. J.** *Gratz v. Wilson*, 6 N. J. L. 419. **N. Y.** *In re* Livingston, 8 Johns. 351. **Va.** *Com. v. Ronald*, 4 Call. (8 Va.) 97.

23. **Del.**—*Brooks v. State ex rel. Richards*, 3 Boyce 1, 79 Atl. 790, Ann. Cas. 1915A, 1133, 51 L. R. A. (N. S.) 1126. **Md.**—*Brookes v. Chesley*, 4 Harr. & McH. 295. **Mass.**—*In re* McNeil, 3 Mass. 288. **Mich.**—*Brower v. Tatrow*, 115 Mich. 368, 73 N. W. 421. **Pa.** *United States v. Edme*, 9 Serg. & R.

147. **Va.**—*Com. v. Ronald*, 4 Call. (8 Va.) 97.

24. *Elam v. Lewis*, 19 Ga. 608.

25. *Day v. Brett*, 6 Johns. (N. Y.) 22; *Hill v. Lott*, 10 How. Pr. (N. Y.) 46.

[a] But during the sitting of the court, he may be. *Elam v. Lewis*, 19 Ga. 608.

26. *George v. Fellows*, 58 N. H. 494.

27. *Hart v. Kennedy*, 23 How. Pr. (N. Y.) 417, 14 Abb. Pr. 432 (privilege is only while actually on duty and superintendents and captains of police are always on actual duty, but patrolmen have certain intervals of remission from duty, fixed and known, during which they are not liable to duty, and consequently in such cases may be liable to arrest on civil process); *Coxson v. Doland*, 2 Daly (N. Y.) 66.

28. See *Swift v. Chamberlain*, 3 Conn. 537; *Coxson v. Doland*, 2 Daly (N. Y.) 66.

[a] But the privilege does not extend to an elector preparing to go, if he has not actually started on his way. *Hobbs v. Getchell*, 8 Greenl. (Me.) 187, 23 Am. Dec. 497.

29. **U. S.**—*Ex parte* Mifflin, 17 Fed. Cas. No. 9,537; *McFerran v. Wherry*, 5 Cranch C. C. 677, 16 Fed. Cas. No. 8,792; *Ex parte* Hurst, 1 Wash. C. C.

and while going to and returning from court; and this applies to a non-resident party.³⁰

(II.) Defendant in Criminal Proceeding. — A defendant in a criminal case is not privileged from arrest on civil process while attending court in response to the criminal charge.³¹

j. Attorneys. — As an officer of the court, an attorney is privileged from arrest on civil process during his attendance upon sessions of the court for the purpose of engaging in the trial of a cause;³² but attorneys are not privileged from arrest at all times merely because of their profession.³³

186, 12 Fed. Cas. No. 6,924, 4 Dall. 387, 1 L. ed. 878; *Larned v. Griffin*, 12 Fed. 590. **Del.**—*Brooks v. State ex rel. Richards*, 3 Boyce 1, 79 Atl. 790, Ann. Cas. 1915A, 1133, 51 L. R. A. (N. S.) 1126. **Ga.**—*Henegar v. Spangler*, 29 Ga. 217; *Elam v. Lewis*, 19 Ga. 608. **Mass.**—*In re Thompson's Case*, 122 Mass. 428; *Wood v. Neale*, 5 Gray 538. **Mich.**—*People v. Judge of Superior Court*, 40 Mich. 729. **N. Y.**—*Clark v. Grant*, 2 Wend. 257; *Petrie v. Fitzgerald*, 1 Daly 401; *Salhinger v. Adler*, 2 Robt. 704. **Ohio.**—*Barber v. Knowles*, 77 Ohio 81, 82 N. E. 1065; *Gray v. Ayres*, Tapp. 164. **Pa.**—*Steinmetz v. Wade*, 3 Wkly. N. Cas. 187. **R. I.**—*In re Greene*, 35 R. I. 67, 85 Atl. 552; *Ellis v. De Garmo*, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 560. **S. C.**—*Sadler v. Ray*, 5 Rich. L. 523; *Vincent v. Watson*, 1 Rich. L. 194. **Vt.**—*Scott v. Curtis*, 27 Vt. 762. **Va.**—*Com. v. Ronald*, 4 Call. (8 Va.) 97.

[a] Bankrupt is privileged from arrest while in attendance on the hearing of his petition. *United States v. Dobbins*, 1 Clark 5, 25 Fed. Cas. No. 14,971; *In re Kimball*, 2 Ben. 38, 14 Fed. Cas. No. 7,767. See *Tillinghast v. Carr*, 4 McCord (S. C.) 152.

[b] Deviation on return from court to attend funeral removes the privilege. *Wood v. Neale*, 5 Gray (Mass.) 538.

30. **Ga.**—*Henegar v. Spangler*, 29 Ga. 217. **Mass.**—*In re Thompson's Case*, 122 Mass. 428. **N. Y.**—*Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327. **R. I.**—*In re Greene*, 35 R. I. 67, 85 Atl. 552; *Ellis v. De Garmo*, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 560.

[a] Involuntary bankrupt attending hearing before a referee comes within rule. *Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327.

31. **Ga.**—*Rogers v. Rogers*, 138 Ga. 803, 76 S. E. 48. **N. C.**—See *Moore v. Green*, 73 N. C. 394, 21 Am. Rep. 470. **N. D.**—*Ex parte Henderson*, 27 N. D. 155, 145 N. W. 574, 51 L. R. A. (N. S.) 328. **Pa.**—*Wood v. Boyle*, 177 Pa. 620, 35 Atl. 853, 55 Am. St. Rep. 747; *Treichler v. Hauck*, 2 Woodw. Dec. 19. **Vt.**—*Scott v. Curtis*, 27 Vt. 762.

32. **Del.**—*Brooks v. State ex rel. Richards*, 3 Boyce 1, 79 Atl. 790, Ann. Cas. 1915A, 1133, 51 L. R. A. (N. S.) 1126. **Mich.**—*Hoffman v. Bay Circuit Judge*, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L. R. A. 663. **N. Y.**—*National Press Int. Co. v. Brooke*, 18 Misc. 373, 41 N. Y. Supp. 658, 75 N. Y. St. 1044; *Cole v. McClellan*, 4 Hill 59; *Humphrey v. Cumming*, 5 Wend. 90; *Corey v. Russell*, 4 Wend. 204; *Sperry v. Willard*, 1 Wend. 32 (holding that a counselor is privileged from arrest during the sitting of the court, though not in actual attendance at term); *Gibbs v. Loomis*, 10 Johns. 463. **N. C.**—*Greenleaf v. People's Bank*, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L. R. A. 499, when in actual attendance in court in the due course of employment as attorney. **Va.**—*Com. v. Ronald*, 4 Call. (8 Va.) 97.

[a] While attending before an examiner, master, or a judge out of court, an attorney is not privileged from arrest. *Cole v. McClellan*, 4 Hill (N. Y.) 59.

[b] When sued with another an attorney is not privileged from arrest, though during the actual sitting of the court, and during his attendance at court. *Gay v. Rogers*, 3 Cow. (N. Y.) 368.

33. **Ga.**—*Elam v. Lewis*, 19 Ga. 608. **N. Y.**—*Gibbs v. Loomis*, 10 Johns. 463. **Pa.**—*Respublica v. Fisher*, 1 Yeates 350.

k. *Witnesses*.—The privilege of witnesses from civil arrest is treated elsewhere in this title.³⁴

l. *Freeholders*.—A resident freeholder is privileged from civil arrest.³⁵

m. *Women* are privileged from arrest on civil process under some authorities.³⁶

n. *Persons Forcibly or Fraudulently Brought Within Jurisdiction*.

(I.) *Generally*.—One brought within the jurisdiction by false or fraudulent representations of a plaintiff cannot be arrested at his instance on civil process.³⁷ And where one was forcibly detained until the sheriff of the county could arrest him, he was released on motion.³⁸

(II.) *Persons Brought Into State by Extradition Proceedings*.—A person brought into the United States under an extradition treaty is not subject to arrest in a civil proceeding.³⁹ The same is true of one brought into one state from another by virtue of extradition proceedings.⁴⁰

o. *Privileged Person's Co-Party*.—The fact that a party's co-defendant is privileged from arrest has been held not to privilege such party.⁴¹

[a] **While remaining at home, an attorney is not privileged from arrest.** *Corey v. Russell*, 4 Wend. (N. Y.) 204.

34. See *infra*, I, B, 6.

35. **U. S.**—*Penman v. Wayne*, 1 Dall. 348, 1 L. ed. 169. **N. Y.**—*Burton v. Temple*, 1 How. Pr. 8. **Pa.** *Fitler v. La Breure*, 1 Serg. & R. 363; *Henry v. Flanagan*, 1 Kulp 352.

[a] **His land must be unincumbered**, to entitle a freeholder to the privilege from arrest. *Logan v. O'Neill*, 34 Wkly. N. Cas. (Pa.) 281; *Tesone v. Longo*, 18 Wkly. N. Cas. (Pa.) 64.

36. See the following: **Me.**—*Knowlton v. Ross*, 114 Me. 18, 95 Atl. 281. **Mich.**—*People ex rel. Strickland v. Bartow*, 27 Mich. 68. **N. J.**—*Blight v. Meeker*, 7 N. J. L. 97. **N. Y.**—*Northern R. Co. v. Carpentier*, 13 How. Pr. 222, 3 Abb. Pr. 259; *Wheeler v. Hartwell*, 4 Bosw. 684; *Eypert v. Bolenius*, 2 Abb. N. C. 193; *Duncan v. Katen*, 6 Hun 1. **Ohio.**—*O'Boyle v. Brown*, *Wright* 465. **Pa.**—*Kent Iron & Hdw. Co. v. Pearson*, 3 Pa. Co. Ct. 349; *Kirkendall Bros. v. Stevens*, 4 Kulp 473. **S. C.**—*Desprang v. Davis*, 3 McCord 16.

[a] **In California the arrest of a female in any civil action is unlawful.** *Nelson v. Kellogg*, 162 Cal. 621, 123 Pac. 1115, Ann. Cas. 1913D, 759.

37. **Conn.**—*Hill v. Goodrich*, 32 Conn. 588, holding that one, decoyed

by false pretenses from the state of Massachusetts where he resides, into Connecticut for the purpose of being sued, will be discharged from arrest when his body is attached in such suit. **Ill.**—*Wanzer v. Bright*, 52 Ill. 35. **N. Y.**—*Snelling v. Watrous*, 2 Paige 314; *Goupil v. Simonson*, 3 Abb. Pr. 474; *Smith v. Meyers*, 1 Thomp. & C. 665. **Vt.**—*Steele v. Bates*, 2 Aiken 338, 16 Am. Dec. 720.

38. *Harland v. Howard*, 57 Hun 113, 587, 10 N. Y. Supp. 449, 32 N. Y. St. 869, 871, 872.

39. *In re Baruch*, 41 Fed. 472; *In re Reinitz*, 39 Fed. 204, 23 Abb. N. C. 69, 7 N. Y. Cr. 74, 4 L. R. A. 236.

40. *Moletor v. Sinned*, 76 Wis. 308, 44 N. W. 1099, 20 Am. St. Rep. 71, 7 L. R. A. 817. *Contra*, *Adrianne v. Lagrave*, 59 N. Y. 110, 17 Am. Rep. 317, reversing *Bacharach v. Lagrave*, 1 Hun (N. Y.) 689, 47 How. Pr. 385, 4 Thomp. & C. 215. See also *Slade v. Joseph*, 5 Daly (N. Y.) 187; *Williams v. Bacon*, 10 Wend. (N. Y.) 636; *Com. v. Daniel*, 4 Clark (Pa.) 49.

[a] **After an extradited person has been discharged, he cannot be detained upon civil process.** *Benninghoff v. Oswell*, 37 How. Pr. (N. Y.) 235.

41. *Gibbes v. Mitchell*, 2 Bay (S. C.) 406. But see *Faulkner v. Whitaker*, 15 N. J. L. 438, holding that where one enters into a contract with two persons, one of whom he knows cannot

B. FROM SERVICE OF CIVIL PROCESS. — 1. Members of Congress and Legislatures. — The privilege of members of congress from arrest given by the constitution does not include a privilege from the service of civil process where it is not accompanied with an arrest of the person.⁴² Members of state legislatures are usually privileged from the service of process while in attendance on a session of the legislature,⁴³ though in the absence of statute no such privilege exists,⁴⁴ and a statute exempting members of the legislature from arrest while attending a session thereof does not exempt the members from service of civil process while so attending.⁴⁵

2. Ambassadors, Ministers, and Consuls. — All persons associated in the performance of the duties of the embassy are privileged from seizure of the goods by civil process.⁴⁶ A foreign consul cannot be compelled to appear for examination as a judgment debtor.⁴⁷

3. Judges and Jurors. — While holding court or traveling to and from court, a judge has been held privileged from the service of civil process;⁴⁸ but while at home he may be served.⁴⁹

A statute exempting jurors from the service of civil process does not exempt them from the service of civil process not requiring arrest.⁵⁰

be arrested on civil process (being a freeholder) he thereby extends the exemption from such process to the other.

42. U. S.—*Kimberly v. Butler*, 14 Fed. Cas. No. 7,777. **D. C.**—*Howard v. Citizens' Bank & Tr. Co.*, 12 App. Cas. 222. **N. H.**—*Bartlett v. Blair*, 68 N. H. 232, 38 Atl. 1004.

See also *Worth v. Norton*, 56 S. C. 56, 338 S. E. 792, 76 Am. St. Rep. 524, 45 L. R. A. 563.

Contra, *Miner v. Markham*, 28 Fed. 387.

43. U. S.—*Gyer's Lessee v. Irwin*, 4 Dall. 107, 1 L. ed. 762. See *Bolton v. Martin*, 1 Dall. 296, 1 L. ed. 144. **Conn.**—*King v. Coit*, 4 Day 129. **Kan.** *Cook v. Senior*, 3 Kan. App. 278, 45 Pac. 126. **S. C.**—*Tillinghast v. Carr*, 4 McCord 152. **Va.**—*McPherson v. Nesmith*, 3 Gratt. (44 Va.) 237. **Wis.** *Anderson v. Rountree*, 1 Pin. 115.

44. *Berlet v. Weary*, 67 Neb. 75, 93 N. W. 238, 108 Am. St. Rep. 616, 60 L. R. A. 609.

But see *Anderson v. Rountree*, 1 Pin. (Wis.) 115, holding members of territorial legislature privileged from service of civil process though there was no statute on the subject.

45. Ky.—*Johnson v. Offutt*, 4 Mete. 19; *Catlett v. Morton*, 4 Litt. 122. **Minn.**—*Rhodes v. Walsh*, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632. **Neb.** *Berlet v. Weary*, 67 Neb. 75, 93 N. W. 238, 108 Am. St. Rep. 616, 60 L. R. A.

609. Tex.—*Gentry v. Griffith, Hyatt & Co.*, 27 Tex. 461.

But see *Anderson v. Rountree*, 1 Pin. (Wis.) 115, holding that the privilege from arrest secured to members of the legislature not only exempts their persons from actual arrest, but also exempts them from suit or any civil process, which may interfere with their public duties, during the continuance of their privilege.

46. *Gittings v. Crawford, Taney* 1, 10 Fed. Cas. No. 5,465; *Parkinson v. Potter*, 16 Q. B. Div. 152, 55 L. J. Q. B. 153, 2 Eng. Rul. Cas. 696, 50 J. P. 470, 34 W. R. 215, 53 L. T. N. S. 818.

47. *Griffin v. Dominguez*, 2 Duer (N. Y.) 656, after an order for his examination has been obtained, and served, he cannot be attached for his refusal to obey it.

[a] **May Be Summoned as a Garnishee.**—*Kidderlin v. Meyer*, 2 Miles (Pa.) 242.

48. *Lyell v. Goodwin*, 4 McLean 29, 15 Fed. Cas. No. 8,616; *Cameron v. Roberts*, 87 Wis. 291, 58 N. W. 376, 41 Am. St. Rep. 43.

[a] **Service of summons on justice of the peace while holding court is void and a contempt of court.** *Cameron v. Roberts*, 87 Wis. 291, 58 N. W. 376, 41 Am. St. Rep. 43.

49. *Lyell v. Goodwin*, 4 McLean 44, 15 Fed. Cas. No. 8,617.

50. *Grove v. Campbell*, 9 Yerg.

4. **Attorneys** are privileged from the service of civil process while attending court, in some,⁵¹ but not all,⁵² jurisdictions.

A **non-resident attorney**, within the state to act in a matter pending in the courts, has been held not privileged from service of process;⁵³ while in some jurisdictions, the privilege has been recognized.⁵⁴

5. **Parties.**—a. *Generally.*—A party to a suit is privileged from service of civil process, in some jurisdictions, while attending and while going to and from a session of court.⁵⁵ But in other jurisdictions, this privilege is not recognized.⁵⁶

b. *Non-Resident Parties.*—A non-resident party defendant who comes into the state for the purpose of defending a suit pending against him is exempt from service of civil process for the commencement of another civil action against him.⁵⁷ And the same is true of

(Tenn.) 7. See *Brown v. Edinger*, 61 Misc. 366, 114 N. Y. Supp. 1116, holding that an order in supplementary proceedings for the examination of a judgment debtor may be served on him while attending court; and if such service interferes with his duties as a juror, the matter may be brought to the attention of the court by motion.

51. **Mich.**—*Hoffman v. Bay Circuit Judge*, 113 Mich. 109, 71 N. W. 480, 67 Am. St. Rep. 458, 38 L. R. A. 663, privileged from service of process while attending upon the supreme court, and while going to the court, and returning therefrom to the county of his residence. **N. Y.**—*Gilbert v. Vanderpool*, 15 Johns. 242. But see *National Press Int. Co. v. Brooke*, 18 Misc. 373, 41 N. Y. Supp. 658, 75 N. Y. St. 1044, statutory modification of common law rule. **Va.**—*Com. v. Ronald*, 4 Call. (8 Va.) 97.

52. *Robbins v. Lincoln*, 27 Fed. 342 (Illinois); *Greenleaf v. People's Bank*, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L. R. A. 499.

53. **U. S.**—*Robbins v. Lincoln*, 27 Fed. 342. **Minn.**—*Nelson v. McNulty*, 135 Minn. 317, 160 N. W. 795, L. R. A. 1917C, 86. **N. Y.**—*Kutner v. Hodnett*, 59 Misc. 21, 109 N. Y. Supp. 1068. See *National Press Int. Co. v. Brooke*, 18 Misc. 373, 41 N. Y. Supp. 658, 75 N. Y. St. 1044. **N. C.**—*Greenleaf v. People's Bank*, 133 N. C. 292, 45 S. E. 638, 98 Am. St. Rep. 709, 63 L. R. A. 499. **Ohio.**—*Whitman v. Sheets*, 20 Ohio Cir. Ct. 1, 11 Ohio Cir. Dec. 179.

[a] **Non-Resident of County.**—The attorney for an attachment creditor, both of whom are non-residents of the county in which the action is pending,

is not privileged from service of citation in interlocutory proceedings to dissolve the writ, while in the county for the purpose of trying the principal suit. *Cleland v. Clark*, 111 Mich. 336, 69 N. W. 652.

54. **U. S.**—*Read v. Neff*, 207 Fed. 890; *Central Trust Co. v. Milwaukee St. R. Co.*, 74 Fed. 442. **Pa.**—*Huddeson v. Prizer*, 9 Phila. 65. **S. C.**—*Williams v. Hatcher*, 95 S. C. 49, 78 S. E. 615.

55. **U. S.**—*Nichols v. Horton*, 14 Fed. 327, 4 McCrary 567. **Ill.**—*Gregg v. Sumner*, 21 Ill. App. 110. **Ind.**—*Minnich v. Packard*, 42 Ind. App. 371, 85 N. E. 787. **N. J.**—*Halsey v. Stewart*, 4 N. J. L. 366. **Ohio.**—*Barber v. Knowles*, 77 Ohio St. 81, 82 N. E. 1065; *Bassett v. Gunsolus*, 6 Ohio Dec. 1228. **Pa.**—*Hayes v. Shields*, 2 Yeates 222; *Miles v. McCullough*, 1 Bin. 77; *Wetherill v. Seitzinger*, 1 Miles 237; *Huddeson v. Prizer*, 9 Phila. 65; *Moyer v. Place*, 13 Pa. Co. Ct. 163.

[a] This is a rule of public policy recognized at common law, aside from statutes. *Minnich v. Packard*, 42 Ind. App. 371, 85 N. E. 787.

[b] **Party attending before an examiner in an equity case** is privileged. *Huddeson v. Prizer*, 9 Phila. (Pa.) 65.

56. **U. S.**—*Blight v. Fisher*, Pet. C. C. 41, 3 Fed. Cas. No. 1,542. **Mich.**—*Case v. Rorabacher*, 15 Mich. 537. **N. Y.**—*Coburn v. Hopkins*, 1 Wend. 292. See also *Parker v. Marco*, 136 N. Y. 585, 32 N. E. 989, 32 Am. St. Rep. 770, 20 L. R. A. 45. **S. C.**—*Hunter v. Cleveland*, 1 Brev. 167; *Sadler v. Ray*, 5 Rich. L. 523.

57. **U. S.**—*Skinner & M. Co. v. Waite*, 155 Fed. 828; *Parker v. Hotchkiss*, 1 Wall. Jr. 269, 18 Fed. Cas. No. 10,739; *Hale v. Wharton*, 73 Fed. 739.

non-resident parties generally, in many jurisdictions.⁵³

See also *Iron Dyke Min. Co. v. Iron Dyke R. Co.*, 132 Fed. 208. **Ky.** *Jackson v. Bank of Lockport*, 144 Ky. 43, 137 S. W. 767. **Md.**—*Long v. Hawken*, 114 Md. 234, 79 Atl. 190, 42 L. R. A. (N. S.) 1101. **Minn.**—*First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308. **N. J.**—*Dungan v. Miller*, 37 N. J. L. 182; *Halsey v. State*, 4 N. J. L. 324. **N. Y.**—*Parker v. Marco*, 136 N. Y. 585, 32 N. E. 989, 32 Am. St. Rep. 770, 20 L. R. A. 45; *Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327; *People ex rel. Hess v. Inman*, 74 Hun 130, 26 N. Y. Supp. 329.

Contra.—*Baldwin v. Emerson*, 16 R. I. 304, 15 Atl. 83, 27 Am. St. Rep. 741, the court saying: "While we concede the force of the reasons advanced for protecting nonresident witnesses from the service of a summons against them for the commencement of a suit . . . we are not convinced of the sufficiency of the reasons assigned for the exemption of nonresident suitors from such process. We think it would rarely happen that the attention of a non-resident plaintiff or defendant would be so distracted by the mere service of a summons from the immediate business in hand, in prosecuting or defending a pending suit, that the interests of justice would suffer in consequence, or that the liability to such service would often deter them from prosecuting or defending their just claims or rights." To same effect, see *Christian v. Williams*, 111 Mo. 429, 20 S. W. 96; *State v. Moore*, 164 Mo. App. 649, 147 S. W. 551; *Ellis v. Degarmo*, 17 R. I. 715, 24 Atl. 579, 19 L. R. A. 560; *Capwell v. Sipe*, 17 R. I. 475, 23 Atl. 14, 33 Am. St. Rep. 890.

[a] **This Exemption Exists in the Absence of a State Statute Abrogating It.**—*Skinner & M. Co. v. Waite*, 155 Fed. 828.

[b] **Case of Plaintiff Distinguished From Defendant.**—In *Wilson Sewing Machine Co. v. Wilson*, 51 Conn. 595, it is held that a non-resident defendant is privileged from service of summons in a new suit. The court refuses, however, to overrule *Bishop v. Vose*, 27 Conn. 1 (holding a non-resident plaintiff to be not so privileged), on the ground that the case

of a plaintiff is distinguishable from that of a defendant.

58. See the following: **U. S.**—*Stewart v. Ramsay*, 242 U. S. 128, 37 Sup. Ct. 44, 61 L. ed. 192; *Peet v. Fowler*, 170 Fed. 618; *Kinne v. Lant*, 68 Fed. 436; *Plimpton v. Winslow*, 9 Fed. 365, 20 Blatch. 82; *Brooks v. Farwell*, 4 Fed. 166, 2 McCrary 220; *Juneau Bank v. McSpedan*, 5 Biss. 64, 14 Fed. Cas. No. 7,582. **Alaska.**—*Pearce v. Sutherland*, 3 Alaska 302. **Ark.**—*Martin v. Bacon*, 76 Ark. 158, 88 S. W. 863, 113 Am. St. Rep. 81; *Powers v. Arkadelphia Lumb. Co.*, 61 Ark. 504, 33 S. W. 842, 54 Am. St. Rep. 276. **Ind.**—*Wilson v. Donaldson*, 117 Ind. 356, 20 N. E. 250, 10 Am. St. Rep. 48, 3 L. R. A. 266; *Minnich v. Packard*, 42 Ind. App. 371, 85 N. E. 787. **Kan.** *Bolz v. Crone*, 64 Kan. 570, 67 Pac. 1108. **Ky.**—*Koopendafe v. Trimble*, 7 Ky. L. Rep. 599, 605. **Mass.**—*Diamond v. Earle*, 217 Mass. 499, 105 N. E. 363, 51 L. R. A. (N. S.) 1178. **Mich.** *Shaver v. Letherby*, 73 Mich. 500, 41 N. W. 677. **Minn.**—*First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308. **Neb.**—*Linton v. Cooper*, 54 Neb. 438, 74 N. W. 842, 69 Am. St. Rep. 727. **N. J.**—*Halsey v. Stewart*, 4 N. J. L. 366. **N. Y.**—*Matthews v. Tufts*, 87 N. Y. 568, 62 How. P. 508; *Tribune Assn. v. Sleeman*, 12 N. Y. Civ. Proc. 20, 8 N. Y. St. 343; *Cake v. Haight*, 30 Misc. 386, 63 N. Y. Supp. 1043. **N. C.**—*Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731. **Ohio.**—*Andrews v. Lembeck*, 46 Ohio St. 38, 18 N. E. 483, 15 Am. St. Rep. 547; *Bassett v. Gunsolus*, 6 Ohio Dec. 1228. **S. C.**—*Breon v. Miller Lumb. Co.*, 83 S. C. 221, 65 S. E. 214, 24 L. R. A. (N. S.) 276. **S. D.**—*Fisk v. Westover*, 4 S. D. 233, 55 N. W. 961, 46 Am. St. Rep. 780. **Vt.**—*In re Healey*, 53 Vt. 694, 38 Am. Rep. 713.

[a] **A resident of the state while in attendance upon a federal court in a county other than that of his residence is exempt from the service of a summons in an action brought in that county.** *Underwood v. Fosha*, 73 Kan. 408, 85 Pac. 564.

[b] **Non-resident Plaintiff Not Privileged.**—**Idaho.**—*Guynn v. McDaniel*, 4 Idaho 605, 43 Pac. 74, 95 Am. St. Rep. 158. **Mo.**—*Baisley v. Baisley*, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726.

c. *Defendant in Criminal Proceeding.*—A defendant attending court in response to a criminal charge against him has been held privileged from the service of civil process;⁵⁹ but a defendant coming involuntarily into a county,⁶⁰ or state,⁶¹ other than that in which he resides to answer a criminal charge has been held privileged. But if the appearance be voluntary, no privilege exists.⁶² One brought into the state by extradition proceedings has been held not privileged from

Nev.—*Tiedemann v. Tiedemann*, 35 Nev. 259, 129 Pac. 313. **Okla.**—*Liven-good v. Ball* (Okla.), 162 Pac. 768.

[c] **Hearings before referee or register in bankruptcy** are within the rule exempting a non-resident party from service of civil process. *Morrow v. Dudley & Co.*, 144 Fed. 441.

[d] **Attending the taking of depositions** (1) before a commissioner has been held within the rule. *Larned v. Griffin*, 12 Fed. 590; *Plimpton v. Winslow*, 9 Fed. 365, 20 Blatch. 82; *Powers v. Arkadelphia Lumb. Co.*, 61 Ark. 504, 33 S. W. 842, 54 Am. St. Rep. 276. (2) The same has been held where depositions were taken before a notary public. *Roschynialski v. Hale*, 201 Fed. 1017. See also *Parker v. Marco*, 136 N. Y. 585, 32 N. E. 989, 32 Am. St. Rep. 770, 20 L. R. A. 45; *Partridge v. Powell*, 180 Pa. 22, 36 Atl. 419, holding that (3) where a non-resident who is a plaintiff in a suit in his own state agrees that the defendants shall take depositions in Pennsylvania, the plaintiff in attending the taking of the depositions is privileged from service of process in a suit instituted in Pennsylvania by the defendants. But in *Greer v. Young*, 120 Ill. 184, 11 N. E. 167, it was held (4) that proceedings for taking depositions before a notary public did not give the privilege to a non-resident party. See also *Cassem v. Galvin*, 53 Ill. App. 419.

[e] **Proceedings before auditor appointed to state account between parties within rule.** *Martin v. Whitney*, 74 N. H. 505, 69 Atl. 888.

[f] **When appearing before examiner in chancery**, a non-resident party is privileged. *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308.

[g] **Non-resident not returning with reasonable dispatch** loses his privilege. *Cake v. Haight*, 30 Misc. 386, 63 N. Y. Supp. 1043, 7 N. Y. Ann. Cas. 329; *Sizer v. Hampton & B. R. & Lumb. Co.*, 57 App. Div. 390, 68 N. Y. Supp. 232, 9 N. Y. Ann. Cas. 354.

[h] **Summary proceedings for dis-possession under landlord and tenant act** are judicial proceedings within statute exempting non-resident parties while in attendance on judicial proceedings. *Richardson v. Smith*, 74 N. J. L. 111, 65 Atl. 162.

59. **Ga.**—*Rogers v. Rogers*, 138 Ga. 803, 76 S. E. 48. **Ill.**—See *Nichols, Shepard & Co. v. Goodheart*, 5 Ill. App. 574. **N. Y.**—See *Williams v. Bacon*, 10 Wend. 636. **N. D.**—*Ex parte Henderson*, 27 N. D. 155, 145 N. W. 574, 51 L. R. A. (N. S.) 328. **Pa.**—See *Garr v. Kessler*, 18 Pa. Co. Ct. 216; *Treichler v. Hauck*, 2 Woodw. Dec. 19.

Contra in the United States courts. *Feister v. Hulick*, 228 Fed. 821.

60. *Jacobson v. Hosmer*, 76 Mich. 234, 42 N. W. 1110; *Reid v. Ham*, 54 Minn. 305, 56 N. W. 35, 40 Am. St. Rep. 333, 21 L. R. A. 232.

61. **U. S.**—*Kaufman v. Garner*, 173 Fed. 550; *United States v. Bridgman*, 9 Biss. 221, 24 Fed. Cas. No. 14,645. **Mich.**—*McCullough v. McCullough*, 168 N. W. 929. **N. Y.**—*Murphy v. Sweezy*, 2 N. Y. Supp. 241.

[a] **A non-resident charged with crime** and brought within the jurisdiction of the court by compulsory process is exempt from service of civil process, while coming into the jurisdiction, while necessarily in attendance upon the court, and while returning to his place of residence, providing no unnecessary delay occurs in returning. *McCullough v. McCullough* (Mich.), 168 N. W. 929.

[b] **A creditor who has nothing to do with the bringing of the defendant in a criminal case within the state** may have process served on such defendant in a suit of his against the defendant. *Nichols, Shepard & Co. v. Goodheart*, 5 Ill. App. 574; *Bank of Metropolis v. White*, 26 Misc. 504, 57 N. Y. Supp. 460.

62. *King v. Phillips*, 70 Ga. 409; *Netograph Mfg. Co. v. Scrugham*, 133 App. Div. 750, 118 N. Y. Supp. 212.

civil process.⁶³ One confined to jail or prison on a criminal charge is not privileged from the service of civil process.⁶⁴

6. **Witnesses.**—a. *In General.*—It is a well settled general rule that a witness in attendance upon the trial of any case is privileged from arrest under any civil process,⁶⁵ whether he is attending with or without a writ of protection.⁶⁶ So also one is privileged from

63. *Palmer v. Rowan*, 21 Neb. 452, 32 N. W. 210, 59 Am. Rep. 844; *Netograph Mfg. Co. v. Scrugham*, 133 App. Div. 750, 118 N. Y. Supp. 212; *Browning v. Abrams*, 51 How. Pr. (N. Y.) 172; *Williams v. Bacon*, 10 Wend. (N. Y.) 636.

64. *Phelps v. Phelps*, 7 Paige (N. Y.) 150; *Davis v. Duffie*, 1 Abb. Dec. (N. Y.) 486, 3 Keyes 606, 4 Abb. Pr. (N. S.) 478 (holding that a statute which "suspends all the civil rights of the person" confined to prison does not exempt him from service of civil process); *White v. Underwood*, 125 N. C. 25, 34 S. E. 104, 74 Am. St. Rep. 630, 46 L. R. A. 706.

65. See the following: **U. S.**—*United States v. Zavelo*, 177 Fed. 536; *Wilson Sewing Machine Co. v. Wilson*, 22 Fed. 803, 23 Blatchf. 51; *Larned v. Griffin*, 12 Fed. 590; *Bridges v. Sheldon*, 7 Fed. 17, 18 Blatchf. 295, 507; *Smythe v. Banks*, 4 Dall. 329, 1 L. ed. 854, 22 Fed. Cas. No. 13,134; *Juneau Bank v. McSpedan*, 5 Biss. 64, 14 Fed. Cas. No. 7,582; *Hurst's Case*, 4 Dall. 387, 1 L. ed. 878, 1 Wash. C. C. 186, 12 Fed. Cas. No. 6,924. **Cal.**—*Page v. Randall*, 6 Cal. 32. **Ga.**—*Rogers v. Rogers*, 138 Ga. 803, 76 S. E. 48; *Thornton v. American Writing-Mach. Co.*, 83 Ga. 288, 9 S. E. 679, 20 Am. St. Rep. 320; *Henegar v. Spangler*, 29 Ga. 217; *Marshall v. Carhart*, 20 Ga. 419. **Me.** *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598. **Md.**—*Brooks v. Chesley*, 4 Harr. & McH. 295. **Mass.**—*Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370; *May v. Shumway*, 16 Gray 86, 77 Am. Dec. 401; *Wood v. Neale*, 5 Gray 538; *Ex parte McNeil*, 6 Mass. 245. **Mich.**—*Watson v. Judge Superior Court*, 40 Mich. 729. **N. H.**—*Dickinson v. Farwell*, 71 N. H. 213, 51 Atl. 624; *Ela v. Ela*, 68 N. H. 312, 36 Atl. 15; *State v. Buck*, 62 N. H. 670. **N. J.** *Jones v. Knauss*, 31 N. J. Eq. 211. **N. Y.**—*Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35; *Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327 (appeal dismissed, 189 N. Y. 536, 82 N. E. 1126); *Mackey v. Lewis*, 7

Hun 83; *Sanford v. Chase*, 3 Cow. 381; *Bours v. Tuckerman*, 7 Johns. 538; *Norris v. Beach*, 2 Johns. 294. **N. C.** *Ballinger v. Elliott*, 72 N. C. 596. **Ohio.** *Compton, Ault & Co. v. Wilder*, 40 Ohio St. 130. **Pa.**—*United States v. Edme*, 9 Serg. & R. 147; *Hudson v. Prizer*, 9 Phila. 65. **Phil. Isl.**—*United States v. Jaca*, 26 Phil. Isl. 100, 110. **R. I.** *In re Greene*, 35 R. I. 67, 85 Atl. 552; *In re Eliason*, 19 R. I. 117, 32 Atl. 166. **Vt.**—*In re Healey*, 53 Vt. 694, 38 Am. Rep. 713; *Washburn v. Phelps*, 24 Vt. 506; *Booream & Co. v. Wheeler*, 12 Vt. 311; *Ex parte Hall*, 1 Tyler 274. **Va.**—*Com. v. Ronald*, 4 Call. (8 Va.) 97. **Eng.**—*Newton v. Askew*, 6 Hare 319, 67 Eng. Reprint 1188; *Ex parte List*, 2 V. & B. 373, 35 Eng. Reprint 361; *Arding v. Flower*, 8 T. R. 534, 101 Eng. Reprint 1531; *Ex parte King*, 7 Ves. Jr. 312, 32 Eng. Reprint 127; *Willingham v. Matthews*, 6 Taunt. 356, 128 Eng. Reprint 1072.

[a] **Must Attend as Witness.**—One attending before a court or officer is not entitled to a witness' privilege from civil arrest unless he attends as a witness; and this, although he is sworn and examined after the arrest. *Cole v. McClellan*, 4 Hill (N. Y.) 59.

[b] **Privilege extends to non-residents** as well as residents. *Dickinson v. Farwell*, 71 N. H. 213, 51 Atl. 624 (non-resident witness before referee); *In re Greene*, 35 R. I. 67, 85 Atl. 552.

[c] **Witness not privileged (1) from arrest by his bail**, *Ex parte Lyne*, 3 Stark 132, 3 E. C. L. 624 (arrest for purpose of surrender), especially (2) where witness has absconded from his bail. *Horn v. Swinford*, 1 D. & R. N. P. 20, 16 E. C. L. 417.

Extent of protection afforded, see *infra*, I, B, 6, c and d.

66. See the following: **U. S.**—*Larned v. Griffin*, 12 Fed. 590. **Mass.**—*Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370; *May v. Shumway*, 16 Gray 86, 77 Am. Dec. 401; *Ex parte McNeil*, 6 Mass. 264. **R. I.**—*In re Greene*, 35 R.

the service of any civil process when he comes from one state or jurisdiction into another state or jurisdiction,⁶⁷ or from one county of the

I. 67, 85 Atl. 552, and generally the cases cited in the preceding note.

67. See the following: **U. S.**—*Stewart v. Ramsay*, 242 U. S. 128, 37 Sup. Ct. 44, 61 L. ed. 192; *Central Ry. Signal Co. v. Jackson*, 238 Fed. 625; *In re Smith Const. Co.*, 224 Fed. 228; *United States v. Zavelo*, 177 Fed. 536 (witness brought into another state under subpoena of federal court sitting in that state); *Skinner, etc. Co. v. Waite*, 155 Fed. 828; *American Wooden-Ware Co. v. Stem*, 63 Fed. 676; *Kauffman v. Kennedy*, 25 Fed. 785; *Small v. Montgomery*, 23 Fed. 707; *Atchison v. Morris*, 11 Fed. 582, 11 Biss. 191; *Brooks v. Farwell*, 4 Fed. 166, 2 McCrary 220. **Alaska.**—*Pearce v. Sutherland*, 3 Alaska 302. **Ark.**—*Martin v. Bacon*, 76 Ark. 158, 88 S. W. 863, 113 Am. St. Rep. 81. **Cal.**—*Fox v. Hale & Norcross Silver Min. Co.*, 108 Cal. 369, 41 Pac. 308. **Conn.**—*Chittenden v. Carter*, 82 Conn. 585, 78 Atl. 884; *Bishop v. Vose*, 27 Conn. 1, extends to non-resident witness. **Del.**—*State ex rel. Wolcott v. Bielder*, 6 Boyce 262, 99 Atl. 278; *Brooks v. State*, 3 Boyce 1, 79 Atl. 790, Ann. Cas. 1915A, 1133, 51 L. R. A. (N. S.) 1126; *In re Dickenson*, 3 Har. 517. **Ga.**—*Rogers v. Rogers*, 138 Ga. 803, 76 S. E. 48; *Fidelity & Casualty Co. v. Everett*, 97 Ga. 787, 25 S. E. 734, 54 Am. St. Rep. 440; *Thornton v. American Writing Mach. Co.*, 83 Ga. 288, 9 S. E. 679, 20 Am. St. Rep. 320. **Idaho.**—*Guynn v. McDaniel*, 4 Idaho 605, 43 Pac. 74, 95 Am. St. Rep. 158, privilege only extends to witnesses. **Ind.**—*Wilson v. Donaldson*, 117 Ind. 356, 20 N. E. 250, 10 Am. St. Rep. 48, 3 L. R. A. 266. **Ia.**—*Murray v. Wilcox*, 122 Iowa 188, 97 N. W. 1087, 101 Am. St. Rep. 263, 64 L. R. A. 534. **Kan.**—*Gillmore v. Gillmore*, 91 Kan. 293, 137 Pac. 958; *Bolz v. Crone*, 64 Kan. 570, 67 Pac. 1108. **Ky.**—*Rains v. Smith*, 155 Ky. 766, 160 S. W. 493. **Md.**—*Long v. Hawken*, 114 Md. 234, 79 Atl. 190, 42 L. R. A. (N. S.) 1101; *Bolgiano v. Gilbert Lock Co.*, 73 Md. 132, 20 Atl. 788, 25 Am. St. Rep. 582. **Mass.**—*Diamond v. Earle*, 217 Mass. 499, 105 N. E. 363, 51 L. R. A. (N. S.) 1178; *May v. Shumway*, 16 Gray 86, 77 Am. Dec. 401. **Mich.**—*Coatsworth v. Wayne Circuit Judge*, 177 Mich. 565, 143 N. W.

881; *Weale v. Clinton Circ. Judge*, 158 Mich. 563, 123 N. W. 31; *Jacobson v. Hosmer*, 76 Mich. 234, 42 N. W. 1110; *Letherby v. Shaver*, 73 Mich. 500, 41 N. W. 677; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, 19 N. W. 176. **Minn.**—*Turner v. Randall*, 134 Minn. 427, 159 N. W. 958, L. R. A. 1917B, 250; *First Nat. Bank v. Ames*, 39 Minn. 179, 39 N. W. 308; *Sherman v. Gundlach*, 37 Minn. 118, 33 N. W. 549. **Mont.**—*State ex rel. Lane v. District Ct.*, 51 Mont. 503, 154 Pac. 200. **Neb.**—*Linton v. Cooper*, 54 Neb. 438, 74 N. W. 842, 69 Am. St. Rep. 727; *Palmer v. Rowan*, 21 Neb. 452, 32 N. W. 210, 59 Am. Rep. 844. **N. H.**—*Ela v. Ela*, 68 N. H. 312, 36 Atl. 15. **N. J.**—*Richardson v. Smith*, 74 N. J. L. 111, 65 Atl. 162; *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 153, 21 Atl. 186, 11 L. R. A. 101; *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754; *Miller v. Dungan*, 37 N. J. L. 182; *Halsey v. Stewart*, 4 N. J. L. 366. **N. Y.**—*Finucane v. Warner*, 194 N. Y. 160, 86 N. E. 1118; *Parker v. Marco*, 136 N. Y. 585, 32 N. E. 989, 32 Am. St. Rep. 770, 20 L. R. A. 45; *Matthews v. Tufts*, 87 N. Y. 568, 62 How. Pr. 508; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35; *Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327; *Lemberger v. Lemberger*, 164 N. Y. Supp. 555; *Hopkins v. Coburn*, 1 Wend. 292; *Seaver v. Robinson*, 3 Duer 622; *Merrill v. George*, 23 How. Pr. 331. **N. C.**—*Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731; *Balinger v. Elliott*, 72 N. C. 596. **N. D.**—*Hicks v. Besuchet*, 7 N. D. 429, 75 N. W. 793, 66 Am. St. Rep. 665. **Ohio.**—*Compton, Ault & Co. v. Wilder*, 40 Ohio St. 130. **Pa.**—*Hayes v. Shields*, 2 Yeates 222; *Miles v. McCullough*, 1 Binn. 77; *Huddeson v. Prizer*, 9 Phila. 65. **R. I.**—*In re Greene*, 35 R. I. 67, 85 Atl. 552; *Capwell v. Sipe*, 17 R. I. 475, 23 Atl. 14, 33 Am. St. Rep. 890; *Baldwin v. Emerson*, 16 R. I. 304, 15 Atl. 83, 27 Am. St. Rep. 741; *Waterman v. Merritt*, 7 R. I. 345, where person attending under writ of protection. **S. C.**—*Breon v. Miller Lumb Co.*, 83 S. C. 221, 65 S. E. 214, 137 Am. St. Rep. 803, 24 L. R. A. (N. S.) 276. **S. D.**—*Malloy v. Brewer*, 7 S. D. 587, 64 N. W. 1120, 58 Am. St. Rep.

state into another county thereof,⁶⁸ for the purpose of attending⁶⁹ court

856; *Fisk v. Westover*, 4 S. D. 233, 55 N. W. 961, 46 Am. St. Rep. 780. **Tenn.** *Sewanee Coal, etc. Co. v. Williams & Co.*, 120 Tenn. 339, 107 S. W. 968; *Martin v. Ramsey*, 7 Humph. 260. **Vt.** *In re Healey*, 53 Vt. 694, 38 Am. Rep. 713. **Wis.**—*Rix v. Sprague C. Mach. Co.*, 157 Wis. 572, 147 N. W. 1001, 52 L. R. A. (N. S.) 583; *Cameron v. Roberts*, 87 Wis. 291, 58 N. W. 376, 41 Am. St. Rep. 43; *Moletor v. Sinned*, 76 Wis. 308, 44 N. W. 1099, 20 Am. St. Rep. 71, 7 L. R. A. 817.

[a] Same rule applies regardless of whether witness is summoned before state or federal court. *Sewanee Coal, etc. Co. v. Williams & Co.*, 120 Tenn. 339, 107 S. W. 968.

[b] **Historical.**—"The rule is of ancient origin and is mentioned in the Year Books as early as Henry VI. It came to us out of the common law with only such modifications as were required to make its principle harmonize with American institutions and to be in accord with American jurisprudence." *Brooks v. State*, 3 Boyce (Del.) 1, 79 Atl. 790, Ann. Cas. 1915A, 1133, 51 L. R. A. (N. S.) 1126.

[c] **Exemption Does Not Depend Upon Permanency of Foreign Residence.**—*Cake v. Haight*, 30 Misc. 386, 63 N. Y. Supp. 1043, 7 N. Y. Ann. Cas. 329 (privilege extended even though witness residing abroad for purpose of avoiding service of process); *Thorp v. Adams*, 58 Hun 603, 11 N. Y. Supp. 479, 19 Civ. Proc. 351, 33 N. Y. St. 797.

[d] **Non-resident agent of foreign corporation in attendance on court for sole purpose of testifying as a witness is exempt from service upon him, as such agent, of a process against the corporation.** **Ga.**—*Fidelity & Casualty Co. v. Everett*, 97 Ga. 787, 25 S. E. 734, 54 Am. St. Rep. 440. **N. J.**—*Mulhearn v. Press Pub. Co.*, 53 N. J. L. 153, 21 Atl. 186, 11 L. R. A. 101. **N. Y.**—*Kinsey v. American H. Mfg. Co.*, 94 N. Y. Supp. 455. **Tenn.**—*Sewanee Coal, etc. Co. v. Williams & Co.*, 120 Tenn. 339, 107 S. W. 968.

Compare *Currie F. Co. v. Krish*, 24 Ky. L. Rep. 2471, 74 S. W. 268; *Breon v. Miller Lumb. Co.*, 83 S. C. 221, 65 S. E. 214, 137 Am. St. Rep. 803, 24 L. R. A. (N. S.) 276, service on non-resident agent of domestic corporation.

[e] **Witness passing through state for purpose of attending trial in another is not privileged.** *Holyoke & South Hadley Falls Ice Co. v. Ambden*, 55 Fed. 593, 21 L. R. A. 319.

[f] **Repeal By Implication.**—Common law privilege was not repealed by implication by provisions of statute prohibiting arrest in civil actions of persons attending courts as witnesses or suitors. *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731.

68. Ark.—Statute so provides. See *Paul v. Stuckey*, 126 Ark. 389, 189 S. W. 676, L. R. A. 1917B, 888. **Ill.** *Gregg v. Sumner*, 21 Ill. App. 110. *Compare* *Brya v. Thomas*, 186 Ill. App. 281. **Kan.**—*Bolz v. Crone*, 64 Kan. 570, 67 Pac. 1108. **Ky.**—*Rains v. Smith*, 155 Ky. 766, 160 S. W. 493; *Linn v. Hagan's Admr.*, 121 Ky. 627, 87 S. W. 1101. **Mich.**—*Mitchell v. Huron Circuit Judge*, 53 Mich. 541, 19 N. W. 176; *People v. Judge Superior Ct.*, 40 Mich. 729. **Neb.**—*Mayer v. Nelson*, 54 Neb. 434, 74 N. W. 841; *Palmer v. Rowan*, 21 Neb. 452, 32 N. W. 210, 59 Am. Rep. 844. **N. J.**—*Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754. **N. Y.**—*People ex rel. Hess v. Inman*, 74 Hun 130, 26 N. Y. Supp. 329. **N. D.**—*Hicks v. Besuchet*, 7 N. D. 429, 75 N. W. 793, 66 Am. St. Rep. 665. **Pa.**—*United States v. Edme*, 9 Serg. & R. 147; *Miles v. McCullough*, 1 Binn. 77; *Hayes v. Shields*, 2 Yeates 222.

69. See the cases cited in the preceding notes.

[a] **Mere spectator is not privileged.** *McIntire v. McIntire*, 5 Mackey (D. C.) 344; *Michaels v. Hain*, 78 Hun 500, 29 N. Y. Supp. 567. See also *Brooks v. State*, 3 Boyce (Del.) 1, 35, 79 Atl. 790, Ann. Cas. 1915A, 1133, 51 L. R. A. (N. S.) 1126.

[b] **One coming for double purpose of attending court as witness and attending to business having no connection with trial is not privileged.** *Pinucane v. Warner*, 194 N. Y. 160, 86 N. E. 1118. See also *Smythe v. Banks*, 4 Dall. 329, 1 L. ed. 854, 22 Fed. Cas. No. 13,134; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Sofge v. Lowe*, 131 Tenn. 626, 176 S. W. 106, L. R. A. 1916A, 734.

as a witness in a pending cause, although he does not in fact testify.⁷⁰

Character of Privilege.—Such privilege is not an absolute right; it is, at most, a conditional or contingent right,⁷¹ which may be waived.⁷²

b. Reason and Source of Rule.—The power of the court thus to protect witnesses is said to be a necessary incident to the administration of justice and exists independently of statutory authority.⁷³

c. Growth and Extent of Rule.—This protection extends not only to the attendance of witnesses upon courts,⁷⁴ but to their attendance in good faith upon any legal tribunal of a judicial character, whether a court of record or not, and to every case where the attendance is a duty in conducting any proceedings of a judicial nature.⁷⁵ It has been

70. *Central Ry. Signal Co. v. Jackson*, 238 Fed. 625.

71. *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598.

72. See *infra*, II.

73. See the following: **U. S.** *United States v. Zavelo*, 177 Fed. 536. **Ark.**—*Martin v. Bacon*, 76 Ark. 158, 88 S. W. 863, 113 Am. St. Rep. 81. **Del.**—*Brooks v. State*, 3 Boyce 1, 33, 79 Atl. 790, Ann. Cas. 1915A, 1133, 51 L. R. A. (N. S.) 1126. **Ga.**—*Thorn-ton v. American Writing Mach. Co.*, 83 Ga. 288, 9 S. E. 679. **Ind.**—*Wilson v. Donaldson*, 117 Ind. 360, 20 N. E. 250, 10 Am. St. Rep. 48, 3 L. R. A. 266. **Ia.**—*Murray v. Wilcox*, 122 Iowa 188, 97 N. W. 1087, 101 Am. St. Rep. 263, 64 L. R. A. 534. **Minn.**—*Sherman v. Gundlach*, 37 Minn. 118, 33 N. W. 549. **Mont.**—*State ex rel. Lane v. District Ct.*, 51 Mont. 503, 154 Pac. 200. **N. H.**—*Ela v. Ela*, 68 N. H. 312, 36 Atl. 15. **N. J.**—*Jones v. Knauss*, 31 N. J. Eq. 211. **N. Y.**—*Matthews v. Tufts*, 87 N. Y. 568, 62 How. Pr. 508; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35; *Lamkin v. Starkey*, 7 Hun 479; *Marks v. La Societe A De L'Union Des Papeteries*, 46 N. Y. St. 660, 19 N. Y. Supp. 470, 22 Civ. Proc. 201. **N. C.**—*Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731. **Ohio.**—*Andrews v. Lembeck*, 46 Ohio St. 38, 18 N. E. 483. **Pa.**—*United States v. Edme*, 9 Serg. & R. 147. **S. D.**—*Malloy v. Brewer*, 7 S. D. 587, 64 N. W. 1120, 58 Am. St. Rep. 856. **Tenn.**—*Sewanee Coal, etc., Co. v. Williams & Co.*, 120 Tenn. 339, 107 S. W. 968.

See generally the cases cited *supra*, I, B, 6, a.

[a] The reason supporting the privilege of witnesses from civil arrest "is not altogether that the de-

tention of the witness may prevent his presence and testimony in the cause at the term at which he is summoned to testify, by reason of his confinement under the writ of arrest. The probability that the fear of arrest may prevent his return to the place of trial at a future term, if his presence be thereafter required, operates also in support of the rule, as does the general deterrent effect upon the attendance of witnesses at court of a contrary rule. The purpose of the privilege is not so much for the advantage of the witness as for the proper and efficient conduct of the court in the procuring of the necessary attendance of its witnesses." *United States v. Zavelo*, 177 Fed. 536.

[b] "Considerations of public policy and the due administration of justice prompt the enforcement of the rule, to the end that the personal presence of witnesses from foreign jurisdictions in the local courts may be encouraged." *State ex rel. Lane v. District Ct.*, 51 Mont. 503, 154 Pac. 200.

74. *United States v. Edme*, 9 Serg. & R. (Pa.) 147. See *supra*, II, B, 6, a.

75. *United States v. Edme*, 9 Serg. & R. (Pa.) 147. See *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370.

[a] **Before a Legislative Committee.**—*Thorp v. Adams*, 58 Hun 603, 11 N. Y. Supp. 479, 19 Civ. Proc. 351, 33 N. Y. St. 797.

[b] **On Writ of Inquiry.**—*Rimmer v. Green*, 1 M. & S. (Eng.) 638, 105 Eng. Reprint 238.

[c] **On Justification of Bail.**—*Md. Bolgrano v. Gilbert Lock Co.*, 73 Md. 132, 20 Atl. 788, 25 Am. St. Rep. 582. **Neb.**—*Palmer v. Rowan*, 21 Neb. 452, 32 N. W. 210, 59 Am. Rep. 844. **N. Y.**—*Person v. Grier*, 66 N. Y. 124, 23

held to extend to their attendance before arbitrators,⁷⁶ commissioners,⁷⁷ referees,⁷⁸ and masters in chancery.⁷⁹

d. *Duration of Privilege*.—The privilege exempts the witness not only while in attendance at the place of the trial or hearing,⁸⁰ but also on his trip in coming and going⁸¹ between such place and his

Am. Rep. 35. **Vt.**—*Scott v. Curtis*, 27 Vt. 762.

[d] **At summary proceedings for dispossession of tenant**.—*Richardson v. Smith*, 74 N. J. L. 111, 65 Atl. 162.

[e] **Involuntary Bankrupt Hearing**.—*Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327.

[f] **Attendance at judicial sale not protected**.—*Greenleaf v. Bank*, 133 N. C. 292, 45 S. E. 638, 63 L. R. A. 499, 98 Am. St. Rep. 709.

76. *Sanford v. Chase*, 3 Cow. (N. Y.) 381; *Spence v. Stuart*, 3 East 89, 102 Eng. Reprint 530; *Randall v. Gurney*, 1 Chitty 679, 18 E. C. L. 370.

77. *Stratton v. Hughes*, 211 Fed. 557; *Larned v. Griffin*, 12 Fed. 590; *In re Greene*, 35 R. I. 67, 85 Atl. 552.

[a] **Before a Commission of the Supreme Court**.—*Mulhearn v. Press Pub. Co.*, 53 N. J. L. 153, 21 Atl. 186, 11 L. R. A. 101.

[b] **Before a Commissioner or Notary Public Taking Depositions**.—**U. S.**—*Central Ry. Signal Co. v. Jackson*, 238 Fed. 625; *Plimpton v. Winslow*, 9 Fed. 365, 20 Blatch. 82. **Mass.** *Wood v. Neale*, 5 Gray 538. **N. Y.** *Parker v. Marco*, 136 N. Y. 585, 32 N. E. 989, 32 Am. St. Rep. 770, 20 L. R. A. 45. **Ohio**.—*Langdon v. Baker*, 5 Ohio N. P. 118. **Pa.**—*Partridge v. Powell*, 180 Pa. 22, 36 Atl. 419.

[c] **Commissioners in Bankruptcy**.—*Matthews v. Tufts*, 87 N. Y. 568, 62 How. Pr. 508; *Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327; *Ex parte King*, 7 Ves. Jr. 312, 32 Eng. Reprint 127.

[d] **Before a Commissioner in a Foreign State**.—*Bridges v. Sheldon*, 7 Fed. 17, 18 Blatchf. 295, 507.

78. **U. S.**—*In re Smith Const. Co.*, 224 Fed. 228; *Morrow v. Dudley & Co.*, 144 Fed. 441. **N. Y.**—*Clark v. Grant*, 2 Wend. 257. **Eng.**—*Walters v. Rees*, 4 Moore 34, 16 E. C. L. 360.

79. **U. S.**—*Nichols v. Horton*, 14 Fed. 327; *Larned v. Griffin*, 12 Fed. 590; *Plimpton v. Winslow*, 9 Fed. 365, 20 Blatchf. 82; *Bridges v. Sheldon*, 7 Fed. 17, 18 Blatchf. 295, 507. **Minn.**

First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. 308. **N. J.**—*Dungan v. Miller*, 37 N. J. L. 182. **S. C.**—*Vincent v. Watson*, 1 Rich. L. 194. **Vt.**—*Scott v. Curtis*, 27 Vt. 762.

80. See *supra*, I, B, 6, a.

81. See the following: **U. S.**—*United States v. Zavelo*, 177 Fed. 536; *Smythe v. Banks*, 4 Dall. 329, 1 L. ed. 854, 22 Fed. Cas. No. 13,134. **Ark.**—*Martin v. Bacon*, 76 Ark. 158, 88 S. W. 863, 113 Am. St. Rep. 81. **Ill.**—*Gregg v. Sumner*, 21 Ill. App. 110. **Ia.**—*Murray v. Wilcox*, 122 Iowa 188, 97 N. W. 1087, 101 Am. St. Rep. 263, 64 L. R. A. 534. **Ky.**—*Rains v. Smith*, 155 Ky. 766, 160 S. W. 493. **Md.**—*Bolgiano v. Gilbert Lock Co.*, 73 Md. 132, 20 Atl. 788, 25 Am. St. Rep. 582. **Minn.**—*Sherman v. Gundlach*, 37 Minn. 118, 33 N. W. 549. **Mont.**—*State ex rel. Lane v. District Ct.*, 51 Mont. 503, 154 Pac. 200. **Neb.** *Palmer v. Rowan*, 21 Neb. 452, 32 N. W. 210, 59 Am. Rep. 844. **N. H.**—*Ela v. Ela*, 68 N. H. 312, 36 Atl. 15. **N. D.** *Hicks v. Besuchet*, 7 N. D. 429, 75 N. W. 793, 66 Am. St. Rep. 665. **N. Y.** *Goldsmith v. Haskell*, 120 App. Div. 403, 105 N. Y. Supp. 327; *Salhinger v. Adler*, 2 Robt. 704; *Brett v. Brown*, 13 Abb. Pr. N. S. 295. **N. C.**—*Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731. **Pa.**—*Hays v. Shields*, 2 Yeates 222. **S. D.**—*Malloy v. Brewer*, 7 S. D. 587, 64 N. W. 1120, 58 Am. St. Rep. 856. **Vt.**—*Ex parte Hall*, 1 Tyler 274.

See also the cases cited *supra*, I, B, 6, a.

[a] **Privilege extends to the witness for a reasonable time after his discharge** as a witness to enable him to reach his home. **U. S.**—*United States v. Zavelo*, 177 Fed. 536. **Neb.** *Linton v. Cooper*, 54 Neb. 438, 74 N. W. 842, 69 Am. St. Rep. 727, entitled to reasonable time after trial to prepare for return home. **Pa.**—*Rex v. Piatt*, 3 W. N. C. 187. **R. I.**—*In re Greene*, 35 R. I. 67, 85 Atl. 552. **Vt.** *Ex parte Hall*, 1 Tyler 274. Compare *Brooks v. Chesley*, 4 Harr. & McH. (Md.) 295.

home, provided he acts bona fide, and without unreasonable delay.⁸²

e. *Necessity of Subpoena*. — This exemption has been held to apply only to witnesses in attendance under a subpoena,⁸⁴ unless the witness comes from another state,⁸⁵ or, in some states, from another county;⁸⁶ but in some jurisdictions, the privilege is extended to all witnesses, irrespective of the manner of attendance, whether voluntary or compulsory.⁸⁷

7. **Miscellaneous Persons**. — One who is in court as a spectator is not privileged from the service of process.⁸⁸ Nor is one who is induced by fraud to come within the jurisdiction of the court for the purpose of service of process on him amenable thereto.⁸⁹ An elector is privileged from service of process during the hours appointed for the election under statutes in some states.⁹⁰ The privilege of persons engaged in military service is treated elsewhere in this work.⁹¹

II. NECESSITY FOR CLAIMING PRIVILEGE AND WAIVER.

A. **GENERALLY**. — The privilege is one which the person may avail himself of or not as he pleases. Hence, the arrest of,⁹² or the service

82. See the following: **Ia.**—Murray v. Wilcox, 122 Iowa 188, 97 N. W. 1087, 101 Am. St. Rep. 263, 64 L. R. A. 534. **Md.**—Bolgiano v. Gilbert Lock Co., 73 Md. 132, 20 Atl. 788, 25 Am. St. Rep. 582. **Minn.**—Sherman v. Gundlach, 37 Minn. 118, 33 N. W. 549, non-resident. **N. Y.**—Goldsmith v. Haskell, 120 App. Div. 403, 105 N. Y. Supp. 327; Woodruff v. Austin, 15 Misc. 450, 37 N. Y. Supp. 22, 72 N. Y. St. 174; Finch v. Galligher, 25 Abb. N. C. 404, 12 N. Y. Supp. 487. **S. D.**—Malloy v. Brewer, 7 S. D. 587, 64 N. W. 1120, 58 Am. St. Rep. 856.

[a] While transacting general private business after he is discharged from the obligation of the subpoena, he is not protected. Smythe v. Banks, 4 Dall. (U. S.) 329, 1 L. ed. 854, 22 Fed. Cas. No. 13,134. See also *supra*, note 69 [b].

[b] **Witness Need Not Take First Train**.—Turner v. Randall, 134 Minn. 42, 159 N. W. 958, L. R. A. 1917B, 250.

[c] **What constitutes a reasonable time for a witness to take his departure** is a question of fact to be determined from evidence adduced in each particular case. Linton v. Cooper, 54 Neb. 438, 74 N. W. 842, 69 Am. St. Rep. 727. See Turner v. Randall, 134 Minn. 427, 159 N. W. 958, L. R. A. 1917B, 250.

83. **Generally**, see the title "*Subpoena*."

84. **Kan.**—Underwood v. Fosha, 73 Kan. 408, 85 Pac. 564, 9 Ann. Cas.

833. **Mo.**—Christian v. Williams, 111 Mo. 429, 20 S. W. 96. **N. J.**—Rogers v. Bullock, 3 N. J. L. 109, by statute. **N. Y.**—Hardenbrook's Case, 8 Abb. Pr. 416.

85. **N. Y.**—Dixon v. Ely, 4 Edw. Ch. 557. **N. C.**—Ballinger v. Elliott, 72 N. C. 596. **S. D.**—Malloy v. Brewer, 7 S. D. 587, 64 N. W. 1120, 58 Am. St. Rep. 856.

86. Underwood v. Fosha, 73 Kan. 408, 85 Pac. 564, 9 Ann. Cas. 833.

87. See the following: **Mass.**—Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370. See *Ex parte* McNeil, 6 Mass. 264. **Pa.**—United States v. Edme, 9 Serg. & R. 147. **R. I.**—*In re* Greene, 35 R. I. 67, 85 Atl. 552. **Eng.** Mountague v. Harrison, 3 C. B. (N. S.) 292, 140 Eng. Reprint 753. **Can.** Croucher v. Bradley, 7 Newf. 96.

[a] **When the government is a party** the privilege obtains as in other cases. United States v. Edme, 9 Serg. & R. (Pa.) 147.

88. McIntire v. McIntire, 5 Mackey (D. C.) 344; Michaels v. Hain, 78 Hun (N. Y.) 500, 29 N. Y. Supp. 567, 61 N. Y. St. 234.

89. Wanzer v. Bright, 52 Ill. 35.

90. See the statutes, and Corlies v. Holmes, 20 Wend. (N. Y.) 681.

91. See the title "*Navy and Army*."

92. **Ark.**—Reed v. State, 103 Ark. 391, 147 S. W. 76, Ann. Cas. 1914B, 811. **Mich.**—Brower v. Tatro, 115 Mich. 368, 73 N. W. 421. **Wis.**—State v. Polacheck, 101 Wis. 427, 77 N. W. 708.

of process⁹³ on one privileged is not void, but merely voidable. So the privilege from arrest or service of process may be waived by the conduct of the party,⁹⁴ or by laches.⁹⁵ But it has been held that a foreign minister cannot waive his privilege from arrest on civil process.⁹⁶

B. MUST BE CLAIMED AT FIRST OPPORTUNITY.—The privilege must be interposed at the first opportunity or it will be waived.⁹⁷ Thus demurring on grounds other than jurisdictional and entering into a stipulation,⁹⁸ or entering a plea in bar,⁹⁹ or confession of judgment,¹ waives the privilege. But filing an answer to the merits with the plea in abatement does not waive the privilege;² nor, it has been held, does the filing of a petition and bond for removal to the federal court.³ The giving of bail⁴ by the privileged person upon his arrest is not a

[a] **Privilege Cannot Be Claimed for Him by Another.**—*Savage v. Sully*, 74 Misc. 98, 131 N. Y. Supp. 619.

93. *Peters v. League*, 13 Md. 58, 71 Am. Dec. 622; *Tiedemann v. Tiedemann*, 156 N. Y. Supp. 109.

94. **U. S.**—*Gracie v. Palmer*, 8 Wheat. 699, 5 L. ed. 719. **Ark.**—*Reed v. State*, 103 Ark. 391, 147 S. W. 76, Ann. Cas. 1914B, 811. **Me.**—*Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598. **Md.**—*Peters v. League*, 13 Md. 58, 71 Am. Dec. 622. **Mich.**—*McCullough v. McCullough*, 168 N. W. 929. **N. H.**—*Woods v. Davis*, 34 N. H. 328. **N. Y.**—*Weston v. Citizens' Nat. Bank*, 64 App. Div. 145, 71 N. Y. Supp. 827; *Farmer v. Robbins*, 47 How. Pr. 415 (holding that the giving of bail and then waiting twenty-two days before applying for his discharge amounted to a waiver); *Petrie v. Fitzgerald*, 1 Daly 401; *Cole v. McClellan*, 4 Hill 59; *Savage v. Sully*, 74 Misc. 98, 131 N. Y. Supp. 619. **Vt.**—*Fletcher v. Baxter*, 2 Aiken 224. **Va.**—*Johnson's Exrs. v. Johnson*, 4 Call (8 Va.) 38; *Prentiss v. Com.*, 5 Rand. (26 Va.) 697, 16 Am. Dec. 782. **Wis.**—*State v. Polacheck*, 101 Wis. 427, 77 N. W. 708.

[a] **Silence at time of arrest** is not a waiver. *Swift v. Chamberlain*, 3 Conn. 537.

95. See *Thornton v. American Writing Mach. Co.*, 83 Ga. 288, 9 S. E. 679 (where a non-resident suitor who was garnisheed while in attendance upon the trial of his cause in the state of Georgia, remained silent as to his privilege, filed no answer, and suffered default to be entered against him, and, eighteen months thereafter moved to set aside the judgment, and it was held that the motion came too late);

Thompson v. Michigan Mut., etc. Assn., 52 Mich. 522, 18 N. W. 247, objection must be made seasonably.

[a] **Delay of three weeks in asserting privilege from service of process** does not of itself constitute a waiver. *Morrow v. Dudley & Co.*, 144 Fed. 441.

96. *United States v. Benner*, Baldw. 234, 24 Fed. Cas. No. 14,568.

97. **U. S.**—*Matthews v. Puffer*, 10 Fed. 606, 20 Blatchf. 233. **Ill.**—*Wilson v. Nettleton*, 12 Ill. 61, plea of privilege being a dilatory plea. **Md.**—*Peters v. League*, 13 Md. 58, 71 Am. Dec. 622. **Mo.**—*Sheehan & L. Transp. Co. v. Sims*, 36 Mo. App. 224.

98. *Sheehan & L. Transp. Co. v. Sims*, 36 Mo. App. 224.

99. *Randall v. Crandall*, 6 Hill (N. Y.) 342.

1. *Peters v. League*, 13 Md. 58, 71 Am. Dec. 622.

2. *Larned v. Griffin*, 12 Fed. 590.

3. *Atchison v. Morris*, 11 Fed. 582, 11 Biss. 191, does not prevent objection to service when the cause is removed to federal court.

4. **U. S.**—*Larned v. Griffin*, 12 Fed. 590; *Matthews v. Puffer*, 10 Fed. 606, 20 Blatchf. 233. **N. H.**—*Dickinson v. Farwell*, 71 N. H. 213, 51 Atl. 624. **N. Y.**—*Mackay v. Lewis*, 7 Hun 83; *Farmer v. Robbins*, 47 How. Pr. 415. See also *Stewart v. Howard*, 15 Barb. 26. See also *Cole v. McClellan*, 4 Hill 59, holding that where an attorney on being arrested does not mention his privilege but requests the officer to obtain a bail bond and executes it he waives the privilege. **Pa.**—*United States v. Edme*, 9 Serg. & R. 147. **Tenn.**—*Tipton v. Harris*, Peck. 414. **Vt.**—*Washburn v. Phelps*, 24 Vt. 506, the court

waiver of the privilege from arrest, nor is it waived by a motion to reduce the bail.⁵

III. MANNER OF CLAIMING PRIVILEGE. — A. FROM ARREST. On being arrested, one privileged therefrom may obtain his release by habeas corpus,⁶ or on motion,⁷ or under some circumstances, by plea in abatement.⁸ The application for a discharge from arrest by one privileged has been held to be an *ex parte* proceeding.⁹

B. FROM SERVICE OF PROCESS. — The exemption from service of process is a personal privilege which the person is entitled to plead in abatement,¹⁰ or take advantage of by motion to quash the service.¹¹

IV. REMEDY FOR VIOLATION OF PRIVILEGE.¹² — One privileged from arrest on civil process has a remedy by civil action for damages against one causing his arrest in violation of that privilege.¹³

saying: "It was not esteemed any good ground for presuming a waiver of privilege from arrest because a party makes the most expeditious mode of freeing himself." See also *Fletcher v. Baxter*, 2 Aiken 224.

5. *Dobson v. Fitzpatrick*, 2 W. N. C. 186, such a motion not being an appearance.

6. *Conn.*—*Hill v. Goodrich*, 32 *Conn.* 588. *Me.*—*Smith v. Jones*, 76 *Me.* 138, 49 *Am. Rep.* 598. *Mass.*—*Thompson's Case*, 122 *Mass.* 428, 23 *Am. Rep.* 370. *N. Y.*—*Lagrange's Case*, 14 *Abb. Pr.* (N. S.) 333, 45 *How. Pr.* 301. *Pa.* *Land Title & Trust Co. v. Crump*, 16 *Pa. Co. Ct.* 593. *Wis.*—See *State v. Polacheck*, 101 *Wis.* 427, 77 *N. W.* 708.

See 2 *STANDARD PROC.* 970, and the title "*Habeas Corpus.*"

7. *Conn.*—*Swift v. Chamberlain*, 3 *Conn.* 537. *Me.*—*Smith v. Jones*, 76 *Me.* 138, 49 *Am. Rep.* 598. *N. Y.* *Harland v. Howard*, 57 *Hun* 113, 587, 10 *N. Y. Supp.* 449, 32 *N. Y. St.* 869, 871, 872; *Humphrey v. Cumming*, 5 *Wend.* 90; *Goupil v. Simonson*, 3 *Abb. Pr.* 474. *Pa.*—*Land Title & Trust Co. v. Crump*, 16 *Pa. Co. Ct.* 593; *United States v. Edme*, 9 *Serg. & R.* 147. *R. I.* *Ellis v. Degarmo*, 17 *R. I.* 715, 24 *Atl.* 579, 19 *L. R. A.* 560. *Tenn.*—*Tipton v. Harris*, *Peck* 414.

See 2 *STANDARD PROC.* 970.

8. See 2 *STANDARD PROC.* 970.

9. *Humphrey v. Cumming*, 5 *Wend.* (N. Y.) 90, where an attorney was arrested while privileged. The court said: "The application for a discharge is necessarily a summary one. If notice were required to be given, the privilege would be of no value either to the attorney or to his client."

10. *U. S.*—*Morrow v. Dudley & Co.*, 144 *Fed.* 441; *Larned v. Griffin*, 12 *Fed.* 590. *Conn.*—*King v. Coit*, 4 *Day* 129; *Avery v. Wetmore*, *Kirby* 48. *Md.* *Peters v. League*, 13 *Md.* 58, 71 *Am. Dec.* 622. *N. H.*—See *Wilkins' Admr. v. Brock*, 79 *Vt.* 57, 64 *Atl.* 232. *Tenn.* *Grove v. Campbell*, 9 *Yerg.* 7. *Vt.* *Bank of Vergennes v. Barker*, 27 *Vt.* 243; *Wood v. Kinsman*, 5 *Vt.* 588. *Va.* *Prentiss v. Com.*, 5 *Rand.* (26 *Va.*) 697, 16 *Am. Dec.* 782. *Wis.*—*State v. Polacheck*, 101 *Wis.* 427, 77 *N. W.* 708.

[a] Fact that privilege has terminated when plea in abatement is interposed is immaterial if the privilege existed when process was served. *M'Pherson v. Nesmith*, 3 *Gratt.* (44 *Va.*) 237.

11. *Alaska.*—*Pearce v. Sutherland*, 3 *Alaska* 302. *Ia.*—*Murray v. Wilcox*, 122 *Iowa* 188, 97 *N. W.* 1087, 101 *Am. St. Rep.* 263, 64 *L. R. A.* 534. *Md.* *Peters v. League*, 13 *Md.* 58, 71 *Am. Dec.* 622. *N. C.*—*Dell School v. Peirce*, 163 *N. C.* 424, 79 *S. E.* 687.

[a] Where privilege appears from face of record, it may be taken advantage of by motion to quash. *Bishop v. Vose*, 27 *Conn.* 1; *Greer v. Young*, 120 *Ill.* 184, 11 *N. E.* 167.

12. Manner of obtaining release from arrest, see *supra*, III.

13. *Conn.*—*Swift v. Chamberlain*, 3 *Conn.* 537, action is case rather than trespass. *Ill.*—*Wanzer v. Bright*, 52 *Ill.* 35, one decoyed into jurisdiction and there arrested on civil process has action against creditors for the illegal arrest and imprisonment. *Vt.*—*Steele v. Bates*, 2 *Aiken* 338, 16 *Am. Dec.* 720.

But see *Smith v. Jones*, 76 *Me.* 138, 49 *Am. Rep.* 598, action for damages

As the privilege is for the advantage of the court, as well as for the witness, the person ordering the arrest may also be punished for contempt of court.¹⁴

does not lie at instance of person arrested. | Am. Rep. 598; United States v. Jaca, 26 Phil. Isl. 100, 110. See also United States v. Zavelo, 177 Fed. 536.

14. Smith v. Jones, 76 Me. 138, 49

PRIVITY. — See **Implied and Express Agreements; Parties; Res Judicata; Title.**

PRIZE. — See **Admiralty; War.**

PRIZE FIGHTING

By the Editorial Staff.

I. INDICTMENT AND INFORMATION, 639

II. TRIAL, 639

CROSS-REFERENCES:

Indictment and Information; Theaters and Shows.

For forms, see 9 STANDARD PROC. 1000.

For further references and cross-references, see the index to this work.

I. INDICTMENT OR INFORMATION.—In accordance with the general rule elsewhere treated,¹ an indictment or information substantially in the language of the statute sufficiently charges the offense of prize-fighting,² or the aiding and abetting thereof.³ Where, however, the offense is not fully defined by the statute, all the elements necessary to constitute it must be set forth with reasonable precision and certainty.⁴ Exceptions in the statute, unless descriptive of the offense, need not be negatived.⁵

II. TRIAL.⁶—The question as to what constitutes prize-fighting is a question of law for the court.⁷ But the question whether in fact a combat was a prize-fight, is one to be determined by the jury under proper instructions from the court⁸ as is the question of the good

1. See 12 STANDARD PROC. 447, et seq.

2. *Com. v. Barrett*, 108 Mass. 302; *Com. v. Welsh*, 7 Gray (Mass.) 324; *People v. Taylor*, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287.

3. *Com. v. Welsh*, 7 Gray (Mass.) 324.

4. *State v. Patton*, 159 Ind. 248, 64 N. E. 850. See 12 STANDARD PROC. 452.

[a] The facts of fighting for a wager in a public place must be charged in an indictment or information; it is not sufficient to follow the language of the statute. *Sullivan v. State*, 67 Miss. 346, 7 So. 275. *Compare Seville v. State*, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516, holding that it is not necessary to aver that the fight took place in public, such not being an element of the offense.

[b] **Showing That Both Parties Fought.**—Under a statute denouncing the offense of "engaging" in a prize-fight it is essential to allege that the defendant contended against another as the guilt arises from the joint act of two persons. *Sullivan v. State*, 67 Miss. 346, 7 So. 275.

5. *Seville v. State*, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516. See 12 STANDARD PROC. 458, et seq.

6. See generally the title "**Trial**," and the cross-references there made.

7. *People v. Taylor*, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287.

8. **La.**—*State v. Olympic Club*, 46 La. Ann. 935, 15 So. 190, 24 L. R. A. 452. **Ohio.**—*Seville v. State*, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516. **Vt.**—*State v. Burham*, 56 Vt. 445, 48 Am. Rep. 801. **Eng.**—*Reg. v. Caney*, 8

faith organization of the club which staged the fight.⁹

Q. B. D. 534, 30 Wkly. Rep. 678, 15 Cox C. C. 46, 46 L. T. N. S. 307; Reg. v. Orton, 14 Cox C. C. 226, 39 L. T. Rep. N. S. 292.

[a] Whether the gloves used were such as rendered it imprcbable that the contestants could inflict injury on each other, or were put on as a mere sub-

terfuge to disguise a fight, is a question of fact for the jury. *State v. Purtell*, 56 Kan. 479, 43 Pac. 782.

9. *Com. v. Mack*, 187 Mass. 441, 73 N. E. 534, whether it was a sham organization designed to promote prize fights under pretense of conducting private exhibitions.

PROBABLE CAUSE. — See **Certificate of Probable Cause and of Reasonable Doubt; False Imprisonment; Malicious Prosecution.**

Vol. XXI

PROBATE COURTS

By the Editorial Staff.

- I. IN WHAT COURTS PROBATE JURISDICTION IS VESTED, 642
- II. WHETHER PROBATE COURTS ARE COURTS OF RECORD, 642
- III. JURISDICTION OF, 643
 - A. *Generally*, 643
 - B. *Equitable Powers and Jurisdiction*, 647
 - C. *Over Real and Personal Property*, 649
 - D. *Over Claims Against Third Persons*, 651
- IV. JURISDICTION OF COURTS OF EQUITY AND PROBATE COMPARED, 651
 - A. *Generally*, 651
 - B. *Where Equity and Probate Courts Have Concurrent Jurisdiction*, 652
 - C. *Where Probate Courts Have Exclusive Jurisdiction*, 655
 - D. *Where Equity Jurisdiction Is Ancillary*, 655
 - E. *Federal Equity Jurisdiction*, 658
- V. PROCEDURE, 658
 - A. *Generally*, 658
 - B. *Pleading*, 659
 - C. *Process and Notice*, 660
 - D. *Trial*, 660
 - 1. *Generally*, 660
 - 2. *Right To Trial by Jury*, 660
 - 3. *Reference*, 661
 - 4. *Findings of Fact*, 661
 - E. *New Trial*, 661
 - F. *Judgments, Orders and Decrees*, 661
 - 1. *Generally*, 661
 - 2. *Vacation and Amendment*, 663
 - G. *Enforcement of Judgments and Orders*, 664
 - H. *Bills of Review*, 665
 - I. *Certiorari*, 665

- J. *Mandamus*, 665
- K. *Writ of Error*, 665
- L. *Appeal*, 665
 - 1. *Generally*, 665
 - 2. *How and When Appeal Must Be Taken*, 667
 - 3. *Proceedings on Appeal*, 669
 - a. *Generally*, 669
 - b. *Pleadings*, 670
 - c. *Issues*, 671
 - d. *Right to Jury Trial*, 671
 - e. *Reference*, 672
 - f. *Findings and Conclusions*, 672
 - g. *Disposition of the Case*, 672
 - h. *Appeal From Superior or District Court*, 672
 - i. *Certiorari*, 673
 - j. *Writ of Error*, 673
- M. *Correction of Records*, 674

CROSS-REFERENCES:

Courts;	Guardian and Ward;
Decedents' Estates;	Inheritance;
Executors and Administrators;	Judicial Sale
Wills.	

Jurisdiction of probate court in particular actions or proceedings, see the specific titles.

Collateral attack on probate proceedings, see 15 STANDARD PROC. 393, 401, 435.

Jurisdiction of federal courts in probate proceedings, see the title "United States Courts."

Powers of probate judge in vacation and in chambers, see 16 STANDARD PROC. 630.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. IN WHAT COURTS PROBATE JURISDICTION IS VESTED.

The probate of wills, both of real and personal estate and the administration of the estates of decedents are generally confided to courts of special jurisdiction, which are variously denominated probate courts,¹ county courts,² surrogate's courts,³ orphan's courts,⁴ and

1. *Clark v. Chase*, 101 Me. 270, 64 Atl. 493; *Clancey v. Clancey*, 7 N. M. 405, 410, 37 Pac. 1105, 38 Pac. 168.
 2. *Scott v. McGirth*, 41 Okla. 520, 139 Pac. 519; *In re Jackman's Will*, 26 Wis. 104.

3. *Sanders v. Soutter*, 126 N. Y. 193, 200, 27 N. E. 263; *In re Martin's Will*, 80 Misc. 17, 141 N. Y. Supp. 784, reviewing history of court.

4. *Brinker v. Brinker*, 7 Pa. 53.

courts of ordinary.⁵ In some states this jurisdiction is conferred upon courts having general jurisdiction,⁶ such as superior⁷ or district courts;⁸ and in others the jurisdiction of such courts in probate matters is appellate only.⁹

II. WHETHER PROBATE COURTS ARE COURTS OF RECORD.—Originally probate courts were not courts of record,¹⁰ but statutes generally have made them such,¹¹ and require them to keep and maintain such records as are commonly kept by courts of record.¹²

III. JURISDICTION OF.—A. GENERALLY.¹³—Probate courts, especially those that exercise probate jurisdiction exclusively, are courts of special and limited jurisdiction,¹⁴ having such powers only

5. *McGowan v. Lufburrow*, 82 Ga. 523, 9 S. E. 427, 14 Am. St. Rep. 178

6. *Hutton v. Laws*, 55 Iowa 710, 8 N. W. 642; *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147; *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107.

7. **U. S.**—*Christianson v. King Co.*, 239 U. S. 356, 370, 36 Sup. Ct. 114, 60 L. ed. 327, 335, under Washington practice. **Ariz.**—*Garver v. Thoman*, 15 Ariz. 38, 135 Pac. 724. **Cal.**—*Estate of Davis*, 136 Cal. 590, 597, 69 Pac. 412. **Wash.**—*Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433; *In re Hoscheid's Estate*, 78 Wash. 309, 139 Pac. 61.

8. *Douglass v. Folsom*, 21 Nev. 441, 33 Pac. 660.

9. *Decker v. Decker*, 3 Alaska 121; *Franks v. Chapman*, 60 Tex. 46; *Shook v. Journeay* (Tex. Civ. App.), 149 S. W. 406; *Levy v. W. L. Moody & Co.* (Tex. Civ. App.), 87 S. W. 205; *Ballard v. Wheeler*, 23 Tex. Civ. App. 422, 56 S. W. 946. But compare *Prendergass v. Beale*, 59 Tex. 446, where the county judge is disqualified.

10. See *Ferris v. Higley*, 20 Wall (U. S.) 375, 22 L. ed. 383.

11. **Idaho.**—*Fraser v. Davis*, 29 Idaho 70, 156 Pac. 913, 158 Pac. 233; *In re Estate of McVay*, 14 Idaho 56, 64, 93 Pac. 23, 31; *Dewey v. Schreiber Imp. Co.*, 12 Idaho 280, 85 Pac. 921. **Mich.**—*Ellsworth v. Hall*, 48 Mich. 407, 12 N. W. 512. **Minn.**—*Brown v. Strom*, 113 Minn. 1, 129 N. W. 136. **Mo.**—*Farris v. Burchard*, 242 Mo. 1, 145 S. W. 825; *North Missouri R. Co. v. Green's Admr.*, 34 Mo. 159. **Neb.**—*Hertel v. Hertel*, 97 Neb. 260, 149 N. W. 795; *Williams v. Miles*, 63 Neb. 859, 865, 89 N. W. 451; *Wilson v. Coburn*, 35 Neb. 530, 53 N. W. 466. **N. H.**—*Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38; *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213. **N. Y.**

In re Spingarn's Estate, 159 N. Y. Supp. 605; *Matter of Halsey*, 13 Abb. N. C. 353. **S. C.**—*Turner v. Malone*, 24 S. C. 398. **Vt.**—*Missionary Society v. Eells*, 68 Vt. 497, 35 Atl. 463, 54 Am. St. Rep. 888.

12. *Ex parte Sharp*, 15 Idaho 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886; *Weems v. Masterson*, 80 Tex. 45, 54, 15 S. W. 590.

[a] The jurisdiction (1) of the probate court must be shown by the record of its proceedings. *Taber v. Douglas*, 101 Me. 363, 64 Atl. 653. (2) But to require that everything necessary to authorize them to act must appear on their records would be to deny them general jurisdiction in probate matters. *Weems v. Masterson*, 80 Tex. 45, 54, 15 S. W. 590.

13. See generally the title "Jurisdiction."

14. **Cal.**—*Clarke v. Perry*, 5 Cal. 58, 63 Am. Dec. 82. **Colo.**—*Marshall v. Marshall*, 11 Colo. App. 505, 53 Pac. 617. **Idaho.**—*State ex rel. Peterson v. Dunlap*, 28 Idaho 784, 156 Pac. 1141, Ann. Cas. 1918A, 546. **Kan.**—*Byerly v. Eadie*, 95 Kan. 400, 148 Pac. 757. **La.**—*Schiek v. Corbett*, 52 La. Ann. 180, 26 So. 862. **Mass.**—*Peters v. Peters*, 8 Cush. 529; *Smith v. Rice*, 11 Mass. 507. **Mo.**—*Ford v. Talmage*, 36 Mo. App. 65. **Mont.**—*In re Pepin's Estate*, 53 Mont. 240, 163 Pac. 104; *In re Dolenty's Estate*, 53 Mont. 33, 161 Pac. 524; *Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82. **N. J.**—*Mellor v. Kaighn*, 89 N. J. L. 543, 99 Atl. 207. **N. Y.**—*In re McDonald's Estate*, 211 N. Y. 272, 105 N. E. 407. **Ohio.**—*Saxton v. Seiberling*, 48 Ohio St. 554, 29 N. E. 179; *Davis v. Davis*, 11 Ohio St. 386. **Pa.**—*In re Ake's Appeal*, 74 Pa. 116. **S. C.**—*Turner v. Malone*, 24 S. C. 398. **Vt.**—*White v. White*, 99 Atl. 305.

as are conferred upon them by constitution and statute,¹⁵ and such auxiliary and incidental powers as are necessary to carry into effect the powers expressly granted.¹⁶ In some states, probate courts are given jurisdiction over some matters of a non probate character.¹⁷

But see *infra*, this section, and 15 STANDARD PROC. 431, 435.

15. **Colo.**—*Marshall v. Marshall*, 11 Colo. App. 505, 53 Pac. 617. **Conn.** *Massey v. Foote*, 101 Atl. 499; *Schutte v. Douglass*, 90 Conn. 529, 536, 97 Atl. 906. **Ill.**—*Chapman v. American Surety Co.*, 261 Ill. 594, 104 N. E. 247. **Me.**—*In re Thompson*, 116 Me. 473, 102 Atl. 303. **Md.**—*Fidelity & Deposit Co. v. Freud*, 115 Md. 29, 80 Atl. 603. **Mich.**—*Grady v. Hughes*, 64 Mich. 540, 31 N. W. 438. **Mo.**—*State ex rel. Baker v. Bird*, 253 Mo. 569, 162 S. W. 119, Ann. Cas. 1915C, 353; *Ford v. Talmage*, 36 Mo. App. 65. **Mont.** *In re Tuohy's Estate*, 33 Mont. 230, 83 Pac. 486; *State ex rel. Donovan v. District Court*, 27 Mont. 415, 71 Pac. 401. **N. J.**—*In re Struble's Estate*, 87 N. J. Eq. 311, 101 Atl. 177; *In re Fritz's Estate*, 83 N. J. Eq. 610, 91 Atl. 1017; *Ludlow v. Ludlow*, 4 N. J. L. 189. **N. Y.**—*In re Martin's Estate*, 211 N. Y. 328, 105 N. E. 546; *Sanders v. Soutter*, 126 N. Y. 193, 200, 27 N. E. 263; *Matter of Halsey*, 13 Abb. N. E. 353. **Ohio.**—*Saxton v. Seiberling*, 48 Ohio St. 554, 29 N. E. 179. **Pa.**—*In re Hazard's Estate*, 253 Pa. 447, 98 Atl. 678; *In re Cutler's Estate*, 225 Pa. 167, 73 Atl. 1111. **R. I.**—*Moulton v. Smith*, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728. **Tex.**—*Francis v. Northcote*, 6 Tex. 185; *United States Fidelity & G. Co. v. Buhner*, 61 Tex. Civ. App. 372, 132 S. W. 505.

Compare 15 STANDARD PROC. 432.

[a] From the common law, the probate courts derive none of their powers. **Me.**—*In re Thompson*, 116 Me. 473, 102 Atl. 303. **Mich.**—*Grady v. Hughes*, 64 Mich. 540, 31 N. W. 438. **Minn.**—*State ex rel. Matteson v. Probate Court*, 84 Minn. 289, 87 N. W. 783. **Mo.**—*Butler v. Lawson*, 72 Mo. 227; *Ford v. Talmage*, 36 Mo. App. 65; *Elliott's Estate v. Wilson*, 27 Mo. App. 218. **R. I.**—*Moulton v. Smith*, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728. But see *Hayes v. Hayes*, 48 N. H. 219; *Morgan v. Dodge*, 44 N. H. 255, holding the probate court has an extensive jurisdiction not conferred in express terms but implied by reference to the powers and practice

of the ecclesiastical courts in England.

[b] Powers cannot be extended by implication or construction. *Flater v. Weaver*, 108 Md. 668, 677, 71 Atl. 309.

[c] The term "probate matters" in a grant of jurisdiction does not include the supervision of testamentary trusts. *In re Mortenson's Estate*, 248 Ill. 520, 94 N. E. 120.

16. **Colo.**—*Marshall v. Marshall*, 11 Colo. App. 505, 53 Pac. 617. **Conn.** *Massey v. Foote*, 101 Atl. 499; *Schutte v. Douglass*, 90 Conn. 529, 536, 97 Atl. 906. **Me.**—*In re Thompson*, 116 Me. 473, 102 Atl. 303. **Mont.**—*In re Dolenty's Estate*, 53 Mont. 33, 161 Pac. 524; *In re Tuohy's Estate*, 33 Mont. 230, 83 Pac. 486. **N. Y.**—*In re Martin's Estate*, 211 N. Y. 328, 105 N. E. 546; *Sanders v. Soutter*, 126 N. Y. 193, 200, 27 N. E. 263; *In re Kent*, 92 Misc. 113, 155 N. Y. Supp. 383. **Ohio.** *Sayler v. Simpson*, 45 Ohio St. 141, 12 N. E. 181; *Davis v. Davis*, 11 Ohio St. 386; *Jones v. Standard Home & Sav. Assn. Co.*, 10 Ohio Cir. Dec. 41, 18 Ohio Cir. Ct. 189. **Pa.**—*In re Cutler's Estate*, 225 Pa. 167, 73 Atl. 1111; *In re Ake's Appeal*, 74 Pa. 116.

[a] Jurisdiction by implication is not favored in probate courts. To be sustained the implication must be extremely clear. *In re Davis' Will*, 99 Misc. 447, 164 N. Y. Supp. 143.

[b] As to the ordinary routine business connected with the settlement and distribution of an estate probate courts have incidental powers. *Ford v. Talmage*, 36 Mo. App. 65.

17. See *Smith v. Clyne*, 16 Idaho 466, 101 Pac. 819; *Garmire v. Willy*, 36 Neb. 340, 54 N. W. 562; *Mushrush v. Devereaux*, 20 Neb. 49, 28 N. W. 847; *Stout v. Rapp*, 17 Neb. 462, 23 N. W. 364.

[a] Criminal Jurisdiction. — See *State v. Frederic*, 28 Idaho 709, 155 Pac. 977; *State v. Drury*, 25 Idaho 787, 139 Pac. 1129; *Fitzgerald v. Com.*, 5 Allen (Mass.) 509.

Jurisdiction over juvenile delinquents, see 12 STANDARD PROC. 862, 863.

[b] Statute extending jurisdiction beyond constitutional grant, held un-

Generally they are courts of superior and general jurisdiction as to the subjects over which they have exclusive original jurisdiction,¹⁸ although in some states even as to such matters they are regarded as courts of special and not general jurisdiction.¹⁹ Superior courts, when sitting in probate, are held by some authorities to have only the statutory powers of a probate court,²⁰ while others hold that they can exercise all the powers of a court of general jurisdiction with power to determine every matter necessary to the due administration of the estate.²¹

constitutional. *Clayton v. Utah Territory*, 132 U. S. 632, 10 Sup. Ct. 190, 33 L. ed. 455; *Ferris v. Higley*, 20 Wall. (U. S.) 375, 22 L. ed. 383 (under Utah practice); *Garrett v. London & L. Fire Ins. Co.*, 15 Okla. 222, 81 Pac. 421.

In escheat proceedings, see 8 STANDARD PROC. 665.

18. *Ala.*—*Milbra v. Sloss-Sheffield S. & I. Co.*, 182 Ala. 622, 62 So. 176, 46 L. R. A. (N. S.) 274. *Ark.*—*Arkansas Valley Trust Co. v. Young*, 128 Ark. 42, 195 S. W. 36, 40; *Meredith v. Scallion*, 51 Ark. 361, 11 S. W. 516, 3 L. R. A. 812. *Cal.*—*In re Estate of Bell*, 168 Cal. 253, 141 Pac. 1179; *Harter Co. v. Geisel*, 18 Cal. App. 282, 122 Pac. 1094. *Colo.*—*Miller v. Weston*, 25 Colo. App. 231, 138 Pac. 424. *Ga.*—*Stuckey v. Watkins*, 112 Ga. 268, 37 S. E. 401, 81 Am. St. Rep. 47. *Kan.*—*Bennett v. Arrowsmith*, 101 Kan. 143, 165 Pac. 812. *Ky.*—*Master's Exr. v. Brinker*, 87 Ky. 1, 7 S. W. 158. *Mass.*—*Clarke v. Andover*, 207 Mass. 91, 98, 92 N. E. 1013. *Mich.*—*Mitchell v. Bay Probate Judge*, 155 Mich. 550, 119 N. W. 916; *Reason v. Jones*, 119 Mich. 672, 78 N. W. 899; *Schlee v. Darrow's Estate*, 65 Mich. 362, 373, 32 N. W. 717; *Church v. Holcomb*, 45 Mich. 29, 7 N. W. 167. *Minn.*—*State ex rel. Benz v. Probate Court*, 133 Minn. 124, 155 N. W. 966, 158 N. W. 234; *Fiske v. Lawton*, 124 Minn. 84, 144 N. W. 475. *Mo.*—*Sherwood v. Baker*, 105 Mo. 472, 16 S. W. 938; 24 Am. St. Rep. 339. *Neb.*—*Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861; *Williams v. Miles*, 63 Neb. 859, 89 N. W. 451. *N. H.*—*Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38. *N. J.*—*Mellor v. Kaighn*, 89 N. J. L. 543, 99 Atl. 207 (orphan's court); *In re Hathorn's Will* (N. J. Eq.), 97 Atl. 262; *In re Cassell's Will*, 80 N. J. Eq. 163, 82 Atl. 920. *Okla.*—*Holmes v. Holmes*, 27 Okla. 140, 111 Pac. 220, 30 L. R. A.

(N. S.) 920. *Ore.*—*Hillman v. Young*, 64 Ore. 73, 127 Pac. 793, 129 Pac. 124. *Tex.*—*Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550; *Shook v. Journey* (Tex. Civ. App.), 149 S. W. 406. *Wash.*—*Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433; *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147. *Wis.*—*Brook v. Chappell*, 34 Wis. 405.

See 15 STANDARD PROC. 431, 435.

[a] Probate courts have plenary powers in all matters within their jurisdiction. *Minn.*—*State ex rel. Benz v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234. *Neb.*—*Williams v. Miles*, 63 Neb. 859, 89 N. W. 451. *N. J.*—*In re Hathorn's Will* (N. J. Eq.), 97 Atl. 262. *Wash.*—*Ritchie v. Trumbull*, 89 Wash. 389, 154 Pac. 816; *In re Martin's Estate*, 82 Wash. 226, 144 Pac. 42. *Wis.*—*Brook v. Chappell*, 34 Wis. 405, 413; *Tryon v. Farnsworth*, 30 Wis. 577.

[b] A conveyance of property held by an administrator in trust is within the jurisdiction of the probate court. *Ritchie v. Trumbull*, 89 Wash. 389, 154 Pac. 816.

19. *Saylor v. Simpson*, 45 Ohio St. 141, 12 N. E. 181; *Davis v. Davis*, 11 Ohio St. 386. See 15 STANDARD PROC. 437, note 82.

20. *Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82; *State ex rel. Donovan v. District Court*, 27 Mont. 415, 71 Pac. 401. See also *Hutton v. Laws*, 55 Iowa 710, 8 N. W. 642.

21. *U. S.*—*Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507, construing California statute. *Cal.*—*In re Estate of Bell*, 168 Cal. 253, 141 Pac. 1179; *Estate of Davis*, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105; *Burris v. Kennedy*, 108 Cal. 231, 41 Pac. 458. *Wash.*—*State ex rel. Neal v. Kauffman*, 86 Wash. 172, 149 Pac. 656; *In re Martin's Estate*, 82 Wash.

Probate courts are given jurisdiction and power to probate wills,²² to appoint executors and administrators,²³ to hear claims against an estate,²⁴ to determine heirship,²⁵ to determine controversies as to advancements,²⁶ to order distribution of decedent's estates,²⁷ and to assign dower.²⁸ They are given jurisdiction over guardianship proceedings,²⁹ over property of insane persons,³⁰ over inquisition of insane persons and lunacy proceedings,³¹ over proceedings to set apart

226, 144 Pac. 42; *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147 (*overruling In re Alfstad's Estate*, 27 Wash. 175, 67 Pac. 593); *In re Williamson*, 75 Wash. 353, 134 Pac. 1066; *In re Sall*, 59 Wash. 539, 110 Pac. 32, 626; *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502.

[a] Superior courts are not made probate courts, but are made courts of general jurisdiction of "all matters of probate." *Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433.

[b] The superior court, while sitting in probate, is a court of general jurisdiction, having power to bring to its aid the full equitable and legal powers with which, as a superior court, it is invested. It has power to hear and determine in the mode provided by law all questions the determination of which is ancillary to a proper judgment. But it must follow the mode of procedure prescribed by statute and can only determine those questions arising in the estate which it is authorized to do. *In re Estate of Bell*, 168 Cal. 253, 141 Pac. 1179.

[c] The superior court exercises in probate matters a special and limited jurisdiction, in the sense that its jurisdiction is limited by the mode and procedure prescribed by the statute. *In re Ryder's Estate*, 141 Cal. 366, 74 Pac. 993.

[d] Procedure.—"When the court, sitting in a probate proceeding, discovers in a petition the statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder when an appearance has been made thereto, and then proceed to try it in a proper manner, as any other civil cause. The court may require the proceeding to be separately docketed, if, when the issues are formed, it appears to be such as should be thus docketed. . . . Under our liberal practice as to the form of actions, the petition could be treated as in the nature of a com-

plaint. The issues could be framed thereunder, and the cause tried without requiring another statement of the same facts under some other form or name. If it developed that it was not properly a probate proceeding, it would not be treated as such." *Filley v. Murphy*, 30 Wash. 1, 80 Pac. 107.

[e] The existence of a partnership may be determined on an application by the surviving partner to administer the estate, although denied by the administrator. *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147.

22. See the title "Wills."

23. See 6 STANDARD PROC. 502.

Appointment of administrators for estates of tribal Indians, see 12 STANDARD PROC. 41.

24. *In re Jarboe's Estate*, 227 Mo. 59, 127 S. W. 26. See 6 STANDARD PROC. 526, et seq.

25. See 12 STANDARD PROC. 918.

26. See 12 STANDARD PROC. 932.

27. See 6 STANDARD PROC. 626.

28. See 7 STANDARD PROC. 867.

29. See 10 STANDARD PROC. 779, and 8 STANDARD PROC. 408.

Proceedings to terminate guardianship, see 10 STANDARD PROC. 809.

Jurisdiction of accountings and settlements between guardian and ward, see 10 STANDARD PROC. 826.

Jurisdiction over actions relative to guardianship matters, see 10 STANDARD PROC. 856.

Jurisdiction over claims against the estate of wards, see 10 STANDARD PROC. 853.

Guardianship of incompetents, see 12 STANDARD PROC. 14.

Guardianship of insane persons, see 13 STANDARD PROC. 498.

Guardianship of Indians, see 12 STANDARD PROC. 41.

Appointment and settlement in vacation, etc., see 16 STANDARD PROC. 630.

30. See 13 STANDARD PROC. 438, 573.

31. See 13 STANDARD PROC. 446.

homesteads,³² and to sell property of infants,³³ and insane persons.³⁴

B. EQUITABLE POWERS AND JURISDICTION.—Probate courts are not courts of equity,³⁵ and have no general chancery jurisdiction, and no jurisdiction over purely equitable matters.³⁶ But, in the performance of duties devolved upon them, they often administer according to equitable principles, and have, it has been held, full equity powers necessary to the settlement and distribution of the estate.³⁷ As a

32. See 11 STANDARD PROC. 387.

33. See 12 STANDARD PROC. 812.

In vacation, see 16 STANDARD PROC. 630.

34. See 13 STANDARD PROC. 573.

35. *Jones v. Graham*, 36 Ark. 383, 405; *In re Estate of Connor*, 254 Mo. 65, 80, 162 S. W. 252, 49 L. R. A. (N. S.) 1108.

36. **U. S.**—*Clayton v. Utah Territory*, 132 U. S. 632, 10 Sup. Ct. 190, 33 L. ed. 455; *Ferris v. Higley*, 20 Wall. 375, 22 L. ed. 383 (under Utah practice); *Eddy v. Eddy*, 168 Fed. 590, 93 C. C. A. 586. **Ga.**—*Pope v. Lee*, 138 Ga. 536, 75 S. E. 632. **Idaho.** *Dewey v. Schreiber Imp. Co.*, 12 Idaho 280, 85 Pac. 921, holding a statute giving them jurisdiction to enforce liens to be unconstitutional. **Ill.**—*Stinson v. Andrews*, 166 Ill. App. 92; *Teel v. Mills*, 117 Ill. App. 97; *Wheeler v. Wheeler*, 105 Ill. App. 48; *Northern Trust Co. v. Marsh*, 98 Ill. App. 596, 605. **Kan.**—*Ross v. Woollard*, 75 Kan. 383, 89 Pac. 680, the probate court has no equitable jurisdiction. **Mass.**—*Bailey v. Dillon*, 186 Mass. 244, 71 N. E. 538, 66 L. R. A. 427. **Minn.**—*State ex rel. Union Nat. Bank v. Probate Court*, 103 Minn. 325, 115 N. W. 173. **Mo.**—*State ex rel. Fleming v. Shackelford*, 263 Mo. 52, 172 S. W. 347; *In re Estate of Connor*, 254 Mo. 65, 80, 162 S. W. 252, 49 L. R. A. (N. S.) 1108; *Lietman's Estate v. Lietman*, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374; *In re Glover's Estate*, 127 Mo. 153, 29 S. W. 982; *Burckhardt v. Helfrich's Admr.*, 77 Mo. 376. **Neb.**—*In re Wilson's Estate*, 97 Neb. 780, 151 N. W. 316; *Mattheis v. Fremont E. & M. V. R. Co.*, 53 Neb. 681, 74 N. W. 30; *Wilson v. Coburn*, 35 Neb. 530, 53 N. W. 466. **N. Y.**—*Matter of Schnabel*, 202 N. Y. 134, 95 N. E. 698; *In re Ziegler*, 161 App. Div. 589, 146 N. Y. Supp. 881. **Ohio.**—*Gilliland v. Sellers' Admrs.*, 2 Ohio St. 223. **Okl.**—*State Capital Printing Co. v. Grant*, 8 Okla. 229, 56 Pac. 957. **Ore.**—*Hillman v. Young*, 64 Ore. 73, 127 Pac. 793, 129

Pac. 124. **Pa.**—*Power v. Grogan*, 232 Pa. 387, 81 Atl. 416; *In re Ake's Appeal*, 74 Pa. 116.

[a] Probate courts have no jurisdiction of suits (1) to enforce liens (*Dewey v. Schreiber Imp. Co.*, 12 Idaho 280, 85 Pac. 921), or (2) to order an accounting (*Northern Trust Co. v. Marsh*, 98 Ill. App. 596, 605), or (3) to determine conflicting claims to the income of a trust and compel execution of the trust according to the will (*Hayes v. Hayes*, 48 N. H. 219), or (4) to set aside an agreement not to contest a will (*Tell v. Mills*, 117 Ill. App. 97), or (5) to appoint a receiver (*Miss.*—*Scott v. Searles*, 5 Smed. & M. 25. **Okl.**—*Garrett v. National Fire Ins. Co.*, 15 Okla. 226, 81 Pac. 422; *Garrett v. London & L. Fire Ins. Co.*, 15 Okla. 222, 81 Pac. 421. **Pa.**—*Power v. Grogan*, 232 Pa. 387, 81 Atl. 416), or (6) to establish and enforce a trust (*In re O'Callaghan's Appeal*, 64 N. J. Eq. 287, 51 Atl. 64), or (7) to cancel a creditor's mortgage (*Gilliland v. Sellers' Admrs.*, 2 Ohio St. 223), or (8) to entertain actions to annul and vacate judgments (*State Capital Printing Co. v. Grant*, 8 Okla. 239, 56 Pac. 957; *Weyand v. Weller*, 39 Pa. 443), or (9) to classify a demand against the estate on equitable grounds contrary to statute. *Burckhardt v. Helfrich's Admr.*, 77 Mo. 376.

[b] A continuing trust cannot be administered by an orphan's court. *In re Hagerstown Trust Co.*, 119 Md. 224, 86 Atl. 982, citing local cases.

[c] Settlement of accounts of partnership between decedent and another is not within jurisdiction of a probate court. *Morris v. Stroude*, 123 Ark. 313, 185 S. W. 451.

37. **Cal.**—*In re Estate of Bell*, 168 Cal. 253, 141 Pac. 1179; *Toland v. Earl*, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100; *In re Heeney's Estate*, 3 Cal. App. 548, 86 Pac. 842. **Colo.**—*Marshall v. Marshall*, 11 Colo. App. 505, 519, 53 Pac. 617. **Conn.** *In re Ashmead's Appeal*, 27 Conn. 241;

general rule a probate court has no jurisdiction to entertain suits the sole basis of which is a demand for equitable relief, even though it may incidentally pertain to some matter of probate jurisdiction.³⁸ But in some states where the probate courts are given complete and exclusive jurisdiction in probate matters, it has been held that suits in equity regarded as a part of the proceedings for the settlement of decedent's estates and having no further object than to procure or advance such settlement, must be brought in the probate court.³⁹

Bailey v. Strong, 8 Conn. 278. **Ga.**—Lester v. Toole, 20 Ga. App. 381, 93 S. E. 55, the power of the court of ordinary is as broad as that of a court of equity in the settlement of an estate. **Ill.**—Rowden v. Meisinger, 164 Ill. App. 125; Wheeler v. Wheeler, 105 Ill. App. 48; Northern Trust Co. v. Marsh, 98 Ill. App. 596, 605. **Ind.**—Chamness v. Chamness, 53 Ind. App. 225, 101 N. E. 323, circuit court in probate can determine legal or equitable questions. **Mich.**—Brooks v. Hargrave, 179 Mich. 136, 146, 146 N. W. 325. **Minn.**—State ex rel. Benz v. Probate Court, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234. **Mo.**—In re Estate of Connor, 254 Mo. 65, 80, 162 S. W. 252, 49 L. R. A. (N. S.) 1108; State ex rel. Baker v. Bird, 253 Mo. 569, 580, 162 S. W. 119, Ann. Cas. 1915C, 353; Hess v. Sandner (Mo. App.), 198 S. W. 1125; Graham v. Wilson (Mo. App.), 185 S. W. 1160. **Neb.**—In re Wilson's Estate, 97 Neb. 780, 151 N. W. 316; Williams v. Miles, 63 Neb. 859, 89 N. W. 451; Wilson v. Coburn, 35 Neb. 530, 53 N. W. 466. **N. Y.**—In re Hoffman's Will, 165 App. Div. 252, 150 N. Y. Supp. 776 (surrogates' courts have only such equitable powers as are necessary for discharge of statutory duties); In re Kenny, 92 Misc. 320, 156 N. Y. Supp. 827; In re Brewster, 92 Misc. 339, 156 N. Y. Supp. 588, under express statute. **Pa.**—In re Ake's Appeal, 74 Pa. 116; In re Dundas' Appeal, 64 Pa. 325, the orphans' court is strictly a court of equity within the limits of its jurisdiction. **Wis.**—Brook v. Chappell, 34 Wis. 405.

[a] A probate court may exercise all the powers of a court of general jurisdiction, either legal or equitable, which pertain to a subject over which it is given jurisdiction. Williams v. Miles, 63 Neb. 859, 866, 89 N. W. 451.

[b] A superior court sitting in probate may bring to its aid the full

equitable and legal powers with which, as the superior court, it is invested. In re Estate of Bell, 168 Cal. 253, 141 Pac. 1179; Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458.

[c] County courts have only such equity jurisdiction as is incidental to their general powers of adjudicating claims against estates. But their equitable powers do not extend to cases where third parties must be brought into court and conflicting interests composed and settled. Marshall v. Marshall, 11 Colo. App. 505, 53 Pac. 617.

[d] The ancillary powers of an equity court are not given to the orphan's court. Brinker v. Brinker, 7 Pa. 53.

[e] The rule in equity (1) that when rightfully possessed of a cause, it can make a complete end of the controversy does not apply to orphans' courts. In re Ake's Appeal, 74 Pa. 116. (2) But a superior court sitting in probate has jurisdiction to decide the whole controversy. Sloan v. West, 63 Wash. 623, 116 Pac. 272.

[f] Jurisdiction to compel specific performance of contracts of decedents for sale of real estate is conferred by statute, but this does not authorize a decree against the estate for the balance due when the amount of purchase money was overpaid. In re Ake's Appeal, 74 Pa. 116.

[g] An application to secure return of purchase money paid at a guardian's sale, for fraud, is within the jurisdiction of the probate court which ordered the sale. Stanton v. Johnson's Estate, 177 Mo. App. 54, 163 S. W. 296.

[h] The court cannot violate or disregard a statute in applying equitable principles. Graham v. Wilson (Mo. App.), 185 S. W. 1160.

38. State ex rel. Baker v. Bird, 253 Mo. 569, 580, 162 S. W. 119, Ann. Cas. 1915C, 353. See also Hess v. Sandner (Mo. App.), 198 S. W. 1125.

39. Youngson v. Bond, 69 Neb. 356,

Statutes sometimes give probate courts concurrent jurisdiction in equity of all matters relative to the administration of estates, to wills and testamentary trusts.⁴⁰

C. OVER REAL AND PERSONAL PROPERTY.—Probate courts have no constitutional or inherent jurisdiction over land for any purpose whatever, but have only such special constitutional power as is expressly conferred upon them.⁴¹ It is a general rule that probate courts have no jurisdiction to try disputed questions of title to real⁴² or

95 N. W. 700; *Sprinkle v. Hutchinson*, 66 N. C. 450.

[a] **A suit to construe a will** (1) to enable the representative to settle the estate is within the exclusive jurisdiction of the county court. *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700. To same effect, *Swasey v. Jaques*, 144 Mass. 135, 10 N. E. 758, 59 Am. Rep. 65. *Compare Ford v. Talmage*, 36 Mo. App. 65. See the title "Wills." (2) But a suit by trustees under a will after settlement of the estate, to obtain a construction of the provisions of the will relating to their trust, is within the jurisdiction of an equity court. *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700.

40. *Abbott v. Gaskins*, 181 Mass. 501, 63 N. E. 933 (construing statute); *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560; *Bennett v. Kimball*, 175 Mass. 199, 55 N. E. 893; *Nathan v. Nathan*, 166 Mass. 294, 44 N. E. 221; *Swasey v. Jaques*, 144 Mass. 135, 10 N. E. 758, 59 Am. Rep. 65.

[a] **Bills not entertainable by the superior or the supreme judicial court** cannot be entertained by the probate court. *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560.

[b] **Where Relief Can Be Granted on Probate Side.**—The probate court on its equity side cannot do anything with reference to trusts which it can do under its probate jurisdiction only. *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560.

[c] **Accounting of Trustees.**—Testamentary trustees appointed by a probate court have a right to have their accounts adjusted on the probate side of the probate court. *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560, citing local cases.

41. *Hollman v. Bennett*, 44 Miss. 322.

Jurisdiction to decree partition, see the title "Partition."

42. U. S.—*Rich v. Victoria Copper*

Min. Co., 147 Fed. 380, 77 C. C. A. 558. Cal.—*In re Klumpke's Estate*, 167 Cal. 415, 139 Pac. 1062; *In re Estate of Niccolls*, 164 Cal. 368, 373, 129 Pac. 278; *Anderson v. Fisk*, 41 Cal. 308. Colo.—*Marshall v. Marshall*, 11 Colo. App. 505, 511, 53 Pac. 617. Haw.—See *Keahi v. Bishop*, 3 Hawaii 546. Idaho.—*In re Blackinton's Estate*, 29 Idaho 310, 158 Pac. 492. Ia. *Mullen v. Callanan*, 167 Iowa 367, 149 N. W. 516; *Matheson v. Matheson*, 139 Iowa 511, 117 N. W. 755, 18 L. R. A. (N. S.) 1167. Kan.—*Byerly v. Eadie*, 95 Kan. 400, 148 Pac. 757; *Aetna Bldg. & Loan Assn. v. Hobson*, 82 Kan. 857, 108 Pac. 79; *Cooper v. Armstrong*, 3 Kan. 78. La.—*Schick v. Corbett*, 52 La. Ann. 180, 26 So. 862; *Kemp v. Kemp*, 15 La. 517. Md. *Wingert v. State*, 125 Md. 536, 94 Atl. 166. Mich.—*Mitchell v. Bay Probate Judge*, 155 Mich. 550, 119 N. W. 916. Mont.—*In re Dolenty's Estate*, 53 Mont. 33, 161 Pac. 524. Neb. *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861 (under statute); *Best v. Grolapp*, 69 Neb. 811, 96 N. W. 641, 99 N. W. 837; *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700; *Garmire v. Willy*, 36 Neb. 340, 54 N. W. 562. N. H.—*Pickering v. Pickering*, 21 N. H. 537. N. Y.—*Matter of Trotter's Will*, 182 N. Y. 465, 75 N. E. 305 (under statute); *Hastrich v. Pilcher*, 171 App. Div. 470, 157 N. Y. Supp. 613; *In re Lampson's Will*, 22 Misc. 198, 49 N. Y. Supp. 576. Pa.—*In re Ludwick's Estate*, 225 Pa. 548, 100 Atl. 448, 133 Am. St. Rep. 892; *In re Spencer's Estate*, 227 Pa. 469, 76 Atl. 172. Tex.—*Groesbeck v. Groesbeck*, 78 Tex. 664, 14 S. W. 792; *Hamm v. Hutchins*, 19 Tex. Civ. App. 209, 46 S. W. 873.

Jurisdiction to construe wills devising realty, see the title "Wills."

[a] "The power to decide what shall be done with property owned by a decedent does not include the power to decide what property the decedent

personal⁴³ property. But, if the question of title arises incidentally or collaterally,⁴⁴ or if the present title is not involved,⁴⁵ the probate court has jurisdiction. Generally the validity of any claim of title adverse to that of the estate, cannot be determined in a probate court,⁴⁶ but under some circumstances the question of ownership may

owned." *Powers v. Scharling*, 76 Kan. 855, 92 Pac. 1099.

[b] Controversies between heirs and persons claiming from them by reason of transactions between them cannot be determined by a probate court. *Dobberstein v. Murphy*, 44 Minn. 526, 47 N. W. 171; *Farnham v. Thompson*, 34 Minn. 330, 26 N. W. 9.

43. **Ark.**—*Fowler v. Frazier*, 116 Ark. 350, 172 S. W. 875; *Shane v. Dickson*, 111 Ark. 353, 357, 163 S. W. 1140. **Kan.**—*Yockey v. Yockey*, 95 Kan. 519, 148 Pac. 665; *Gille v. Emmons*, 91 Kan. 462, 138 Pac. 608. **Md.** *Pratt v. Hill*, 124 Md. 252, 92 Atl. 543; *Daugherty v. Daugherty*, 82 Md. 229, 33 Atl. 541. **Mich.**—*Mitchell v. Bay Probate Judge*, 155 Mich. 559, 119 N. W. 916. **N. J.**—*Heyer v. Sullivan* (N. J. Eq.), 102 Atl. 248; *In re Campfield's Estate* (N. J. Eq.), 98 Atl. 381. **N. Y.**—*Fribourg v. Emigrants Ind. Sav. Bank*, 168 App. Div. 816, 154 N. Y. Supp. 532; *In re Hoffman's Will*, 165 App. Div. 252, 150 N. Y. Supp. 776; *In re Hess' Estate*, 85 Misc. 659, 148 N. Y. Supp. 1054. **Pa.**—*In re Williams' Estate*, 236 Pa. 259, 84 Atl. 848; *Odd Fellows' Sav. Bank's Appeal*, 123 Pa. 356, 16 Atl. 606. **Tex.**—*White v. White*, 11 Tex. Civ. App. 113, 32 S. W. 48.

[a] Power to try title to personalty not in possession of deceased at his death is not within jurisdiction of a surrogate's court. *In re Hoffman's Will*, 165 App. Div. 252, 150 N. Y. Supp. 776.

[b] A delivery to the owner of property wrongfully taken by the administrator as part of the estate is not within the jurisdiction of a surrogate. *Marston v. Paulding*, 10 Paige (N. Y.) 40.

[c] A summary proceeding in a probate court for discovery and to compel delivery of property is not a proper remedy to try contested rights to property as between the representative of the estate and others. *Moore v. Brandenburg*, 248 Ill. 232, 240, 93 N. E. 733, 140 Am. St. Rep. 206; *Martin v. Martin*, 170 Ill. 18, 48 N. E. 694; *Dinsmoor v. Bressler*, 164 Ill. 211,

221, 45 N. E. 1086; *Humbarger v. Humbarger*, 72 Kan. 412, 83 Pac. 1095, 115 Am. St. Rep. 204.

44. **Kan.**—*Hartwig v. Flynn*, 79 Kan. 595, 100 Pac. 642. **La.**—*Schick v. Corbett*, 52 La. Ann. 180, 26 So. 862. **Neb.**—*Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700; *Stout v. Rapp*, 17 Neb. 462, 23 N. W. 364.

45. *Morse v. Morse*, 42 Ind. 365; *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700.

[a] The construction of a will and the determination of the effect of a devise of land so far as is necessary to give proper directions to a personal representative do not involve the present title to land within the rule. *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700. See generally the title "Wills."

[b] In determining who are the heirs of a decedent, the court does not determine title to property. *Keahi v. Bishop*, 3 Hawaii 546, 552; *Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861.

46. **Ark.**—*Shane v. Dickson*, 111 Ark. 353, 357, 163 S. W. 1140; *Fancher v. Kenner*, 110 Ark. 117, 161 S. W. 166. **Cal.**—*In re Klumpke's Estate*, 167 Cal. 415, 139 Pac. 1062; *In re Estate of Niccolls*, 164 Cal. 368, 373, 129 Pac. 278, 280. **Kan.**—*Gille v. Emmons*, 91 Kan. 462, 138 Pac. 608; *Hartwig v. Flynn*, 79 Kan. 595, 100 Pac. 642. **Md.**—*Pratt v. Hill*, 124 Md. 252, 92 Atl. 543; *Fowler v. Brady*, 110 Md. 204, 73 Atl. 15. **Mo.**—*Garver's Estate v. Richardson*, 77 Mo. App. 459. **Ore.** *Harrington v. Jones*, 53 Ore. 237, 99 Pac. 935. **Pa.**—See *In re Williams' Estate*, 236 Pa. 259, 84 Atl. 848. **Tex.** *Wise v. O'Malley*, 60 Tex. 588. *Wash.* *Stewart v. Lohr*, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150.

[a] Either against an administrator claiming the property in his own right or a stranger to the estate, title to land or personalty cannot be tried in a probate court. *Mitchell v. Bay Probate Judge*, 155 Mich. 550, 119 N. W. 916.

be determined by such a court for certain purposes at least,⁴⁷ as where the property has been made a part of the estate and there is no substantial dispute,⁴⁸ or the claimant has voluntarily submitted his claim to the probate court.⁴⁹ Claims to property as between those interested in the estate may be adjudicated,⁵⁰ and the *prima facie* title of the estate to property may be determined in a proceeding to compel an inventory of omitted property.⁵¹

A probate court can order the sale of land belonging to the estate to pay debts of the estate,⁵² and set aside a sale of real estate made under a testamentary power.⁵³ But after property has been set apart as a homestead, the probate court ceases to have jurisdiction over it.⁵⁴

D. OVER CLAIMS AGAINST THIRD PERSONS.—The probate court has no jurisdiction to determine the validity of a debt by a third person to the estate.⁵⁵

IV. JURISDICTION OF COURTS OF EQUITY AND PROBATE COMPARED.—A. GENERALLY.—Equity has a jurisdiction of probate matters more or less extensive, depending upon the statutes of the forum.⁵⁶ The constitutions and statutes creating probate courts

47. See *In re Williams' Estate*, 236 Pa. 259, 84 Atl. 848.

[a] On a petition to compel a former administrator to deliver certain property to his successor the court may determine whether the property is his individual property or the property of the estate. *Filley v. Murphy*, 31 Wash. 1, 70 Pac. 107.

48. *In re Williams' Estate*, 236 Pa. 259, 84 Atl. 848, where the representative wrongfully parted with the property to one whose title was only colorable.

[a] A mere denial of ownership by the deceased of property in his possession will not oust the probate court of jurisdiction. The court may investigate to ascertain if the denial is in good faith and if a substantial dispute exists. But it cannot go beyond that. *In re Williams' Estate*, 236 Pa. 259, 271, 84 Atl. 848; *In re Cutler's Estate*, 225 Pa. 167, 73 Atl. 1111.

49. *In re Turner's Estate*, 244 Pa. 568, 90 Atl. 916; *In re Williams' Estate*, 236 Pa. 259, 84 Atl. 848 (reviewing local cases); *In re Hermann's Estate*, 226 Pa. 543, 75 Atl. 731; *In re Crosetti's Estate*, 211 Pa. 490, 60 Atl. 1081.

50. Ill.—*In re Bennett's Estate*, 168 Ill. App. 658. Minn.—*Farnham v. Thompson*, 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59. Wash.—*Stewart v. Lohr*, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150.

[a] Compare *Garver's Estate v. Richardson*, 77 Mo. App. 459, holding probate courts cannot pass upon the rights or claims of one heir or legatee to the portion coming to another either by law or devise.

[b] **Extent of Power.**—The power to determine claims to property as between those interested in the estate only goes to the extent of determining their relative interests as derived from the estate and not to an interest claimed adversely thereto. *Stewart v. Lohr*, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150.

[c] The probate court may determine to whom an estate passes, and in what proportions. *Farnham v. Thompson*, 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59.

51. See 6 STANDARD PROC. 525.

52. *Hamm v. Hutchins*, 19 Tex. Civ. App. 209, 46 S. W. 873. See 6 STANDARD PROC. 543.

53. *In re Schnebly's Estate*, 249 Pa. 208, 94 Atl. 827; *In re Spencer's Estate*, 227 Pa. 469, 76 Atl. 172; *In re Dundas' Appeal*, 64 Pa. 325.

54. See 11 STANDARD PROC. 389, 390, 397.

55. *In re Duffy*, 127 App. Div. 74, 111 N. Y. Supp. 77; *Meeks v. Meeks*, 122 App. Div. 461, 106 N. Y. Supp. 907; *Van Valkenburg v. Lasher*, 53 Hun 594, 6 N. Y. Supp. 775, 25 N. Y. St. 291.

56. See *Moulton v. Smith*, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728.

do not oust equity of its jurisdiction in connection with the administration and settlement of estates, except in so far as they have done so by express negative language or by necessary implication from affirmative language conferring exclusive power on the probate courts.⁵⁷ The statutes fall into three general classes, those in which equity and probate courts have concurrent jurisdiction, those in which probate courts have exclusive jurisdiction, and those in which equity may be said to have auxiliary jurisdiction. This classification is somewhat arbitrary and it is often difficult to classify a state, as the practice in each varies considerably.⁵⁸ But however extensive this jurisdiction may be, it does not extend to the probate of wills whether of real or personal estate,⁵⁹ or the setting aside of probate of wills,⁶⁰ or to the appointment⁶¹ and discharge⁶² of administrators and executors.

B. WHERE EQUITY AND PROBATE COURTS HAVE CONCURRENT JURISDICTION.⁶³—In the above-mentioned first class of states, probate courts and equity courts have concurrent jurisdiction of the administration of the estates of deceased persons, although frequently equity will refuse to exercise its jurisdiction unless there are special or extraordinary circumstances existing.⁶⁴ In states of this class,

As to equity jurisdiction, see generally 8 STANDARD PROC. 412, and 6 STANDARD PROC. 514, 595, 612.

[a] **Basis of Jurisdiction.**—(1) It was at one time supposed that this jurisdiction depended solely upon the doctrine of constructive trust. But it is now conceded that there are other sources of jurisdiction collaterally connected with this, such as the necessity of discovery, and taking accounts, existing frequently in very complicated forms. *Walker v. Morris*, 14 Ga. 323. (2) Equity jurisdiction was based upon the ground that the spiritual courts were unable to give adequate relief. *Toland v. Earl*, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100; *Rosenberg v. Frank*, 58 Cal. 387, 402.

Equity jurisdiction of wardships, see 8 STANDARD PROC. 408.

Equity jurisdiction in case of legacies charged on land, see 8 STANDARD PROC. 401.

Jurisdiction of accounts of personal representatives, see 6 STANDARD PROC. 595, 612.

Equity jurisdiction to construe wills, see the title "Wills."

57. 3 Pomeroy Eq. Jur., §1153, and the following cases: *Ala.*—*Gould v. Hayes*, 19 Ala. 438. *Cal.*—*Rosenberg v. Frank*, 58 Cal. 387. *Colo.*—*People ex rel. Porteus v. Barton*, 16 Colo. 75, 26 Pac. 149; *Marshall v. Marshall*, 11 Colo. App. 505, 53 Pac. 617. *Mont.*

Burns v. Smith, 21 Mont. 251, 264, 53 Pac. 742, 69 Am. St. Rep. 653. *S. C.* *Jordan v. Moses*, 10 S. C. 431. *Vt.* *Missionary Society v. Eells*, 68 Vt. 497, 35 Atl. 463, 54 Am. St. Rep. 888.

58. See *infra*, this section, and see also 3 Pomeroy Eq. Jur., §1154.

59. *Cal.*—*Rosenberg v. Frank*, 58 Cal. 387. *Md.*—*Bradley v. Bradley*, 117 Md. 515, 83 Atl. 446. *Neb.*—*Brown v. Webster*, 87 Neb. 788, 128 N. W. 635. *N. Y.*—*De Coppet v. Cone*, 199 N. Y. 56, 92 N. E. 411, 139 Am. St. Rep. 844. *Wis.*—*In re Jackman's Will*, 26 Wis. 104.

See the title "Wills."

[a] **Equity will not recognize or act upon a will** until it has been probated. *Pratt v. Hargreaves*, 76 Miss. 955, 25 So. 658, 71 Am. St. Rep. 551.

60. See 15 STANDARD PROC. 286.

61. *De Coppet v. Cone*, 199 N. Y. 56, 92 N. E. 411, 139 Am. St. Rep. 844; *Campbell v. Bank of Charleston*, 3 S. C. 384. *Compare Shown v. McMackin*, 9 Lea (Tenn.) 601, 42 Am. Rep. 680, under statute.

62. *Campbell v. Bank of Charleston*, 3 S. C. 384. See 6 STANDARD PROC. 514.

63. See 17 STANDARD PROC. 802.

64. *U. S.*—*Jennings v. Smith*, 232 Fed. 921, under Georgia practice. *Ala.* *Hurt v. Hurt*, 157 Ala. 126, 47 So. 260; *Rensford v. Joseph A. Magnus & Co.*, 150 Ala. 288, 42 So. 832. *Fla.*

when a chancery court once takes jurisdiction of an administration

Deans v. Wilcoxon, 25 Fla. 980, 1024, 7 So. 163; *Sanderson's Admr. v. Sanderson*, 17 Fla. 820, 831. See also *Roberts v. Coram*, 72 Fla. 225, 72 So. 668; *Benedict v. Wilmarth*, 46 Fla. 535, 35 So. 84. The constitution confers supervisory and appellate jurisdiction upon the circuit court as to matters pertaining to the probate jurisdiction of county judges. *Opitz v. Morgan*, 68 Fla. 469, 67 So. 67. **Ga.**—A court of equity and the court of ordinary have concurrent jurisdiction for the purpose of distributing estates. *McGowan v. Lufburrow*, 82 Ga. 523, 9 S. E. 427, 14 Am. St. Rep. 178; *Ewing v. Moses*, 50 Ga. 264 (over settlement of accounts); *Walker v. Morris*, 14 Ga. 323; *Lester v. Toole*, 20 Ga. App. 381, 93 S. E. 55. Equity will not interfere with the regular administration of estates, except upon the application of the representative either for the construction and direction or for marshalling of the assets; or upon the application of any person interested in the estate, where there is danger of loss or other injury to his interests. *Duggan v. Lamar*, 101 Ga. 760, 29 S. E. 19. See also *Thompson v. Orser*, 105 Ga. 482, 30 S. E. 626. **Ill.**—Equity will take jurisdiction to administer an estate only under unusual circumstances. *Patterson v. Patterson*, 251 Ill. 153, 95 N. E. 1051; *Moore v. Brandenburg*, 248 Ill. 232, 93 N. E. 733, 140 Am. St. Rep. 206; *Rowden v. Meisinger*, 164 Ill. App. 125; *Hill v. Tarbel*, 91 Ill. App. 272. **Miss.** The chancery court has the fullest jurisdiction to determine all matters relating to the administration of estates. *Owens v. Waddell*, 87 Miss. 310, 39 So. 459; *Hunt v. Potter*, 58 Miss. 96. See also *Buie v. Pollock*, 55 Miss. 309; *Brunini v. Pera*, 54 Miss. 649; *Bank of Mississippi v. Duncan*, 52 Miss. 740. But see *Green v. Creighton*, 10 Smed. & M. 159, 48 Am. Dec. 742. A chancery court administering an estate can hear and determine purely legal demands against the estate. *Hunt v. Potter*, 58 Miss. 96. See *Clopton v. Haughton*, 57 Miss. 787. **Mont.** Equity and probate courts have concurrent jurisdiction of a suit to enforce a contract to devise. *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653. **N. J.**—*Vaiden v. Edson*, 85 N. J. Eq. 184, 95 Atl. 980;

Vincent v. Vincent, 70 N. J. Eq. 272, 62 Atl. 700; *Coddington v. Bispham's Exrs.*, 36 N. J. Eq. 574; *Van Mater v. Sickler*, 9 N. J. Eq. 483. The propriety of taking jurisdiction is within the discretion of the chancellor. *Vaiden v. Edson*, 85 N. J. Eq. 184, 95 Atl. 980. **N. C.**—The statute gives the superior and probate courts concurrent jurisdiction to settle estates and subject them to the payment of debts. *Shober v. Wheeler*, 144 N. C. 403, 57 S. E. 152; *Fisher v. Southern Loan & Trust Co.*, 138 N. C. 90, 50 S. E. 592; *Pegram v. Armstrong*, 82 N. C. 326; *Haywood v. Haywood*, 79 N. C. 42. Equity can set aside a will for fraud. *Sumner v. Staton*, 151 N. C. 198, 65 S. E. 902. **R. I.**—The equity and municipal courts have concurrent jurisdiction over an accounting by the executor. *Dean v. Rounds*, 18 R. I. 436, 449, 27 Atl. 515, 28 Atl. 802. Equity has jurisdiction of a bill by an administrator of a deceased administrator to establish a lien for compensation, etc. *Moulton v. Smith*, 16 R. I. 126, 12 Atl. 891, 27 Am. St. Rep. 728. **S. C.**—*Jordan v. Moses*, 10 S. C. 431. See also *Witte Bros. v. Clarke*, 17 S. C. 313. **Va.**—*Harris v. Wyatt*, 113 Va. 254, 74 S. E. 189. Suits for legacies are brought in courts of equity only. *Nelson's Admr. v. Cornwall*, 11 Gratt. (52 Va.) 724. **W. Va.** The county and circuit courts have concurrent jurisdiction of a suit to establish a lost or destroyed will. *Dower v. Seeds*, 28 W. Va. 113, 139, 57 Am. Rep. 646. Equity jurisdiction to construe wills is limited and special. *Martin v. Martin*, 52 W. Va. 381, 44 S. E. 198. Equity may appoint a receiver to take charge of the assets in a proper case. *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432. [a] No special equity need be shown to justify resort to equity by any interested person other than the personal representative, before the jurisdiction of the probate court has attached, by the institution of proceedings having substantially the same object. But if instituted afterwards, special equities must be shown. *Swoope v. Swoope*, 173 Ala. 157, 55 So. 418; *Hardwick v. Hardwick*, 164 Ala. 390, 51 So. 389; *Rensford v. Joseph A. Magnus & Co.*, 150 Ala. 288, 43 So. 853; *Bresler v. Bloom*, 146 Ala. 504,

on any ground of equitable interposition, the cause will be retained and the administration finally settled in that court.⁶⁵

41 So. 1010; *Greenhood v. Greenhood*, 143 Ala. 440, 39 So. 299; *Noble v. Tate*, 119 Ala. 399, 24 So. 438; *Gould v. Hayes*, 19 Ala. 438.

[b] The right of an heir or legatee to have the administration removed to equity (1) without assigning any reasons does not apply to removals by the personal representative. *Swope v. Swope*, 178 Ala. 172, 59 So. 661; *Kirkbride v. Kelly*, 167 Ala. 570, 52 So. 660; *Hurt v. Hurt*, 157 Ala. 126, 47 So. 260; *McNeill's Admr. v. McNeill's Creditors*, 36 Ala. 109, 76 Am. Dec. 320, note. (2) The fact that he joins an heir as complainant is immaterial. *Kirkbride v. Kelly*, 167 Ala. 570, 52 So. 660.

[c] At the instance of a representative, equity will interfere when the trusts of a will are doubtful, or where the personal representative may be embarrassed in their execution, or when a discovery and accounting on the part of some of the distributees is necessary. *Townsend v. Miles*, 167 Ala. 514, 52 So. 651; *Hurt v. Hurt*, 157 Ala. 126, 47 So. 260.

[d] Where the administration involves the settlement of partnership accounts, equity has jurisdiction. *Newell v. Bradford*, 187 Ala. 251, 65 So. 800.

[e] **Insolvency.**—Where executors have reported to the probate court the insolvency of the estate, a bill by a creditor to remove the estate to chancery must disclose some special ground of equity. *J. Pollock & Co. v. Haigler*, 195 Ala. 522, 70 So. 258.

[f] **Marshaling Assets.**—A bill praying the direction of the court in the marshaling of the assets is sustainable only where from complication of affairs, the administration of the estate is unsafe. *Adams v. Dixon*, 19 Ga. 513, 65 Am. Dec. 608.

[g] On a bill to set aside gifts of decedent's property, equity may distribute the property. *Moore v. Brandenburg*, 248 Ill. 232, 238, 93 N. E. 733, 140 Am. St. Rep. 206.

[h] For good reasons (1) equity can take jurisdiction of a case for accounting (*Frey v. Demarest*, 16 N. J. Eq. 236; *Salter v. Williamson*, 2 N. J. Eq. 480, 35 Am. Dec. 513), or (2) settlement of an estate (*Van Dyke v.*

Van Dyke, 72 N. J. Eq. 300, 65 Atl. 215) pending in the orphans' court. (3) But where no special reason or cause requiring the interposition of equity, or no matter which is not within the proper jurisdiction of the orphans' court is shown, equity will not take jurisdiction. *Nelson v. Erickson*, 81 N. J. Eq. 226, 87 Atl. 116; *Outwater v. Benson*, 81 N. J. Eq. 154, 85 Atl. 206; *Fillely v. Van Dyke*, 74 N. J. Eq. 219, 69 Atl. 200; *Rutherford v. Alyea*, 54 N. J. Eq. 411, 34 Atl. 1078; *Salter v. Williamson*, 2 N. J. Eq. 480, 35 Am. Dec. 513.

[i] A next of kin may, in equity, seek an ascertainment of his distributive share, a decree for its payment, a discovery of assets, or a final settlement of accounts where fraud and mistake are alleged in the procurement of an adjudication already had in the orphans' court. *Van Dyke v. Van Dyke*, 72 N. J. Eq. 300, 65 Atl. 215.

[j] In Wisconsin the circuit court has concurrent jurisdiction with the county court, but should not exercise it unless the circumstances are such that the county court cannot afford as complete and adequate a remedy as the circuit court. The circuit court should be treated as without jurisdiction if the county court can grant relief. *Wisdom v. Wisdom*, 155 Wis. 434, 145 N. W. 126; *Merrill v. Comstock*, 154 Wis. 434, 442, 143 N. W. 313; *Gianella v. Bigelow*, 96 Wis. 185, 200, 71 N. W. 111; *Meyer v. Garthwaite*, 92 Wis. 571, 576, 66 N. W. 704. See *Brook v. Chappell*, 34 Wis. 405; *Tryon v. Farnsworth*, 30 Wis. 577.

Concurrent jurisdiction in guardianship proceedings, see 10 STANDARD PROC. 779, and 13 STANDARD PROC. 435.

Concurrent jurisdiction as to accounts of personal representatives, see 6 STANDARD PROC. 595.

Concurrent jurisdiction of proceeding to determine heirship, see 12 STANDARD PROC. 918.

Proceeding to determine advancement, see 12 STANDARD PROC. 933.

Concurrent jurisdiction to partition property, see the title "Partition."

65. Ala.—*Hamby v. Hamby*, 165 Ala. 171, 51 So. 732, 138 Am. St. Rep.

C. WHERE PROBATE COURTS HAVE EXCLUSIVE JURISDICTION.—In the second class of states above-mentioned, exclusive original jurisdiction of all matters of probate, settlements of estates of deceased persons, etc., has been conferred upon the probate courts.⁶⁶ In states within this class, equity can assume jurisdiction only as to matters purely equitable outside the regular course of administration.⁶⁷ When it has exercised its jurisdiction its functions are at an end and further proceedings must be had in the probate court.⁶⁸

D. WHERE EQUITY JURISDICTION IS ANCILLARY.—In the third class of states above-mentioned, the equitable jurisdiction is not concurrent, but is rather auxiliary, ancillary or corrective, and can be

23; *Hurt v. Hurt*, 157 Ala. 126, 47 So. 260, citing local cases. **Ill.**—*Moore v. Brandenburg*, 248 Ill. 232, 238, 93 N. E. 733, 140 Am. St. Rep. 206; *Huddleston v. Henderson*, 181 Ill. App. 176, citing local cases. **N. J.**—*Coddington v. Bispham's Exrs.*, 36 N. J. Eq. 574. **N. Y.**—*Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263; *Wager v. Wager*, 89 N. Y. 161.

[a] **A sale of land may be ordered if necessary to a settlement.** *Bragg v. Beers*, 71 Ala. 151; *McGowan v. Lufburrow*, 82 Ga. 523, 531, 9 S. E. 427, 14 Am. St. Rep. 178.

[b] **But a bill for partition among the heirs does not necessarily involve the administration of the estate of the deceased and necessarily draw jurisdiction of such administration to the chancery court.** *Hamby v. Hamby*, 165 Ala. 171, 51 So. 732, 138 Am. St. Rep. 23.

66. U. S.—*In re Cilley*, 58 Fed. 977, under New Hampshire practice. **Cal.** *Sohler v. Sohler*, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; *Toland v. Earl*, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100, reviewing early cases—when sitting in probate, the superior court may exercise all equity powers necessary for a complete administration. See *Raisch v. Warren*, 18 Cal. App. 655, 124 Pac. 95. **Conn.** *Tweedy v. Bennett*, 31 Conn. 276; *In re Ashmead's Appeal*, 27 Conn. 241. See also *Butler v. Sisson*, 49 Conn. 580. **Idaho.**—*Connolly v. Probate Court*, 25 Idaho 35, 126 Pac. 205; *In re Estate of McVay*, 14 Idaho 56, 64, 93 Pac. 28, 31; *Abrams v. White*, 11 Idaho 497, 83 Pac. 602. **Ia.**—*Duffy v. Duffy*, 114 Iowa 581, 87 N. W. 500. See *Goodnow v. Wells*, 67 Iowa 654, 25 N. W. 864. **Kan.**—*Keith v. Guthrie*, 59 Kan. 200, 52 Pac. 435. Compare *In re Hyde*, 47 Kan. 277, 27 Pac. 1001.

Ky.—*Master's Exr. v. Brinker*, 87 Ky. 1, 7 S. W. 158. **Neb.**—*In re Bayer's Estate*, 145 N. W. 1030; *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700; *Williams v. Miles*, 63 Neb. 859, 865, 89 N. W. 451; *Whalen v. Kitchen*, 61 Neb. 329, 85 N. W. 278. **Ore.**—*In re Wilson's Estate*, 85 Ore. 604, 167 Pac. 580; *Freebrich v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634. **Pa.**—*In re Long's Estate*, 254 Pa. 370, 98 Atl. 1066; *Linsensbiger v. Gourley*, 56 Pa. 166, 94 Am. Dec. 51. **Tex.** *Kennedy v. Pearson* (Tex. Civ. App.), 109 S. W. 280.

[a] Although a court has both probate and equity powers, when sitting in equity it cannot review the acts of a representative and settle his account while administration is pending. *Hutton v. Laws*, 55 Iowa 710, 8 N. W. 642.

[b] **The federal courts have concurrent jurisdiction with the courts of the states to hear and allow claims against the estates of deceased persons between citizens of different states, notwithstanding the fact that the states have by their legislation conferred exclusive jurisdiction to adjudicate such claims on their probate courts.** *Schurmeier v. Connecticut Mut. L. Ins. Co.*, 137 Fed. 42, 69 C. C. A. 22. See the title "**United States Courts.**"

67. 3 Pomeroy Eq. Jur., §1154.

[a] **As to the exercise of powers with respect to personal estate of insolvent in the hands of an assignee, equity and probate courts have concurrent jurisdiction.** *Wilson v. Coburn*, 35 Neb. 530, 53 N. W. 466.

68. Green v. Creighton, 10 Smed. & M. (Miss.) 159, 48 Am. Dec. 742.

But for the present law in Mississippi, see *supra*, IV, B, note 64.

exercised only when the relief afforded by the probate court is imperfect or inadequate, or where its proceedings have miscarried through fraud, accident or mistake. There must be some special ground of exclusive equitable cognizance to warrant the interference of equity with the course of an administration.⁶⁹ The assumption of

69. **Ark.**—*Arkansas Valley Trust Co. v. Young*, 128 Ark. 42, 195 S. W. 36; *Robinson v. Black*, 84 Ark. 92, 104 S. W. 554; *Wallace v. Swepston*, 74 Ark. 520, 526, 36 S. W. 398, 109 Am. St. Rep. 94; *Turner v. Rogers*, 49 Ark. 51, 4 S. W. 193; *Flash, Lewis & Co. v. Gresham*, 36 Ark. 529; *Reinhardt v. Gartrell*, 33 Ark. 727. The probate courts have exclusive jurisdiction of administration of estates, but they cannot foreclose mortgages on the estate of a decedent or uncover assets to facilitate a sale where property was fraudulently disposed of in the life time of the deceased. *Turner v. Rogers*, 49 Ark. 51, 4 S. W. 193. **Md.**—*Redwood v. Howison*, 129 Md. 577, 99 Atl. 863; *Hagerstown Trust Co. v. Executor of Mealey*, 119 Md. 224, 232, 86 Atl. 982; *Woods v. Fuller*, 61 Md. 457. **Mass.**—Where there is a plain and adequate remedy in the probate court, equity will not take jurisdiction. *Allen v. Hunt*, 213 Mass. 276, 100 N. E. 552. See *Fourth Nat. Bank v. Mead*, 214 Mass. 549, 102 N. E. 69. Executor's accounts shall be rendered only in the probate court. *Ammidown v. Kinsey*, 144 Mass. 587, 12 N. E. 365; *Foster v. Foster*, 134 Mass. 120; *Morgan v. Rotch*, 97 Mass. 396. **Mich.**—Except in cases where its remedies are inadequate, the probate court has exclusive jurisdiction of all matters relative to the settlement of decedents' estates. *Gustin v. McKay*, 162 N. W. 996; *Powell v. Pennock*, 181 Mich. 588, 148 N. W. 430; *Brooks v. Hargrave*, 179 Mich. 136, 146 N. W. 325; *Davis v. McCamman*, 165 Mich. 287, 291, 130 N. W. 691; *Shelden v. Walbridge*, 44 Mich. 251, 6 N. W. 681. See *Flammer v. Cullen*, 194 Mich. 585, 161 N. W. 846; *In re Estate of Andrews*, 92 Mich. 449, 452, 52 N. W. 743, 17 L. R. A. 296. **Minn.**—The probate court has exclusive jurisdiction in the administration of the estates of deceased persons. *State ex rel. Benz v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234 (citing local cases); *Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302; *Peterson v. Vanderburgh*, 77 Minn. 218, 79 N. W. 828. Chancery court may exercise an ancillary jurisdiction to aid it in the performance of its proper functions. *Brown v. Strom*, 113 Minn. 1, 129 N. W. 136. **Mo.**—In the ordinary routine of administration, the probate court has original and exclusive jurisdiction. *Caldwell v. Hawkins*, 73 Mo. 450; *Butler v. Lawson*, 72 Mo. 227, 245; *Pearce v. Calhoun*, 59 Mo. 271; *Overton v. McFarland*, 15 Mo. 312. Equity has jurisdiction of a suit to establish a demand against the estate or to restrain a distribution. *Miller v. Woodward*, 8 Mo. 169. And it has jurisdiction to construe wills. *First Baptist Church v. Robberson*, 71 Mo. 326. **Nev.**—Probate and equity courts have concurrent jurisdiction to foreclose mortgages against decedents' estates where the only necessary parties are the personal representative and the mortgagee. If other parties are necessary, equity has exclusive jurisdiction. *Corbett v. Rice*, 2 Nev. 330. **N. H.** Probate courts have exclusive original jurisdiction of the probate of wills and the settlement of estates. And the superior court cannot on original bill require the executor to account. *Barrett v. Cady*, 96 Atl. 325; *Glover v. Baker*, 76 N. H. 393, 83 Atl. 916, 921; *Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38. See *Crockett v. Sibley*, 73 N. H. 322, 61 Atl. 469. Absence of remedy in probate court must clearly appear. *Joslin v. Wheeler*, 62 N. H. 169. See also *Walker v. Cheever*, 35 N. H. 339. **Ohio.**—*First Nat. Bank v. Beebe*, 62 Ohio St. 41, 56 N. E. 485; *McDonald v. Aten*, 1 Ohio St. 293, 297, holding the aid of equity may be invoked not for a general settlement, but to reach assets otherwise unreachable. **Utah.**—*In re Moulton's Estate*, 9 Utah 159, 33 Pac. 694. **Vt.** *Hurlburt Bros. v. Hinde*, 86 Vt. 517, 86 Atl. 739; *Harris v. Harris*, 79 Vt. 22, 64 Atl. 75; *Missionary Society v. Eells*, 68 Vt. 497, 508, 35 Atl. 463, 54 Am. St. Rep. 888; *Blair v. Johnson's Heirs*, 64 Vt. 598, 24 Atl. 764. Equity has jurisdiction whenever its aid is required and the powers of the probate court are inadequate to deal

jurisdiction by equity to correct fraud and mistakes in the accounts of administrators or guardians does not deprive the probate court of jurisdiction of the estate which is still pending there for all purposes, subject only to the jurisdiction assumed by the court of equity.⁷⁰ Having determined the special matter which called into exercise its peculiar powers, the chancery court should send the case back to the probate court for administration.⁷¹ But should there be no con-

with the question at issue. *Bailey v. Bailey*, 67 Vt. 494, 32 Atl. 470, 48 Am. St. Rep. 826.

[a] Even if the probate court has not assumed active jurisdiction of the estate of the decedent by the appointment of an administrator, another court cannot intervene. *Meredith v. Scallion*, 51 Ark. 361, 11 S. W. 516, 3 L. R. A. 812.

[b] Fraud in the settlements of executors. *Reinhardt v. Gartrell*, 33 Ark. 727.

[c] Although equity cannot establish a will, it may issue an injunction to prevent disposition of the property in controversy for such time as may be required to establish it. *Missionary Society v. Eells*, 68 Vt. 497, 514, 35 Atl. 463, 54 Am. St. Rep. 888.

[d] In Colorado the constitution does not give the county court exclusive jurisdiction of probate matters. The statute has generally provided that such matters shall be adjudicated in the county court but has made many exceptions, jurisdiction of which is conferred on the district courts. *People ex rel. Porteus v. Barton*, 16 Colo. 75, 26 Pac. 149; *Berry v. French*, 24 Colo. App. 519, 135 Pac. 985; *Marshall v. Marshall*, 11 Colo. App. 505, 53 Pac. 617.

[e] In Michigan (1) the statute providing that the jurisdiction conferred upon the probate court shall not be construed to deprive the circuit court in chancery of concurrent jurisdiction "as originally exercised over the same matters," does not confer on the court of chancery powers originally exercised by that court, but merely removes any doubt as to the power of the court to exercise its general inherent functions where the remedies in the probate court were inadequate. The quoted part of the statute refers merely to the exercise of inherent equitable powers of the court as theretofore exercised in Michigan. *Brooks v. Hargrave*, 179 Mich. 136, 146 N. W. 325; *Nolan v.*

Garrison, 156 Mich. 397, 120 N. W. 977. (2) Determination of a claim against an estate arising from contract is not within the jurisdiction of equity. *Rogers v. Schram*, 161 Mich. 278, 126 N. W. 423; *Aldrich v. Annin*, 54 Mich. 230, 19 N. W. 964.

[f] Equity has power to appoint appraisers where a power to appraise realty is given by the will without naming a donee of the power, the orphan's court having no jurisdiction. *Magin v. Niner*, 110 Md. 299, 73 Atl. 12.

[g] The orphans' court has no jurisdiction of the administration of a trust created by will. *Coudon v. Updegraf*, 117 Md. 71, 83 Atl. 145.

[h] Executors may ask directions of equity courts as to their duties in a proper case. *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432.

[i] In New York (1) the supreme court will refuse to take cognizance of an action unless it is shown that adequate relief cannot be had in the surrogate's court. *Pyle v. Pyle*, 137 App. Div. 568, 122 N. Y. Supp. 256. (2) The surrogate and supreme court have concurrent jurisdiction to require an accounting. *Sanders v. Soutter*, 126 N. Y. 193, 27 N. E. 263; *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177; *Haddow v. Lundy*, 59 N. Y. 320. (3) If in the accounting proceeding, the plaintiff is denied relief to which he is entitled on equitable principles, he may apply to a court of equity for such relief. *Rutherford v. Myers*, 50 App. Div. 298, 63 N. Y. Supp. 939. (4) Creditors who are unable to obtain payment of their claims in ordinary course may sue in equity for administration of the property of deceased in the forum. *De Coppet v. Cone*, 199 N. Y. 56, 92 N. E. 411, 139 Am. St. Rep. 844.

70. *Wallace v. Swepston*, 74 Ark. 520, 526, 86 S. W. 398, 109 Am. St. Rep. 94.

71. Ark.—*Robinson v. Black*, 84 Ark. 92, 104 S. W. 554; *Reinhardt v.*

tinuing necessity for a further course of administration, equity may retain the cause for completion.⁷²

E. FEDERAL EQUITY JURISDICTION. — That the courts of the United States, sitting in equity have no general jurisdiction in matters of probate and the administration of estates of decedents is well settled.⁷³

V. PROCEDURE. — A. GENERALLY. — Proceedings belonging to probate and administration are not, in a strict sense, suits or actions,⁷⁴ but partake, at least to some extent, of the character of proceedings in rem.⁷⁵ The procedure is liberal,⁷⁶ and somewhat informal.⁷⁷ Although statutes often regulate the procedure in probate matters,⁷⁸ probate courts, when acting in such matters, in the absence of statute, are not governed in their mode of proceeding, by the rules of the common law.⁷⁹ As to the exercise of their equitable powers, they may

Gartrell, 33 Ark. 727. **N. H.**—Crockett v. Sibley, 73 N. H. 322, 61 Atl. 469. **Ohio.**—McDonald v. Aten, 1 Ohio St. 293. **Wis.**—Gianella v. Bigelow, 96 Wis. 185, 200, 71 N. W. 111.

72. Reinhardt v. Gartrell, 33 Ark. 727.

[a] If the assets be collected and the debts be ascertained and nothing remains but to fix the liabilities of executors and the rights of creditors and distributees and to make adjustment on equitable principles, equity may retain the cause. Reinhardt v. Gartrell, 33 Ark. 727.

73. Goodrich v. Ferris, 214 U. S. 71, 80, 29 Sup. Ct. 580, 53 L. ed. 914; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. ed. 867; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. ed. 1054; Smith v. Jennings, 238 Fed. 48, 151 C. C. A. 124; Eddy v. Eddy, 168 Fed. 590, 93 C. C. A. 586. See more fully the title "United States Courts."

74. Allison v. Smith, 16 Mich. 405, 415.

[a] Controversies arising in the course of settlement of estates in probate courts are not civil actions in the sense of the code provision that there shall be but one form of civil action, etc. Slattery v. Woodin, 90 Conn. 48, 96 Atl. 178.

75. **U. S.**—Goodrich v. Ferris, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. ed. 914. **Cal.**—Toland v. Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100. **Idaho.**—Connolly v. Probate Court, 25 Idaho 35, 136 Pac. 205. **Mich.**—Allison v. Smith, 16 Mich. 405, 416. **Mont.** State ex rel. Floyd v. District Court, 41 Mont. 357, 109 Pac. 438. **Neb.** In re Creighton's Estate, 91 Neb. 654,

136 N. W. 1901, Ann. Cas. 1913D, 128. **N. Y.**—In re Martin's Will, 82 Misc. 574, 144 N. Y. Supp. 174. **S. D.**—Carter v. Frahm, 31 S. D. 379, 141 N. W. 370. **Tex.**—Weems v. Masterson, 80 Tex. 45, 55, 15 S. W. 590.

Compare Clancey v. Clancey, 7 N. M. 405, 37 Pac. 1105, 38 Pac. 168, holding the general administration of an estate in a probate court is in the nature of a proceeding in equity.

[a] "While proceedings in probate are to some extent in rem, we do not see that such is in all respects their character as to parties actually before the court in person or by legal representation. Weems v. Masterson, 80 Tex. 45, 55, 15 S. W. 590.

76. Dewey v. Schreiber Imp. Co., 12 Idaho 280, 85 Pac. 921.

77. State ex rel. Rowland v. Smith, 91 Conn. 110, 99 Atl. 555; Wheeler v. Wheeler, 105 Ill. App. 48.

78. See generally the statutes and the following: **Cal.**—In re Estate of Bell, 168 Cal. 253, 141 Pac. 1179. **Neb.** Whalen v. Kitchen, 61 Neb. 329, 85 N. W. 278. **N. Y.**—In re Graham's Estate, 98 Misc. 518, 162 N. Y. Supp. 861; In re Filley's Estate, 20 N. Y. Supp. 427, 47 N. Y. St. 428, statute provides that the surrogate shall proceed according to the course and practice of a court having by common law jurisdiction of such matters. **Ore.**—In re Webster's Estate, 74 Ore. 489, 145 Pac. 1063 (the statute makes the proceedings substantially a suit in equity); Hillman v. Young, 64 Ore. 73, 127 Pac. 793, 129 Pac. 124.

79. **U. S.**—Ferris v. Higley, 20 Wall. 375, 22 L. ed. 383. **Ill.**—See Rowden v. Meisinger, 164 Ill. App. 125. **Mich.**—Allison v. Smith, 16 Mich. 405,

and should adopt the forms of equitable proceedings.⁸⁰ Statutes sometimes provide that when acting with the jurisdiction of a common law court, probate courts shall be governed by the procedure applicable to such court.⁸¹

B. PLEADING.—There is no special system of pleading in probate courts,⁸² and formal pleadings are not ordinarily required in probate matters.⁸³ The same strictness of pleading required in courts of common law jurisdiction is not requisite.⁸⁴ But if a party elects to

415. **N. H.**—*Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38. **N. Y.**—See *Campbell v. Logan*, 2 Bradf. Sur. 90.

[a] **Where no mode of procedure is specially provided** in probate matters (1), the rules of procedure in civil cases may be followed. *McConahey's Estate v. Foster*, 21 Ind. App. 416, 52 N. E. 619. (2) "When the statute is silent, the surrogate proceeds according to the course of the testamentary common law." *In re Martin's Will*, 80 Misc. 17, 141 N. Y. Supp. 784, 787, citing local cases.

[b] **Superior and district courts** vested with jurisdiction of probate matters administer the jurisdiction under the same principles that formerly applied to probate courts and under the same rules of practice. *Garver v. Thoman*, 15 Ariz. 38, 135 Pac. 724; *In re Estate of Foley*, 24 Nev. 197, 51 Pac. 834, 52 Pac. 649; *Douglass v. Folsom*, 21 Nev. 441, 33 Pac. 660.

80. **Ill.**—*Adams v. Adams*, 81 Ill. App. 637. **Neb.**—*Genau v. Abbott*, 68 Neb. 117, 93 N. W. 942. **Pa.**—*Horne v. Hasbrouck*, 41 Pa. 169, 180; *Com. v. Judges of Common Pleas*, 4 Pa. 301.

[a] **Applications for equitable relief** to a probate court are to be deemed suits in equity, and the general rules of pleading governing suits in equity should be applied. *Genau v. Abbott*, 68 Neb. 117, 93 N. W. 942.

81. *State ex rel. Berger v. Smith*, 11 Neb. 238, 9 N. W. 92; *Banks v. Uhl*, 6 Neb. 145; *First Nat. Bank v. Hesser*, 12 Okla. 115, 77 Pac. 36; *Nix v. Gilmer*, 5 Okla. 740, 750, 50 Pac. 131 (*overruling* *Brickner v. Sporleder*, 3 Okla. 561, 41 Pac. 726); *De Berry v. Smith*, 2 Okla. 1, 35 Pac. 578; *Chandler v. Colcord*, 1 Okla. 260, 267, 32 Pac. 230.

[a] **The plaintiff may dismiss his action.** *Banks v. Uhl*, 6 Neb. 145.

82. *Ferris v. Higley*, 20 Wall. (U. S.) 375, 22 L. ed. 383.

83. **Ark.**—*Bellows v. Cheek*, 20 Ark.

424. **Colo.**—*Charles v. Eshleman*, 5 Colo. 107. **Md.**—*Long v. Long*, 118 Md. 198, 84 Atl. 375. **Mo.**—*Rassieur v. Zimmer*, 249 Mo. 175, 155 S. W. 24; *Cole v. Dallmeyer*, 101 Mo. 57, 13 S. W. 687; *Exchange Bank v. Robinson*, 185 Mo. App. 582, 172 S. W. 628; *Kessler v. Claves*, 147 Mo. App. 88, 125 S. W. 799; *Williams v. Gerber*, 75 Mo. App. 18. **Tex.**—*Brown v. Hobbs*, 19 Tex. 167.

[a] **No complaint or other pleadings** are required in controversies arising in the course of the settlement of estates. *Slattery v. Woodin*, 90 Conn. 48, 96 Atl. 178. See *Brown v. Hobbs*, 19 Tex. 167, a contestant must file a complaint or exceptions.

[b] **Demurrer.**—There is no demurrer in the surrogate courts. *In re Kelly*, 153 App. Div. 322, 137 N. Y. Supp. 1099 (where the so called demurrer was considered as a motion to strike out); *In re New York Life Ins. & Trust Co.*, 139 N. Y. Supp. 695.

[c] **Where the equitable forms** are adopted, the petition should be met by a demurrer or answer. *Genau v. Abbott*, 68 Neb. 117, 93 N. W. 942.

84. **Idaho.**—*In re Estate of McVay*, 14 Idaho 56, 64, 93 Pac. 28, 31. **Mass.** *Dallinger v. Morse*, 208 Mass. 501, 94 N. E. 701, Ann. Cas. 1912A, 982. **Mo.** *Christianson v. McDermott's Estate*, 123 Mo. App. 448, 100 S. W. 63. **Wis.** *Brook v. Chappell*, 34 Wis. 405.

[a] **The strictness required in pleadings in chancery** is not required in the pleadings in the probate court, unless chancery proceedings are adopted. *Hurd v. Smith*, 5 How. (Miss.) 562.

[b] **A petition in probate should not be treated as a bill in equity** even though presented to a court which has jurisdiction in common law, chancery, and probate cases. *Lucich v. Medin*, 3 Nev. 93, 93 Am. Dec. 376.

[c] **A statute requiring applications to probate courts to be in writing** is directory only and does not make a written application necessary to juris-

file written pleas he must conform to the rules of special pleading.⁸⁵

Amendment. — The probate court may permit amendments to the pleadings.⁸⁶

C. PROCESS AND NOTICE. — Process and notice to the parties is required by statute.⁸⁷

D. TRIAL. — 1. **Generally.** — Some statutes prescribing procedure in regard to trials in courts of record generally have been held applicable to probate courts.⁸⁸ Statutes sometimes require that certain issues in such courts be directed in courts of law.⁸⁹ If there is no jury the court of probate occupies the place of a jury as to facts.⁹⁰

2. **Right To Trial by Jury.**⁹¹ — There is no constitutional right of a trial by jury in probate matters, and the right exists only where it is expressly conferred by statute,⁹² which sometimes provides for

diction. *Robbins v. Taft*, 12 R. I. 67.

[d] **The petition must allege facts** to show the authority and power of the court to make the decree prayed for. *Taber v. Douglass*, 101 Me. 363, 64 Atl. 653.

[e] **It is sufficient if the petitioner show a valid subsisting right in his favor and assert it in general terms, although not with the particularity of pleadings in courts of general jurisdiction.** *Brook v. Chappell*, 34 Wis. 405.

[f] **In a suit to recover for personal services rendered the deceased, all that is required is that the statement shall show the nature of the claim so that the administrator may know what he has to defend against.** *Christianson v. McDermott's Estate*, 123 Mo. App. 448, 100 S. W. 63.

[g] **A joinder of various independent proceedings in one application is not permissible.** *In re Gillender's Estate*, 98 Misc. 521, 162 N. Y. Supp. 955.

85. *Bellows v. Cheek*, 20 Ark. 424.

[a] **A Plea in Abatement Must Be Signed.**—*Bellows v. Cheek*, 20 Ark. 424, 430.

86. *Long v. Long*, 118 Md. 198, 84 Atl. 375.

87. See generally the statutes, and *Hannah v. Green*, 143 Cal. 19, 76 Pac. 708; *Heisen v. Smith*, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; *San Francisco P. O. Asylum v. Superior Court*, 116 Cal. 443, 48 Pac. 379.

Notice of petition for sale, see 6 STANDARD PROC. 554.

Notice of filing of claim against estate, see 6 STANDARD PROC. 532.

Notice of petition for accounting, see 6 STANDARD PROC. 593.

Notice of application for appointment of administrator, see 6 STANDARD PROC. 504.

[a] **Controversies arising in the course of settlement of estates are not commenced by service of process.** *Slatery v. Woodin*, 90 Conn. 48, 96 Atl. 178.

[b] **Citation must be served in the same manner as a summons.** *Hannah v. Green*, 143 Cal. 19, 76 Pac. 708 (under code provision); *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679; *Ashurst v. Fountain*, 67 Cal. 18, 6 Pac. 849.

[c] **Service of citation by publication is not complete until expiration of six full weeks from time of first publication under statute requiring publication "not less than once a week for six successive weeks."** *In re Koch's Will*, 19 Civ. Proc. 165, 12 N. Y. Supp. 94.

[d] **Citation is waived by voluntary appearance.** *In re Martin's Estate*, 82 Wash. 226, 144 Pac. 42.

[e] **Publication of citation in newspaper issued on Sunday only is valid.** *Heisen v. Smith*, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39.

88. *In re Fox's Estate*, 166 App. Div. 718, 152 N. Y. Supp. 431, statute relating to separate trial of issues.

89. *Bridge v. Dillard*, 104 Md. 411, 65 Atl. 10; *In re Cutler's Estate*, 225 Pa. 167, 73 Atl. 1111, where there is a substantial dispute as to title. See *In re Price's Appeal*, 116 Pa. 410, 9 Atl. 856.

90. *Boyd v. Cook*, 3 Leigh (30 Va.) 32; *Smith v. Jones*, 6 Rand. (27 Va.) 33.

91. See generally the title "Juries and Jurors."

92. *U. S.*—*Ferris v. Higley*, 20 Wall. 375, 22 L. ed. 383; *Esterly v.*

jury trials on demand in certain cases such as will contests, and petitions to revoke the probate of will.⁹³ But even in the absence of statute granting the right, the court in its discretion may order a jury to pass upon the questions of fact in the case.⁹⁴ The right being thus discretionary, it is likewise within the court's discretion whether it shall accept and adopt the findings of the jury.⁹⁵

3. **Reference.**⁹⁶—The orphan's or probate court may refer to a master or referee any matter upon which it may be necessary to have a report by him.⁹⁷

4. **Findings of Fact.**⁹⁸—The statute sometimes authorizes findings of fact.⁹⁹

E. **NEW TRIAL.**¹—New trials in probate courts are sometimes provided for.²

F. **JUDGMENTS, ORDERS AND DECREES.**—1. **Generally.**³—There

Rua, 122 Fed. 609, 58 C. C. A. 548, under Alaska practice. **Cal.**—*In re Estate of Land*, 166 Cal. 538, 137 Pac. 246; *In re Estate of Dolbeer*, 153 Cal. 652, 657, 96 Pac. 266, 15 Ann. Cas. 207. **Haw.**—*Keahi v. Bishop*, 3 Hawaii 546, 553. **La.**—*Pons v. Pons*, 132 La. 370, 61 So. 406. **N. H.**—*Knight v. Hollings*, 73 N. H. 495, 63 Atl. 38, probate courts have no jury. **N. Y.** *In re Fox's Estate*, 166 App. Div. 718, 152 N. Y. Supp. 431. **Okla.** *Parker v. Hamilton*, 49 Okla. 693, 154 Pac. 65; *Cartwright v. Holcomb*, 21 Okla. 548, 97 Pac. 385. **Vt.**—*In re Welch's Will*, 69 Vt. 127, 37 Atl. 250.

93. See generally the statutes and the following: **Cal.**—*In re Estate of Land*, 166 Cal. 538, 137 Pac. 246, construing §§1330 and 1312 of the Code of Civ. Proc., and holding the issue of interest of contestant cannot be determined by jury. **Colo.**—*Charles v. Eshleman*, 5 Colo. 107, in cases of allowance of claims. **Ill.**—*Esmond v. Esmond*, 154 Ill. App. 357. **Ia.**—*Duffy v. Duffy*, 114 Iowa 531, 87 N. W. 500, jury trials are provided for in cases of contested wills and allowance of claims only. **Mich.**—*Owen v. Ward's Estate*, 125 Mich. 30, 83 N. W. 1003.

[a] **Waiver.**—By failing to demand a jury trial, a jury trial in the probate court is waived. *Esmond v. Esmond*, 154 Ill. App. 357.

94. *Parker v. Hamilton*, 49 Okla. 693, 154 Pac. 65; *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 117.

[a] The court will determine as a matter of law whether there is any question of fact to be determined such as will justify framing of an issue and

submitting it to a jury for determination. *McCarthy v. McCarthy*, 20 App. Cas. (D. C.) 195, 209.

95. *Parker v. Hamilton*, 49 Okla. 693, 154 Pac. 65.

96. See generally the title "References."

97. *Outwater v. Benson*, 81 N. J. Eq. 154, 85 Atl. 206; *In re Kent*, 92 Misc. 113, 155 N. Y. Supp. 383 (under statute); *In re Nocton's Estate*, 162 N. Y. Supp. 215.

As to reference of disputed claims, see 6 STANDARD PROC. 541.

[a] The masters and examiners of the court of chancery are ex officio masters and examiners of the orphans' court. *Outwater v. Benson*, 81 N. J. Eq. 154, 85 Atl. 206.

[b] On consent of the parties, the probate court may order a reference. *In re Jarboe's Estate*, 227 Mo. 59, 127 S. W. 26.

[c] An administrator or executor may consent to a reference. *In re Jarboe's Estate*, 227 Mo. 59, 127 S. W. 26.

98. See generally the title "Findings and Conclusions."

99. *In re McCarty's Will*, 68 Misc. 283, 125 N. Y. Supp. 160.

1. See generally the titles "New Trial;" "Rehearing."

2. See generally the statutes, and *In re Rose*, 153 App. Div. 263, 137 N. Y. Supp. 1079.

3. **Order appointing and discharging executor**, see 6 STANDARD PROC. 508, 517.

Order requiring delivery of discovered property, see 6 STANDARD PROC. 522.

are two kinds of orders which probate courts may make, orders which are and must be based on written application,⁴ and those which the court may make at its discretion on its own motion without such application.⁵ A probate court may grant any relief consistent with the case made without any prayer of relief though different relief be prayed for.⁶ The statutes generally have provisions in regard to the form and contents of orders and decrees of probate courts.⁷

Conclusiveness. —Judgments of probate courts in proceedings within their jurisdiction are conclusive and binding upon parties to the proceeding in which it was rendered and their privies until reversed or set aside.⁸ Some judgments of probate courts such as judgments on

Order allowing claim against estate, see 6 STANDARD PROC. 532.

Order of sale of property, 6 STANDARD PROC. 562.

Decree of distribution, see 6 STANDARD PROC. 587, 632.

Decree on accounting, see 6 STANDARD PROC. 609, 622.

Action to review probate decrees, see 15 STANDARD PROC. 359, note 44.

Equitable relief against probate decrees, see 15 STANDARD PROC. 285, 286.

4. *Tyvand v. McDonnell*, 37 N. D. 251, 164 N. W. 1.

5. *Tyvand v. McDonnell*, 37 N. D. 251, 164 N. W. 1.

6. *Brook v. Chappell*, 34 Wis. 405.

[a] **Either legal or equitable relief** may be awarded. *Chamness v. Chamness*, 53 Ind. App. 225, 101 N. E. 323.

[b] **General Equity Relief.** —But even though probate jurisdiction may be vested in a court having equity jurisdiction, general equity relief cannot be secured in a probate proceeding. *Estate of Davis*, 136 Cal. 590, 597, 69 Pac. 412, where it was sought in a contest proceeding to establish a trust under a decree of distribution.

7. See generally the statutes, and *In re Hibbard*, 89 Misc. 707, 153 N. Y. Supp. 1097.

[a] **A verbal order** allowing an administrator to take property at an appraisalment is of no effect. *Scott v. Fox*, 14 Md. 388.

[b] **Separate findings** need not be contained in the decision of the surrogate, under statute. *In re Carpenter*, 178 App. Div. 165, 165 N. Y. Supp. 10. Compare *In re McDonald's Estate*, 211 N. Y. 272, 105 N. E. 407; *Matter of Hoyt*, 5 Dem. Sur. (N. Y.) 284. See *Hartwell v. McMaster*, 4 Redf. Sur. (N. Y.) 389, decided under earlier statute.

[c] **Jurisdictional facts** (1) need

not be stated in the orders and decrees of a probate court. *Holmes v. Holmes*, 27 Okla. 140, 111 Pac. 220, 30 L. R. A. (N. S.) 920; *Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370. (2) But this does not mean that such facts should not be shown by the judgment roll. *Carter v. Frahm*, 31 S. D. 379, 398, 141 N. W. 370.

[d] **The decree is signed** by the surrogate. *McNaughton v. Chave*, 5 Abb. N. C. (N. Y.) 225.

[e] **Signing a decree at a place other than the court room** does not invalidate it. *Newell v. Delorme*, 109 Me. 421, 86 Atl. 31.

[f] **Decrees and orders need not be drawn up at length** while the orphans' court is in actual session. *In re Hartman's Appeal*, 21 Pa. 488.

8. Cal.—*William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323. Ga.—*Stuckey v. Watkins*, 112 Ga. 268, 37 S. E. 401. 81 Am. St. Rep. 47. Idaho.—*Connolly v. Probate Court*, 25 Idaho 35, 136 Pac. 205. Ia.—*Niemand v. Seeman*, 136 Iowa 713, 114 N. W. 48. Me.—*In re Thompson*, 116 Me. 473, 102 Atl. 303; *Paine v. Folsom*, 107 Me. 337, 78 Atl. 378; *In re Mudgett*, 103 Me. 367, 69 Atl. 575; *Taber v. Douglass*, 101 Me. 363, 64 Atl. 653. Minn.—*Brown v. Strom*, 113 Minn. 1, 129 N. W. 136. Miss.—*Hurd v. Smith*, 5 How. 562. Mo.—*McDonald v. McDaniel*, 242 Mo. 172, 145 S. W. 452. Neb.—*Fischer v. Sklenar*, 101 Neb. 553, 163 N. W. 861; *In re Creighton's Estate*, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128. N. H.—*Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213, grant of letters. N. J.—*Shearman v. Cameron*, 78 N. J. Eq. 532, 80 Atl. 545. N. Y.—*In re Heaney's Estate*, 125 App. Div. 619, 110 N. Y. Supp. 80; *Kirk v. McCann*, 117 App. Div. 56, 101 N. Y. Supp. 1093. Tex.—*Minchew v. Case* (Tex.

probate of wills are in rem and bind the world.⁹ Where probate courts are courts of record, their judgments, records and proceedings import verity as fully and completely as those of other courts of record.¹⁰

Collateral Impeachment. — Decisions of a probate court upon matters pending before it are not collaterally impeachable.¹¹

As a Bar to a Subsequent Action. — The judgment of a probate court is a conclusive bar to another action upon the same matter, unless it was without jurisdiction of the matter determined.¹²

Full Faith and Credit. — The rule extending full faith and credit to judgments of sister states applies to probate decrees.¹³

2. Vacation and Amendment.¹⁴ — It is held by some courts that as probate courts are courts of general jurisdiction, they have inherent power to control their decrees and to vacate or amend them as justice requires, at least during the term at which they were rendered;¹⁵ whereas other courts hold that as the courts of probate

Civ. App.), 143 S. W. 366; *Moss v. Slack* (Tex. Civ. App.), 141 S. W. 1063.

[a] **Rule Stated.**—Judgments of a probate court with full jurisdiction of the subject matter and the parties to be affected thereby are as conclusive as those of courts of general jurisdiction. *McDonald v. McDaniel*, 242 Mo. 172, 145 S. W. 452; *In re Ford*, 157 Mo. App. 141, 137 S. W. 32.

[b] **Decrees as to accounting and distribution** are as conclusive as decrees of courts of equity. Where a decree in equity will bind persons not in esse, the decree of the orphans' court will bind them. *Woolsey v. Woolsey*, 73 N. J. Eq. 517, 76 Atl. 1076.

9. *Allison v. Smith*, 16 Mich. 405, 416; *Saunders v. Link*, 114 Va. 285, 76 S. E. 327. See generally the title "Proceedings in Rem."

A Judgment Upon the Probate of a Will Is a Judgment in Rem.—See 14 STANDARD PROC. 969, and the title "Wills."

10. *In re Estate of McVay*, 14 Idaho 56, 64, 93 Pac. 28, 31; *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213. See 15 STANDARD PROC. 426, 435. See also 9 ENCY. OF EN. 927, 941.

Whether courts of record, see *supra*. II.

11. See 15 STANDARD PROC. 393, 401, 435.

Collateral attack on orders allowing or rejecting claims, see 6 STANDARD PROC. 540.

Collateral attack on sales of de-

cedent's land, see 6 STANDARD PROC. 577.

12. See 15 STANDARD PROC. 556.

13. See 15 STANDARD PROC. 659, 692.

14. See 15 STANDARD PROC. 98, 151; 6 STANDARD PROC. 789; and the title "Decedents' Estates."

Vacation of order admitting will to probate, see the title "Wills."

As to vacation of orders on final settlement, see 6 STANDARD PROC. 617.

15. III.—See *Allen v. Hempstead*, 154 Ill. App. 91, holding that whenever a court of equity would take jurisdiction to set aside action taken at a previous term or in another court because of fraud, etc., the probate court on motion at a later term can set aside its prior proceedings. **Mass.**—*Fidelity & Casualty Co. v. Withington*, 118 N. E. 902 (where application was made sixteen years after the rendition of the decree); *Jones v. Jones*, 223 Mass. 540, 112 N. E. 224; *Clarke v. Andover*, 207 Mass. 91, 92 N. E. 1013. **Minn.** *Larson v. How*, 71 Minn. 250, 73 N. W. 966; *In re Hause*, 32 Minn. 155, 19 N. W. 973. **N. J.**—*In re Hathorn's Will* (N. J. Eq.), 97 Atl. 262; *Vincent v. Vincent*, 70 N. J. Eq. 272, 69 Atl. 700. **N. Y.**—*Matter of Regan*, 167 N. Y. 338, 343, 60 N. E. 658 (the surrogate court has power independently of any statute to exercise control over its records and to vacate its own decrees for mistake, fraud or clerical error); *Matter of Malone*, 150 App. Div. 31, 134 N. Y. Supp. 496. **Pa.** *In re Long's Estate*, 254 Pa. 370, 98

have such powers only as are expressly conferred upon it,¹⁶ they cannot vacate their orders when this power is not given them.¹⁷ The power to vacate a decree has been held to be incidental to the power to make the decree in question.¹⁸ Statutes, however, generally confer such power upon probate courts with varying limitations.¹⁹ Courts of coordinate powers, exercising probate jurisdiction, cannot set aside each other's judgments, at least when they are not void.²⁰

G. ENFORCEMENT OF JUDGMENTS AND ORDERS.—In some states, following the ecclesiastical law, probate courts have no direct method of enforcing their decrees.²¹ In other states, however, such courts may enforce their orders or decrees in the ways common to courts of record and appropriate to the character of the decree in question.²² Some statutes have conferred upon the probate courts power to enforce their orders by issuance of warrant of arrest,²³ or by attachment,²⁴ sequestration,²⁵ or execution.²⁶ Generally an action cannot be brought upon a decree of a probate court, but it is otherwise as to a final judgment for payment of money.²⁷

Control by Equity.—Equity has power to control the execution of probate orders and decrees upon a proper statement for equitable relief.²⁸

Atl. 1066; *In re Sloan's Estate*, 254 Pa. 346, 98 Atl. 966.

16. See *supra*, III, A.

17. *Grady v. Hughes*, 64 Mich. 540, 31 N. W. 438; *State ex rel. Donovan v. District Ct.*, 27 Mont. 415, 71 Pac. 401, under statute the court has authority to set aside a sale only to order a resale. See also *Saxton v. Seiberling*, 48 Ohio St. 554, 29 N. E. 179, holding deed in pursuance to order of sale cannot be set aside.

18. *Campbell v. Logan*, 2 Bradf. Sur. (N. Y.) 90, revocation of probate is necessarily incidental to the jurisdiction to probate wills.

19. See the statutes and the following: Conn.—*Massey v. Foote*, 101 Atl. 499; *Schutte v. Douglass*, 90 Conn. 529, 536, 97 Atl. 906; *Murdoch v. Murdoch*, 81 Conn. 681, 72 Atl. 290, 129 Am. St. Rep. 231, ex parte orders and decrees only can be set aside before taking of an appeal. Idaho.—*Smith v. Peterson*, 169 Pac. 290; *Chandler v. Probate Court*, 26 Idaho 173, 141 Pac. 635; *Connolly v. Probate Court*, 25 Idaho 35, 136 Pac. 205. Minn.—*St. Paul Gaslight Co. v. Kenny*, 97 Minn. 150, 106 N. W. 344; *Tomlinson v. Phelps*, 93 Minn. 350, 101 N. W. 496. N. Y.—*Matter of Malone*, 150 App. Div. 31, 134 N. Y. Supp. 496; *In re Graham's Estate*, 98 Misc. 518, 162 N. Y. Supp. 861 (power must be exercised in same manner as in courts of general jurisdiction); *In re Filley's*

Estate, 20 N. Y. Supp. 427, 47 N. Y. St. 428.

[a] Court Cannot Go Beyond Statute.—*Schutte v. Douglass*, 90 Conn. 529, 537, 97 Atl. 906.

[b] After the expiration of the term the probate court cannot set aside its decrees. *Connolly v. Probate Court*, 25 Idaho 35, 136 Pac. 205.

20. *In re Pepins' Estate*, 53 Mont. 240, 163 Pac. 104; *Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433. See generally 15 STANDARD PROC. 154.

21. *Hayes v. Hayes*, 48 N. H. 219, remedy is action at law on bond given to secure performance of the decree.

22. See the titles "Decrees;" "Judgments and Decrees, Enforcement of."

Enforcement of decree of distribution, see 6 STANDARD PROC. 634.

Contempt.—See 5 STANDARD PROC. 368, 369.

23. *Ex parte Merrill*, 245 Fed. 778, under Michigan practice.

24. *In re Watson*, 5 Lans. (N. Y.) 466, 470; *In re Dundas' Appeal*, 64 Pa. 325.

25. *In re Dundas' Appeal*, 64 Pa. 325.

26. *Yeoman v. Younger*, 83 Mo. 424; *In re Dundas' Appeal*, 64 Pa. 325. Compare *Aull v. St. Louis Trust Co.*, 149 Mo. 1, 50 S. W. 289, and 6 STANDARD PROC. 634.

27. See 16 STANDARD PROC. 366.

28. *Jenks v. Steere*, 23 R. I. 160,

H. **BILLS OF REVIEW.**—It has been held that probate courts may entertain bills of review to correct errors and annul its acts,²⁹ though there is authority to the contrary.³⁰

I. **CERTIORARI.**—Certiorari will issue to a probate court, from a court which has appellate jurisdiction over it.³¹

J. **MANDAMUS.**—Mandamus will lie against probate judges.³²

K. **WRIT OF ERROR.**—A writ of error will not lie to probate courts as to decrees or judgments rendered by them in the exercise of their ordinary probate jurisdiction,³³ unless authorized by statute,³⁴ for the reason that such proceedings are not according to the course of the common law. But as to proceedings within the common law or criminal jurisdiction sometimes conferred upon probate courts, the writ will lie.³⁵

L. **APPEAL.**—1. **Generally.**—Statutes generally provide for ap-

49 Atl. 698, restraining sale of certain property.

Bill to set aside sale of decedent's real estate, see 6 STANDARD PROC. 573

Relief as to decree of distribution, see 6 STANDARD PROC. 634, 635; 13 STANDARD PROC. 286.

29. Mass.—Crocker v. Crocker, 198 Mass. 401, 84 N. E. 476. Pa.—Newbold's Estate, 19 Pa. Dist. 523; *In re Martin's Estate*, 7 Pa. Dist. 408. Tex.—Fortson v. Alford, 62 Tex. 576, 579; Franks v. Chapman, 61 Tex. 576.

See generally the title "Bills of Review."

Bill of review to surcharge guardian's accounts, see 10 STANDARD PROC. 845.

30. Cowden v. Dobyns, 5 Smed. & M. (Miss.) 82.

31. Smithwick v. Kelly, 79 Tex. 564, 15 S. W. 486; Franks v. Chapman, 60 Tex. 46; Shook v. Journeay (Tex. Civ. App.), 149 S. W. 406; Lomax v. Comstock (Tex. Civ. App.), 110 S. W. 762; State ex rel. Keasal v. Superior Court, 76 Wash. 291, 136 Pac. 147. See Campbell v. Strong, Hempst. 195, 4 Fed. Cas. No. 2,367b; Ryan v. Hutchinson, 161 Iowa 575, 143 N. W. 433; and the title "Certiorari."

[a] But a court of common law jurisdiction cannot issue a writ of certiorari to a probate court, because of the entire separation of the common law courts and the ecclesiastical courts from which the probate courts were derived. Peters v. Peters, 8 Cush. (Mass.) 529.

[b] Petition should be made to the circuit court in the first instance, not to the supreme court. *Ex parte Davis*, 170 Ala. 114, 54 So. 164.

[c] The hearing is *de novo* upon certiorari from the district court in matters of probate. Shook v. Journeay (Tex. Civ. App.), 149 S. W. 406.

32. *In re Spingarn's Estate*, 159 N. Y. Supp. 605. See the title "Mandamus."

As to mandamus against courts and court officers, see the title "Mandamus."

[a] But a court having appellate jurisdiction only in probate matters cannot direct probate court by mandamus in such matters. Shook v. Journeay (Tex. Civ. App.), 149 S. W. 406.

33. U. S.—Campbell v. Strong. Hempst. 195, 4 Fed. Cas. No. 2,367b. Ala.—Watson v. May, 8 Ala. 177. Ill. Louthan v. Jenne, 151 Ill. App. 77, no writ of error in guardianship matters except those involving applications to sell real estate and where a freehold is not involved. Mass.—Fitzgerald v. Com., 5 Allen 509. See Smith v. Rice, 11 Mass. 507. Mo.—North Missouri R. R. Co. v. Green's Admr., 34 Mo. 159. Tex.—Smith v. Robb, 49 Tex. 269.

See generally the title "Writ of Error."

34. Colo.—Vance's Heirs v. Rockwell, 3 Colo. 240. Ill.—McCallum v. Chicago Title & Tr. Co., 203 Ill. 142, 67 N. E. 823; Thomas v. Waters, 122 Ill. App. 434. Neb.—*In re Hilton*, 99 Neb. 387, 156 N. W. 659, based on Engles v. Morgenstern, 85 Neb. 51, 122 N. W. 688. Wyo.—*In re Barrett's Estate*, 22 Wyo. 281, 138 Pac. 865, 141 Pac. 95; Weidenhoff v. Primm, 16 Wyo. 340, 64 Pac. 453.

35. Fitzgerald v. Com., 5 Allen (Mass.) 509.

peals in probate proceedings.³⁶ The right of appeal in such proceedings is conferred by statute only, and can extend no further than the statute provides.³⁷ What orders are appealable depends upon the

36. See the statutes, and the following: **Colo.**—*Miller v. Weston*, 25 Colo. App. 231, 238, 138 Pac. 424. **Conn.**—*State ex rel. Rowland v. Smith*, 91 Conn. 110, 99 Atl. 555. **Idaho.** *Fraser v. Davis*, 29 Idaho 70, 156 Pac. 913, 158 Pac. 233; *In re Estate of McVay*, 14 Idaho 56, 64, 93 Pac. 28, 31. **Ky.**—*Bell v. Henshaw*, 91 Ky. 430, 15 S. W. 3. **Md.**—*Pratt v. Hill*, 124 Md. 252, 92 Atl. 543. **Mass.**—*Eveleth v. Crouch*, 15 Mass. 307, common law rules of evidence bind the appellate court sitting in probate. **Mich.**—*Grady v. Hughes*, 64 Mich. 540, 31 N. W. 438. **Mo.**—*North Missouri R. R. Co. v. Green's Admr.*, 34 Mo. 159; *Marshall v. Shoemaker's Estate*, 164 Mo. App. 429, 144 S. W. 1120. **N. Y.** *In re Martin's Will*, 80 Misc. 17, 141 N. Y. Supp. 784. **Okla.**—*Barnett v. Blackstone C. & M. Co.*, 35 Okla. 724, 131 Pac. 541; *Apache State Bank v. Daniels*, 32 Okla. 121, 121 Pac. 237. **Ann. Cas.** 1914A, 520, 40 L. R. A. (N. S.) 901; *Nix v. Gilmer*, 5 Okla. 740, 751, 50 Pac. 131, *overruling Bricker v. Sporleder*, 3 Okla. 561, 41 Pac. 726. **Pa.**—*In re Heckman's Estate*, 236 Pa. 193, 84 Atl. 689, what questions will be determined by supreme court. **R. I.**—*Kenyon v. Hart*, 38 R. I. 524, 529, 96 Atl. 529, appeal is not in the nature of a writ of error or bill of exceptions. **Tex.**—*Franks v. Chapman*, 60 Tex. 46; *Shook v. Journeay* (Tex. Civ. App.), 149 S. W. 406. **Utah.**—*In re Reese's Estate*, 9 Utah 171, 33 Pac. 698. **Wash.**—*In re Martin's Estate*, 82 Wash. 226, 144 Pac. 42. **Wis.**—*In re Jackman's Will*, 26 Wis. 104. **Wyo.** *In re Barrett's Estate*, 22 Wyo. 281, 138 Pac. 865, 141 Pac. 95; *Weidenhoft v. Primm*, 16 Wyo. 340, 64 Pac. 453.

Appeal from order appointing and discharging representative, see 6 STANDARD PROC. 509, 517.

Appeal from order allowing claims, see 6 STANDARD PROC. 535.

Appeal from decision in proceeding to discover assets, see 6 STANDARD PROC. 523.

Appeal from order of sale, see 6 STANDARD PROC. 568, 572.

Review of proceedings when estate

is insolvent, see 6 STANDARD PROC. 585.

Appeal in proceedings as to accounting, see 6 STANDARD PROC. 595, 625.

Appeal from order of distribution, see 6 STANDARD PROC. 636.

[a] **To What Court.**—(1) Cases arising under the probate jurisdiction of a county court are not civil cases within a statute authorizing appeals from county courts in civil cases to the supreme court. *Gray v. McKnight*, 50 Okla. 73, 150 Pac. 1046. (2) It is variously provided by statute that appeals from probate courts must be to the district court (*Barnett v. Blackstone Coal & Min. Co.* [Okla.], 158 Pac. 588; *In re Theimer*, 40 Okla. 235, 137 Pac. 358; *Lucas v. Lucas*, 34 Okla. 282, 125 Pac. 481; *Carpenter v. Russell*, 13 Okla. 277, 73 Pac. 930; *United States Fidelity & G. Co. v. Buhner*, 61 Tex. Civ. App. 372, 132 S. W. 505), (3) to the circuit court (*McAvoy v. Renchan*, 116 Md. 333, 81 Atl. 673), (4) to the supreme judicial court (*Pattee v. Stetson*, 170 Mass. 93, 48 N. E. 1022), or (5) to the court of civil appeals, where, because of the amount involved, the case is cognizable only in that court. *Gaines v. Eason*, 133 Tenn. 86, 169 S. W. 309.

[b] **Who May Appeal.**—(1) The heirs of an estate may appeal from a probate order affecting their interests, either in the name of the executor or in their own names. *Ryan v. Hutchinson*, 161 Iowa 575, 143 N. W. 433, *citing Burns v. Keas*, 20 Iowa 16. (2) A statute conferring the right of appeal to any person claiming under an heir at law is not confined to heirs of an heir at law, but extends to the representative of an heir. *Sprowl v. Randell*, 108 Me. 350, 81 Atl. 80.

[c] **A part of a decree may be appealed from under statute.** *In re Blackinton's Estate*, 29 Idaho 310, 153 Pac. 492.

37. **Cal.**—*In re Cahill's Estate*, 142 Cal. 628, 76 Pac. 383; *In re Winslow's Estate*, 128 Cal. 311, 60 Pac. 931; *In re Seymour's Estate*, 15 Cal. App. 287, 114 Pac. 1023, *citing local cases.* **Conn.**—*Slattery v. Woodin*, 90 Conn. 48, 96 Atl. 178. **Idaho.**—*In re Coryell's Estate*, 16 Idaho 201, 101 Pac. 723.

statute and the general principles elsewhere discussed.³⁸

2. How and When Appeal Must Be Taken.—The manner of taking the appeal,³⁹ and the time within which it must be taken,⁴⁰ are regulated by the statutes conferring the right. These statutes should be complied with,⁴¹ but noncompliance in various particulars may be waived.⁴² Under some statutes appeals are a matter of right;⁴³ under others⁴⁴ an order of the probate court allowing the appeal, is neces-

Me.—*Sprowl v. Randell*, 108 Me. 350, 81 Atl. 80.

[a] The statutes are to be liberally construed in favor of the right of appeal. *Pee v. Witt*, 100 Kan. 171, 163 Pac. 797; *Davidson v. Unknown Heirs of Peterson*, 22 N. D. 480, 134 N. W. 751. See *Appeal of Carter*, 111 Me. 186, 88 Atl. 475.

38. See the statutes, and the title "Appeals."

[a] "An order affecting a substantial right" is appealable under the code. An order, upon issue joined, refusing to dismiss a special proceeding to revoke letters is not such an order. *In re Kelly*, 153 App. Div. 322, 137 N. Y. Supp. 1099. See also *In re Powell's Will*, 136 App. Div. 830, 121 N. Y. Supp. 779.

[b] An order vacating in part a previous order is appealable. *Tomlinson v. Phelps*, 93 Minn. 350, 101 N. W. 496.

[c] An order sustaining a demurrer to a petition to compel administrator to inventory omitted property is appealable. *Dobson v. Holmes*, 83 Kan. 476, 112 Pac. 131; *In re Martin's Estate*, 82 Wash. 226, 144 Pac. 42. Compare *Mitchell v. Bay Probate Judge*, 155 Mich. 550, 119 N. W. 916.

Order passing on claim against estate, see 6 STANDARD PROC. 535.

[d] An order setting aside the allowance of a claim against an estate is appealable. *Brockman v. Webb*, 189 Mo. App. 475, 176 S. W. 1082.

[e] An order expressly determining question of decedent's residence on a petition to admit a will to probate is appealable. *State ex rel. Neal v. Kauffman*, 86 Wash. 172, 149 Pac. 656.

[f] Orders denying petition to vacate decree of distribution is appealable to the district court. *Gray v. McKnight*, 50 Okla. 73, 150 Pac. 1046; *Smith v. J. I. Case Threshing Mach Co.*, 43 Okla. 316, 142 Pac. 1032.

[g] Decrees in escheat proceedings are appealable. *McKenzie v. Jensen*, 195 Ala. 36, 70 So. 678.

Appeal from refusal of application to correct inventory, see 6 STANDARD PROC. 526.

Order of distribution, see 6 STANDARD PROC. 636.

[h] Orders of a probate judge after judgment have not been included in the list of appealable orders. *Smith v. Peterson (Idaho)*, 169 Pac. 290.

39. See the statutes.

40. *In re Mudgett*, 103 Me. 367, 69 Atl. 575; *In re Brust's Estate (Minn.)*, 127 N. W. 11.

[a] If not taken within the prescribed time, the appeal may be dismissed. *Beakley v. Cunningham*, 121 Ark. 457, 181 S. W. 287.

[b] The notice of the order or judgment limiting the right of appeal must be in writing. *In re Malchow's Estate (Minn.)*, 157 N. W. 709.

41. *Vail v. Page*, 175 Ind. 126, 93 N. E. 705; *Merriman v. Peck*, 95 Mich. 277, 54 N. W. 871.

42. *Gorton v. Person*, 97 Mich. 561, 56 N. W. 936 (failure to perfect appeal in time); *Lewellyn v. Lewellyn*, 87 Mo. App. 9, defects in transcript.

43. *Fox v. Probate Judge*, 48 Mich. 643, 111 N. W. 1131.

[a] The probate court is not authorized to enter into an inquiry to determine whether the party claiming an appeal is a "person aggrieved" within the meaning of the statute and deny the application if he finds against the claimant. *Clifton v. Jackson Probate Court*, 154 Mich. 488, 117 N. W. 1051.

44. *Tharp v. Barnett*, 93 Ark. 263, 124 S. W. 1027.

[a] Formal written motion for allowance of an appeal is not necessary unless required to show the interest of the party desiring to appeal. *State ex rel. Rowland v. Smith*, 91 Conn. 110, 99 Atl. 555.

[b] Order of Allowance.—The sending of the papers and transcript to the circuit court is tantamount to an allowance of the appeal, where a formal order is necessary. *Lewellyn v. Lewellyn*, 87 Mo. App. 9.

sary. The statutes generally require a notice of appeal,⁴⁵ an appeal bond,⁴⁶ or affidavit in lieu thereof, showing an inability to give a bond,⁴⁷ together with an affidavit on appeal,⁴⁸ and also a bill of excep-

45. Cal.—See *In re McPhee's Estate*, 154 Cal. 385, 97 Pac. 878, as to whether appeal without service of notice is want of due process of law. Mich.—*Hosey v. Ionia Circ. Judge*, 120 Mich. 280, 79 N. W. 177; *Merriman v. Jackson Circ. Judge*, 95 Mich. 277, 54 N. W. 871. Minn.—*Schultz v. Brown*, 47 Minn. 255, 257, 49 N. W. 982, as to notice where creditor or heir appeals. N. D.—*Davidson v. Unknown Heirs of Peterson*, 22 N. D. 480, 134 N. W. 751. Wis.—*Ziegler v. Bark*, 121 Wis. 533, 99 N. W. 224.

See also 6 STANDARD PROC. 537, 586.

[a] A liberal construction is given a notice of appeal. *First Unitarian Soc. v. Houlston*, 96 Minn. 342, 105 N. W. 66.

[b] An objection that the reasons for appeal assigned in the notice are too broad is waived by failing to move for a dismissal of the appeal. *Cassery v. Cassery*, 123 Mich. 44, 81 N. W. 930.

[c] Service on attorney is sufficient. *In re Brown's Will*, 32 Minn. 443, 21 N. W. 474.

[d] Service on executor is sufficient. *Rong v. Haller*, 106 Minn. 454, 119 N. W. 405.

46. Idaho.—*In re Blackinton's Estate*, 29 Idaho 310, 158 Pac. 492. Kan.—*Pee v. Witt*, 100 Kan. 171, 163 Pac. 797; *Ald v. Appling*, 89 Kan. 340, 131 Pac. 569, when bond is filed. Me.—*Appeal of Carter*, 111 Me. 186, 88 Atl. 475. Okla.—*Queen Ins. Co. v. Cotney*, 25 Okla. 125, 105 Pac. 651. Tex.—*Smithwick v. Kelly*, 79 Tex. 564, 573, 15 S. W. 486.

See also 6 STANDARD PROC. 537.

Compare Hines v. Sharp, 123 Ark. 61, 184 S. W. 431 (a bond is not required except where a supersedeas is desired); *In re McPhee's Estate*, 154 Cal. 385, 97 Pac. 878, statute does not require a bond.

[a] Guardians and representatives are relieved from giving bonds on their own appeals by statute. *In re Stark's Will*, 149 Wis. 631, 134 N. W. 389.

[b] A cash deposit cannot be given in lieu thereof where the statute requires a bond. *Pee v. Witt*, 100 Kan. 171, 163 Pac. 797.

[c] The Bond Is Payable to the County Judge.—A bond payable to him is not objectionable even though he is disqualified and a special county judge tries the case. *Wolnitzek v. Lewis*. (Tex. Civ. App.), 162 S. W. 963.

[d] Delivery of Bond by Mail. *Harvey v. Allen*, 94 Ga. 454, 19 S. E. 246.

[e] Omission to give bond is waived by appearance in the appellate court. *Stricklin v. Galloway*, 99 Ark. 56, 137 S. W. 804.

[f] The probate court may permit (1) the filing of a new bond in lieu of a defective one. *Davidson v. Unknown Heirs of Peterson*, 22 N. D. 480, 134 N. W. 751. (2) But where the bond is fatally defective, it cannot be amended in the appellate court. *Appeal of Carter*, 111 Me. 186, 88 Atl. 475. (3) The district court may remand the case to the county court that a sufficient bond may be filed. *Davidson v. Unknown Heirs of Peterson*, 22 N. D. 480, 134 N. W. 751.

47. *Bolen v. Superior Court*, 14 Ariz. 31, 123 Pac. 305; *Smithwick v. Kelly*, 79 Tex. 564, 573, 15 S. W. 486.

48. *Tharp v. Barnett*, 93 Ark. 263, 124 S. W. 1027. Mo.—*Egger v. Egger*, 225 Mo. 116, 123 S. W. 928, 135 Am. St. Rep. 566. Okla.—*Baker v. Cureton*, 49 Okla. 15, 150 Pac. 1090.

[a] An order granting an appeal before the filing of an affidavit is premature. *Tharp v. Barnett*, 93 Ark. 263, 124 S. W. 1027.

[b] The affidavit need not appear in the record, but it must be filed. *Huffman v. Sudbury*, 117 Ark. 628, 174 S. W. 1149.

[c] The jurisdiction of the cause is ousted from the probate court and transferred to the circuit court by the filing of the affidavit for appeal. *Huffman v. Sudbury*, 117 Ark. 628, 174 S. W. 1149; *Lewellyn v. Lewellyn*, 87 Mo. App. 9.

[d] An affidavit by the attorney reciting that it is on behalf of the plaintiff is sufficient although he signs it, describing himself as appellant. *Egger v. Egger*, 225 Mo. 116, 123 S. W. 928, 135 Am. St. Rep. 566.

tions,⁴⁹ or a statement of objections to the decree,⁵⁰ a transmission to the appellate court of a certified transcript of the record and proceedings together with the original papers,⁵¹ the filing of a return of the probate court,⁵² and an entry of appeal in the appellate court.⁵³ Some statutes authorize the appellate court to allow an appeal upon petition of a person aggrieved who failed to prosecute an appeal seasonably.⁵⁴

3. Proceedings on Appeal.—a. *Generally.*—On appeals to supe-

[e] The appeal may be dismissed for want of a proper affidavit. *Tharp v. Barnett*, 93 Ark. 263, 124 S. W. 1027; *Egger v. Egger*, 225 Mo. 116, 137, 123 S. W. 928, 135 Am. St. Rep. 566.

[f] **Insufficiency in the Affidavit May Be Waived.**—*Stricklin v. Gallo-way*, 99 Ark. 56, 137 S. W. 804.

49. See 4 STANDARD PROC. 298, note 21. But see *Davis' Admr. v. Davis*, 162 Ky. 316, 172 S. W. 665, holding no bill of exceptions is required when the cause is tried de novo on appeal.

[a] **Settling and signing a bill of exceptions is within the authority of a probate court.** *Humbarger v. Humbarger*, 72 Kan. 412, 83 Pac. 1095, 115 Am. St. Rep. 204.

50. *Codwise v. Livermore*, 194 Mass. 445, 80 N. E. 609.

51. Ga.—*Ford v. Redfearn*, 145 Ga. 498, 89 S. E. 611. Ill.—*Esmond v. Esmond*, 142 Ill. App. 233, contents of transcript. Mich.—*Merriman v. Peck*, 95 Mich. 277, 54 N. W. 871. Mo.—*Crow v. Lutz's Estate*, 175 Mo. App. 427, 162 S. W. 769 (as to right to supply omitted papers); *Lewellyn v. Lewellyn*, 87 Mo. App. 9. Okla.—*In re Folsom's Estate*, 159 Pac. 751; *Queen Ins. Co. v. Cotney*, 25 Okla. 125, 105 Pac. 651.

[a] **Statute Is Mandatory.**—*Merriman v. Peck*, 95 Mich. 277, 54 N. W. 871.

[b] **But the appeal should not be dismissed for any informality or insufficiency in the transcript without giving the appellant an opportunity to correct it.** *Esmond v. Esmond*, 142 Ill. App. 233.

[c] **The district court does not acquire jurisdiction until the filing of the transcript.** *In re Folsom's Estate*, (Okla.) 159 Pac. 751. See also *Vail v. Pace*, 175 Ind. 126, 93 N. E. 705.

[d] **A statute requiring the transmission (1) of a certified transcript of the record and proceedings together with the original papers, contemplates a transmission promptly or with reasonable diligence.** And where the ap-

peal has been allowed and a transcript filed, the circuit court has jurisdiction to allow the filing of the original papers; but until the original papers are filed, it cannot proceed to hear and try the case. *Lormis v. Hartmann* (Mo. App.), 193 S. W. 36. (2) By having delivered the papers to the administrator who later filed them in the circuit court, the clerk of the probate court has "transmitted" them. *Lormis v. Hartmann* (Mo. App.), 193 S. W. 36.

52. *Hintermeister v. Brady*, 70 Minn. 437, 73 N. W. 145, on filing of return, district court acquires complete jurisdiction.

53. *Daley v. Francis*, 153 Mass. 8, 26 N. E. 132.

[a] **A late entry of appeal confers the same jurisdiction on appellate court as a seasonable entry.** *Daley v. Francis*, 153 Mass. 8, 26 N. E. 132.

54. See generally the statutes and the following cases: Me.—*Sproul v. Randell*, 107 Me. 274, 78 Atl. 450. Mass.—*Nash v. Whitecomb*, 225 Mass. 487, 114 N. E. 669; *Daley v. Francis*, 153 Mass. 8, 26 N. E. 132; *Capen v. Skinner*, 139 Mass. 190, 29 N. E. 651. Mich.—*In re Bright's Estate*, 157 Mich. 220, 121 N. W. 749; *Watson v. Kent Circ. Judge*, 125 Mich. 182, 125 N. W. 54 (holding petition insufficient); *Merriman v. Peck*, 96 Mich. 603, 55 N. W. 1021. R. I.—*Kenyon v. Hayhurst*, 35 R. I. 380, 87 Atl. 168. Wis. *Jamison v. Snyder*, 79 Wis. 286, 48 N. W. 261.

[a] **A broad discretion is vested in the court in allowing such applications.** *Nash v. Whitecomb*, 225 Mass. 487, 114 N. E. 669; *Capen v. Skinner*, 139 Mass. 190, 29 N. E. 651.

[b] **Notice of the petition may be ordered by a justice in vacation.** *Sproul v. Randell*, 107 Me. 274, 78 Atl. 450.

[c] **The petitioner must show not only that he is not in default, but that substantial justice requires a revision**

rior, circuit, or district courts, the statute sometimes provides that if the appeal be on questions of law, the court may review any such question which sufficiently appears on the face of the record or proceeding.⁵⁵ If the appeal be on questions of both law and fact, the trial shall be de novo.⁵⁶ A superior court while hearing appeals from probate courts, sits not as a court of general or common-law jurisdiction,⁵⁷ but as a court of probate,⁵⁸ with no jurisdiction not possessed by the probate court.⁵⁹

b. *Pleadings*. — Formal pleadings are not required in the appellate

of the case. *Capen v. Skinner*, 139 Mass. 190, 29 N. E. 651.

55. See the statutes, and *Smith v. Peterson* (Idaho), 169 Pac. 290.

[a] **New Questions Cannot Be Raised**.—Only such questions as were raised in the probate court on the record can be reviewed. *In re Estate of McVay*, 14 Idaho 56, 64, 93 Pac. 28, 31.

56. **Conn.**—*Slattery v. Woodin*, 90 Conn. 48, 96 Atl. 178. **Idaho**.—*Fraser v. Davis*, 29 Idaho 70, 156 Pac. 913, 158 Pac. 233; *Kent v. Dalrymple*, 23 Idaho 694, 132 Pac. 301; *In re Estate of McVay*, 14 Idaho 56, 64, 93 Pac. 28, 31. **Mo.**—*North Missouri R. Co. v. Green's Admr.*, 34 Mo. 159; *In re Ford*, 157 Mo. App. 141, 137 S. W. 32. **Neb.**—*In re Normand's Estate*, 88 Neb. 767, 130 N. W. 571. **N. Y.**—*In re Martin's Will*, 80 Misc. 17, 141 N. Y. Supp. 784, the appellate division may take additional testimony or it may reconsider on the merits the whole case de novo. **N. D.**—*Davidson v. Unknown Heirs of Peterson*, 22 N. D. 480, 134 N. W. 751. **R. I.**—See *Vaill v. McPhail*, 34 R. I. 361, 370, 83 Atl. 1075, 1079, Ann. Cas. 1914D, 516. **Tex.** *Holt v. Guerguin* (Tex. Civ. App.), 156 S. W. 581; *Shook v. Journeay* (Tex. Civ. App.), 149 S. W. 406; *Levy v. W. L. Moody & Co.* (Tex. Civ. App.), 87 S. W. 205.

See 6 STANDARD PROC. 538.

[a] **Procedure**.—"If the appeal be taken upon questions of both law and fact, then the district court proceeds to try, first, the questions of law, and if the cause is reversed on questions of law, the questions of fact are not tried. If, however, the cause is not reversed on questions of law, then the same questions of fact as were tried in the probate court will be retried in the district court as other trials in said court are conducted. Witnesses may be called and may testify the same as in the trial of any

other cause. In other words, this statute, under the constitution, grants to the district court appellate jurisdiction to retry only the same issues of law and fact as were heard and determined by the probate court. Whatever judgment may be entered in the district court is to be certified back to the probate court for execution in accordance therewith." *In re Estate of McVay*, 14 Idaho 56, 64, 93 Pac. 28, 31. To similar effect, see *Fraser v. Davis*, 29 Idaho 70, 156 Pac. 913, 158 Pac. 233; *Kent v. Dalrymple*, 23 Idaho 694, 702, 132 Pac. 301.

[b] **On failure to enter the cause on the calendar for trial**, the case may be dismissed although the court may direct the cause to be placed on the calendar in its discretion. *Hintermeister v. Brady*, 70 Minn. 437, 73 N. W. 145.

57. *Slattery v. Woodin*, 90 Conn. 48, 96 Atl. 178; *Appeal of Wilson*, 84 Conn. 560, 89 Atl. 718.

58. *Slattery v. Woodin*, 90 Conn. 48, 96 Atl. 178.

[a] **The case is to be tried and determined on the same principles that would be administered by the probate court itself**. *Brooks v. Hargrave*, 179 Mich. 136, 146, 146 N. W. 325. *Brown v. Forsche*, 43 Mich. 492, 501, 5 N. W. 1011.

59. **Conn.**—*Appeal of Wilson*, 84 Conn. 560, 89 Atl. 718. **Kan.**—*Ross v. Woollard*, 75 Kan. 383, 89 Pac. 680. **Mo.**—*Garver's Estate v. Richardson*, 77 Mo. App. 459. Compare *In re Ford*, 157 Mo. App. 141, 137 S. W. 32, holding the circuit court on appeal from probate courts proceeds with all the powers of a circuit court.

Jurisdiction of probate courts generally, see *supra*, III.

[a] **No general equity jurisdiction** is possessed by the appellate court. *In re Wilson's Estate*, 97 Neb. 780, 151 N. W. 316.

court as that court tries and determines the cause anew on the pleadings in the probate court.⁶⁰

c. *Issues*.—The district court is authorized to retry only the same issues of law and fact as were heard and determined by the probate court.⁶¹ Where statute requires a party to state the reasons of his appeal, the appellate court is limited to a determination of the questions presented.⁶²

d. *Right to Jury Trial*.—Except in so far as statutes have been enacted conferring the right,⁶³ no right to a trial by jury exists on a trial de novo in probate proceedings.⁶⁴ But the court may in its discretion submit questions of fact to a jury.⁶⁵

60. *Rassieur v. Zimmer*, 249 Mo. 175, 155 S. W. 24; *Cole v. Dallmeyer*, 101 Mo. 57, 13 S. W. 687; *Kessler v. Claves*, 147 Mo. App. 88, 125 S. W. 799, 803.

On appeal from order approving or rejecting claims, see 6 STANDARD PROC. 538.

On appeal where estate is insolvent, see 6 STANDARD PROC. 586.

[a] **Technical accuracy of common law is not essential** to form of pleadings on appeal. *In re Peek's Estate*, 80 Vt. 469, 68 Atl. 433, 437, where special demurrer was considered as general.

[b] **Amendments of pleadings cannot be allowed** on trial de novo of a probate matter. *In re Estate of McVay*, 14 Idaho 56, 64, 93 Pac. 28, 31. See *In re MacDonald's Estate* (Mich.), 163 N. W. 102.

61. Conn.—Appeal of Wilson, 84 Conn. 560, 80 Atl. 718. Idaho.—*In re Estate of Christensen*, 15 Idaho 692, 99 Pac. 829; *In re Estate of McVay* 14 Idaho 56, 64, 93 Pac. 28, 31. Mich. *American Baptist Missionary Union v. Peek*, 9 Mich. 445. Tex.—*Goodman v. Schwind* (Tex. Civ. App.), 186 S. W. 282; *Levy v. W. L. Moody & Co.* (Tex. Civ. App.), 87 S. W. 295.

See 6 STANDARD PROC. 538.

[a] **New issues need not be framed** in will cases. *Ellair v. Wayne Circuit Judge*, 46 Mich. 496, 9 N. W. 533.

[b] **The fact that either party failed to present evidence** in support of the issues made in the probate court does not authorize dismissal of the appeal, as this is of no consequence on the trial de novo. *In re Estate of Christensen*, 15 Idaho 692, 99 Pac. 829.

[c] **Title to land cannot be tried** on appeal. Appeal of Wilson, 84 Conn. 560, 80 Atl. 718; *Byerly v. Eadie*, 95

Kan. 400, 148 Pac. 757. *Leyerly v. Leyerly*, 87 Kan. 307, 124 Pac. 405.

[c] **When a case involving the probate of a will is appealed**, the district court may probate the will or declare it null and void. *Holt v. Guerguin* (Tex. Civ. App.), 156 S. W. 581.

62. Mass.—*Cowden v. Jacobson*, 165 Mass. 240, 43 N. E. 98; *Harris v. Harris*, 153 Mass. 439, 26 N. E. 1117. Mich. *In re Mill's Estate*, 158 Mich. 504, 158 N. W. 1080; *In re Ward's Estate*, 152 Mich. 218, 239, 116 N. W. 23; *In re Beers*, 148 Mich. 300, 111 N. W. 915; *Jersey v. Jersey*, 146 Mich. 660, 110 N. W. 54; *Casserly v. Casserly*, 123 Mich. 44, 81 N. W. 930, remedy where reasons are general. R. I.—*Gilbert v. Hayward*, 37 R. I. 303, 92 Atl. 625.

63. Conn.—*Slattery v. Woodin*, 90 Conn. 48, 96 Atl. 178, in appeals from probate involving the validity of a will only is a jury trial allowed in Connecticut. Ill.—*Esmond v. Esmond*, 154 Ill. App. 357, the probate court has power to impanel a jury to try issues or matters of fact in any matters pending before the court. Mich.—*Linton v. Howard*, 163 Mich. 556, 128 N. W. 793; *In re Stebbins' Estate*, 94 Mich. 304, 54 N. W. 159, 34 Am. St. Rep. 345 (the party has an absolute right to a jury to try questions of fact); *Grovier v. Hall*, 23 Mich. 7; *American Baptist Missionary Union v. Peek*, 9 Mich. 445.

64. Ill.—*Moody v. Found*, 208 Ill. 78, 69 N. E. 831. Kan.—*Gallon v. Haas*, 67 Kan. 225, 72 Pac. 770. Okla.—*Cartwright v. Holcomb*, 21 Okla. 548, 97 Pac. 385. Wis.—*In re Jackman's Will*, 26 Wis. 104.

65. Mass.—*McKay v. Kean*, 167 Mass. 524, 46 N. E. 120 (statute authorizes framing of issue for jury in discretion of court); *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726, 34

e. *Reference*.—Statutes sometimes authorize the superior court to appoint a referee on appeal in probate matters.⁶⁶

f. *Findings and Conclusions*.—Where issues of fact are presented, findings of fact and conclusions of law are sometimes required to be made.⁶⁷

g. *Disposition of the Case*.—Statutes generally provide what disposition of the case shall be made on appeal.⁶⁸ Some statutes provide that in disposing of the case, the superior or circuit court may reverse or affirm the judgment,⁶⁹ and may make such order or decree as the judge of the probate court ought have made and may remit the cause for further proceedings, or the court may make any other order therein as law and justice shall require.⁷⁰

h. *Appeal From Superior or District Court*.—Under some statutes it is held that an appeal lies from the superior or district court to the supreme court from a final judgment therein on a trial de novo,⁷¹

Am. St. Rep. 258, 17 L. R. A. 188. Okla.—*Apache State Bank v. Daniels*, 32 Okla. 121, 121 Pac. 237, Ann. Cas. 1914A, 520, 40 L. R. A. (N. S.) 901; *Cartwright v. Holcomb*, 21 Okla. 548, 97 Pac. 385. Wis.—*In re Jackman's Will*, 26 Wis. 104.

Issues to jury, see the title "Issues in Pleading and Practice."

[a] *Submission of the case for a general verdict* is erroneous, but will not necessitate a reversal when the judge treated the verdict as advisory. *Apache State Bank v. Daniels*, 32 Okla. 121, 121 Pac. 237, Ann. Cas. 1914A, 520, 40 L. R. A. (N. S.) 901.

66. *In re Martin's Will*, 80 Misc. 17, 141 N. Y. Supp. 784.

67. *Swick v. Sheridan*, 107 Minn. 130, 119 N. W. 791, under a statute that appeals shall be tried in the same manner as if originally commenced in the district court.

68. See generally the statutes.

On appeal from order allowing claim, see 6 STANDARD PROC. 539.

[a] *In New York*, the appellate division may make a final disposition of the controversy. *Matter of Leland's Will*, 219 N. Y. 387, 392, 114 N. E. 854.

[b] *Findings of the probate court* may be reversed where a clear ground is afforded for that purpose. *Stark v. Watson*, 24 S. C. 215, 223; *Black v. White*, 13 S. C. 37.

[c] *On appeal from order removing administrator*, the court cannot order a sale of the property of the estate. *Levy v. W. L. Moody & Co.* (Tex. Civ. App.), 87 S. W. 205.

69. *Mass.*—*Tarbell v. Forbes*, 177

Mass. 238, 58 N. E. 873. *Mich.*—*In re Kilbourne's Estate*, 173 Mich. 258, 139 N. W. 16. *Minn.*—*Blandin v. Brenning*, 106 Minn. 353, 119 N. W. 57, may affirm when appellant fails to appear. *N. Y.*—See *In re Duffy*, 127 App. Div. 74, 111 N. Y. Supp. 77.

70. *Day v. Nichols*, 228 Mass. 230, 117 N. E. 254; *Grinnell v. Baxter*, 17 Pick. 383; *Marskey v. Lawrence*, 121 Mich. 577, 80 N. W. 571; *In re Ensign*, 47 Mich. 443, 11 N. W. 262.

[a] *Inclusion of the sureties on the appeal bond in the judgment* is improper. *Bondie v. Bourassa*, 46 Mich. 321, 9 N. W. 433.

[b] *The circuit court cannot direct the probate court to enter the judgment* but should enter it itself. *In re Ensign*, 47 Mich. 443, 11 N. W. 262.

[c] *Remand for retrial* is not proper under the statute quoted in the text. *In re Kilbourne's Estate*, 173 Mich. 258, 139 N. W. 16.

[d] *A reversal and further hearing* may be ordered under a statute giving supreme court of probate power to make any order justice may require. *In re Swan*, 115 Me. 127, 98 Atl. 190.

[e] *Judgment Is Conclusive.*—*In re Ford*, 157 Mo. App. 141, 137 S. W. 32.

71. *Fla.*—*Finch v. Bonar*, 46 Fla. 246, 35 So. 189. *Mo.*—*Marshall v. Shoemaker's Estate*, 164 Mo. App. 429, 144 S. W. 1120. *N. M.*—*Clancey v. Clancey*, 7 N. M. 405, 37 Pac. 1105, 38 Pac. 168, holding the appeal is to the district court sitting as a court of equity and its action may be reviewed on appeal. *N. Y.*—*Matter of Leland's Will*, 219 N. Y. 387, 392, 114 N. E. 854. *Okla.*

but under other statutes, no such right to appeal exists.⁷²

i. *Certiorari*.—*Certiorari* will lie to review the proceedings of the circuit court on appeal from a probate court.⁷³

j. *Writ of Error*.—If the proceeding in a circuit court on appeal from a probate court is not a proceeding after the course of the common law or does not present issues triable at common law or by common law rules a writ of error to it will not lie.⁷⁴ But where the proceedings on appeal become analogous to suits at common law a writ of error will lie.⁷⁵ Under some statutes, the proceedings for

In re Barnes' Estate, 47 Okla. 117, 147 Pac. 504, construing Sess. Laws 1910, §12, ch. 65. *Wis.*—*Brunson v. Burnett*, 1 Chand. 9, 2 Pinn. 79.

[a] **Presumption on Appeal**.—The appellate court cannot assume that the proper procedure on appeal by an administrator to the district court has been complied with so as to give that court jurisdiction over the proceeding. *Goodwin v. Walker* (Tex. Civ. App.), 124 S. W. 462.

72. *In re Erdman's Estate*, 179 Mich. 567, 146 N. W. 400; *Whalen v. Kitchen*, 61 Neb. 329, 85 N. W. 278.

73. *In re Erdman's Estate*, 179 Mich. 567, 146 N. W. 400; *In re Kilbourne's Estate*, 173 Mich. 258, 139 N. W. 16; *Graves v. Hines*, 106 N. C. 323, 11 S. E. 362, *certiorari* as a substitute for a lost appeal. See *In re Fisher*, 4 Wis. 254, 65 Am. Dec. 309. See generally the title "*Certiorari*" and 6 STANDARD PROC. 637.

[a] **A judgment allowing a contingent claim** against an estate cannot be reviewed by *certiorari*. *John Hancock Mut. L. Ins. Co. v. Hill's Estate*, 108 Mich. 129, 65 N. W. 748.

74. *In re Erdman's Estate*, 179 Mich. 567, 146 N. W. 400; *In re Koenig's Estate*, 152 Mich. 432, 116 N. W. 400; *In re Sanborn's Appeal*, 107 Mich. 189, 65 N. W. 209; *In re Brinsmade's Appeal*, 52 Mich. 537, 18 N. W. 346; *Churchill v. Burt*, 32 Mich. 490; *Swan v. House*, 50 Tex. 650.

[a] **An order requiring a new bond and rendition of an account** cannot be reviewed on writ of error. *In re Sanborn's Appeal*, 107 Mich. 189, 65 N. W. 209; *Fletcher v. Clark*, 39 Mich. 374.

75. *Mich.*—*In re Stroebel*, 194 Mich. 634, 161 N. W. 872; *Owen v. Ward's Estate*, 125 Mich. 30, 83 N. W. 1003; *Peckham v. Hoag*, 92 Mich. 423, 52 N. W. 734; *In re Mower's Appeal*, 48 Mich. 441, 447, 12 N. W. 646; *American Baptist Missionary Union v. Peck*, 9

Mich. 445. *Neb.*—*Whalen v. Kitchen*, 61 Neb. 329, 85 N. W. 278, the proceedings in the district court are statutory and legal as distinguished from equitable. *Ohio.*—*Glaney v. Glaney*, 17 Ohio St. 134. *Wis.*—*Brunson v. Burnett*, 1 Chand. 9, 2 Pinn. 79.

[a] "The jurisdiction of the probate court is such that very different proceedings requiring wholly different treatment in the circuit court may be brought up by appeal, and they must be proceeded with in that court according to their nature and proper analogies. Where the proceeding in the probate court involves common-law questions and stands in the place of a suit at law, it naturally assumes the form of a common-law suit in the circuit court, and it is very proper and not unusual to provide for the making up of a common-law issue. The trial of such an issue will not be different from any common-law trial and exceptions may be settled and writ of error had as in other cases. But appeals from interlocutory orders cannot take that form * * * nor proceedings for the removal of an administrator, * * * or for the appointment of a guardian. * * * But in several cases appeals from the final accounting of an administrator have been proceeded in as common-law cases without difficulty and confusion." *In re Mower's Appeal*, 48 Mich. 441, 447, 12 N. W. 646.

[b] **Where issues of fact may be tried by a jury** in the circuit court, the proceedings are then in conformity with the rules of the common law, and writ of error will lie. *In re Stroebel*, 194 Mich. 634, 161 N. W. 872.

Error from judgment of appellate court allowing claim, see 6 STANDARD PROC. 540.

[c] **An order affirming a probato order denying a petition for appointment of an administrator de bonis non**, the question as to whether there were

review must be by appeal and not by writ of error.⁷⁶

M. CORRECTION OF RECORDS. — Probate courts may correct and complete their records by a nunc pro tunc entry of proceedings had which were not entered of record through mistake, accident or neglect.⁷⁷

assets to be administered being decided against the petitioner is reviewable on error. *Owen v. Ward's Estate*, 125 Mich. 30, 83 N. W. 1003.

[d] The decree upon an appeal from a decree allowing or disallowing a will may be reviewed on error. *American Baptist Missionary Union v. Peck*, 9 Mich. 445.

76. *Finch v. Bonar*, 46 Fla. 246, 35 So. 189.

77. *Kan.*—*Faler v. Culver*, 94 Kan.

123, 146 Pac. 333. *N. Y.*—*In re Davis' Will*, 99 Misc. 447, 164 N. Y. Supp. 143. *Tex.*—*Alexander v. Barton* (Tex. Civ. App.), 71 S. W. 71.

As to correction of records generally, see the title "Records."

[a] Source of Power.—This power to correct its records follows as an incident to the duty to keep records. *In re Davis' Will*, 99 Misc. 447, 164 N. Y. Supp. 143.

PROBATE OF WILLS. — See **Decedents' Estates; Probate Courts; Wills.**

PROBATE PROCEEDINGS. — See **Decedents' Estates; Probate Courts; Wills.**

PRODATION. — See **Sentence and Judgment.**

PROCEDENDO. — See **Mandate and Proceedings Thereafter.**

PROCEEDINGS IN PERSONAM. — See **Personal Actions.**

PROCEEDINGS IN REM

By the Editorial Staff.

I. DEFINITION AND ILLUSTRATION, 675

II. JURISDICTION, 677

III. ACQUISITION OF JURISDICTION, 677

IV. PLEADINGS, 678

V. JOINDER OF ACTIONS, 678

VI. APPEARANCE, 678

VII. CHANGE OF FORM OF REMEDY, 678

VIII. RELIEF AND JUDGMENT, 678

CROSS-REFERENCES:

Admiralty;	Jurisdiction;
Attachment;	Personal Actions;
Default;	Sequestration;
Divorce;	Service of Process and Papers;
Judgments;	Ships and Shipping;
Suits and Actions.	

Abatement of action in personam in rem by a pending action in rem or in personam, see 1 STANDARD PROC. 998, 1006.

Jurisdiction over res, how obtained, see 17 STANDARD PROC. 688, 691.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION AND ILLUSTRATION.—The term “actions or proceedings in rem” is used in opposition to the term “actions or proceedings in personam” and is based on the civil law.¹ Such actions or proceedings are civil in nature,² and strictly considered, include proceedings against property alone treated as responsible for the claim asserted without reference to the title of individual claimants,³ and

1. *Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160.

2. **U. S.**—*United States v. La Ven-geance*, 3 Dall. 297, 1 L. ed. 610. **Mass.** *Barnacoat v. Six Quarter Casks of Gun-*

powder, 1 Metc. 225, 230. **N. H.**—*State v. Barrels of Liquor*, 47 N. H. 369, 374.

3. **U. S.**—*Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; *Galpin v. Page*, 3 Sawy. 93, 124,

proceedings instituted to determine the status of particular property and persons.⁴ Those proceedings which, in form personal actions, seek to subject particular property to the discharge of the claims asserted, are sometimes classed as proceedings in rem or substantially in rem, but they are more properly actions quasi in rem.⁵ A class of

9 Fed. Cas. No. 5,206. **Cal.**—Cunningham *v.* Shanklin, 60 Cal. 118, 125. **Ind.**—Quarl *v.* Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662. **Ia.** Kean *v.* Rogers, 118 N. W. 515. **N. Y.** Gorham Co. *v.* United E. & C. Co., 202 N. Y. 342, 349, 95 N. E. 805. **Tex.** Galveston Chamber of Commerce *v.* Railroad Commission (Tex. Civ. App.), 137 S. W. 737. **W. Va.**—Dulin *v.* McCaw, 39 W. Va. 721, 20 S. E. 681.

[a] Proceedings in admiralty for forfeiture of goods are proceedings in rem. Galpin *v.* Page, 3 Sawy. 93, 124, 9 Fed. Cas. No. 5,206; Cunningham *v.* Shanklin, 60 Cal. 118.

Collision cases, see 5 STANDARD PROC. 133.

[b] Proceedings for registration of land under the Torrens system are in rem. Alba *v.* De la Cruz, 17 Phil. Isl. 49. See the title "Title."

[c] A proceeding to abate dangerous public buildings is not one in rem. Gorham Co. *v.* United E. & C. Co., 202 N. Y. 342, 95 N. E. 805.

4. **U. S.**—Galpin *v.* Page, 3 Sawy. 93, 124, 9 Fed. Cas. No. 5,206. **Cal.** Cunningham *v.* Shanklin, 60 Cal. 118, 125. **Ga.**—Stroupper *v.* McCauley, 45 Ga. 74. **Me.**—Lord *v.* Chadbourne, 42 Me. 429, 66 Am. Dec. 290. **Neb.**—Atkins *v.* Atkins, 9 Neb. 191, 202, 2 N. W. 466. **Ohio.**—Cross *v.* Armstrong, 44 Ohio St. 613, 623, 10 N. E. 160. **Tex.** Galveston Chamber of Commerce *v.* Railroad Commission (Tex. Civ. App.), 137 S. W. 737. **Vt.**—Woodruff *v.* Taylor, 20 Vt. 65.

[a] "A proceeding in rem is one to determine the state or condition of the thing itself." Holcomb *v.* Kelly, 114 N. Y. Supp. 1048.

[b] Probate of wills (1) is an illustration. **U. S.**—*In re* Aspinwall's Est., 83 Fed. 851; Galpin *v.* Page, 3 Sawy. 93, 124, 9 Fed. Cas. No. 5,206. **Fla.**—Torrey *v.* Bruner, 60 Fla. 365, 53 So. 337. **Mo.**—Bartero *v.* Real Est. Sav. Bank, 10 Mo. App. 76. **Vt.**—Woodruff *v.* Taylor, 20 Vt. 65, 73. (2) Proceedings to set aside probate of wills are in rem. McCann *v.* Ellis, 172 Ala. 60, 55 So. 303.

[c] Annulment of Marriage.—Bartero *v.* Real Est. Sav. Bank, 10 Mo. App. 76. See the title "Marriage."

Appointment of guardian, see 10 STANDARD PROC. 784.

[d] Appointment of Executors. Stroupper *v.* McCauley, 45 Ga. 74, 78.

[e] Divorce proceeding, see 7 STANDARD PROC. 739. Effect of foreign decree of divorce, see 15 STANDARD PROC. 670, 692.

Election contest, see 8 STANDARD PROC. 12.

[f] A judgment in a separate maintenance suit establishing the fact of marriage is not in rem. American Woolen Co. *v.* Leshner, 267 Ill. 11, 107 N. E. 882.

[g] A summary proceeding against an insolvent corporation to prevent it from exercising its franchises is in rem. Pierce *v.* Old Dominion C. M. & S. Co., 67 N. J. Eq. 399, 58 Atl. 319.

[h] A proceeding to determine the validity of an assessment for reclamation purposes is in the nature of a proceeding in rem. Reclamation Dist. No. 551 *v.* Runyon, 117 Cal. 164, 49 Pac. 131.

5. **U. S.**—Freeman *v.* Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; Galpin *v.* Page, 3 Sawy. 93, 124, 9 Fed. Cas. No. 5,206. **Mont.**—Gassert *v.* Strong, 38 Mont. 18, 33, 98 Pac. 497. **Va.**—Kelso *v.* Blackburn, 3 Leigh (30 Va.) 299, 306.

[a] Illustrations.—(1) Actions in which property of nonresidents is attached. **U. S.**—Freeman *v.* Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Mankin *v.* Chandler, 2 Brock. 125, 16 Fed. Cas. No. 9,030. **Pa.**—Megee *v.* Beirne, 39 Pa. 50, 61. **Vt.**—Woodruff *v.* Taylor, 20 Vt. 65. See 3 STANDARD PROC. 240. (2) Actions for the enforcement of mortgages and other liens. **U. S.**—Freeman *v.* Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372. **Me.**—Sheridan *v.* Ireland, 66 Me. 138, the action is in rem as well as in personam. **Mich.**—Reilly *v.* Stephenson, 62 Mich. 509, 29 N. W. 99, log lien. **Neb.**—Peters *v.* Dunnells,

cases held to be substantially in rem are those which seek to dispose of property or relate to some interest therein, but which touch the property or interest only through the judgment recovered.⁶

II. JURISDICTION.⁷—As a general rule common law courts do not proceed strictly in rem,⁸ though they have cognizance of some proceedings quasi in rem.⁹ The jurisdiction of proceedings in rem originally was confined to the admiralty,¹⁰ and the ecclesiastical¹¹ courts.

III. ACQUISITION OF JURISDICTION.—In proceedings in rem, jurisdiction is secured by the seizure of the res.¹² In proceedings strictly in rem, public citation to the world is necessary,¹³ but personal

5 Neb. 460. See the titles “**Liens;**” “**Logs and Logging;**” “**Mechanics’ Liens;**” “**Mortgages;**” “**Vendor and Purchaser.**” (3) Actions to partition real estate. *Galpin v. Page*, 3 Sawy. 93, 125, 9 Fed. Cas. No. 5,206; *Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212. (4) Actions to enforce the collection of taxes against lands. *Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212.

[b] **Special Attachment for Landlord’s Lien for Rent.**—See 18 STANDARD PROC. 503.

[c] **Widow’s suit for her dower** is in the nature of a proceeding in rem. *Bartero v. Real Est. Sav. Bank*, 10 Mo. App. 76.

Garnishment, see 10 STANDARD PROC. 375, 474.

Eminent domain, see 8 STANDARD PROC. 261.

Judicial sales, see 16 STANDARD PROC. 719.

[d] **Action to establish and enforce a trust** is quasi in rem. *Gassert v. Strong*, 38 Mont. 18, 34, 98 Pac. 497.

[e] **Action to divest trustee of title to trust property** is in personam. *Holcomb v. Kelly*, 114 N. Y. Supp. 1048.

[f] **A creditor’s suit** is not in rem. *Hughson v. Dameron*, 113 Va. 607, 75 S. E. 92.

[g] **Replevin** is partly in rem and partly in personam. *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750. See the title “**Replevin.**”

6. *Galpin v. Page*, 3 Sawy. 93, 124, 9 Fed. Cas. No. 5,206, quoted in *Gassert v. Strong*, 38 Mont. 18, 33, 98 Pac. 497. See *Smith v. Smith*, 123 Minn. 431, 144 N. W. 138, 52 L. R. A. (N. S.) 1061.

[a] **Proceedings to compel execution of conveyance of real property** in the state, when authorized by statute on publication of summons, is substan-

tially in rem. *Boswell’s Lessee v. Otis*, 9 How. (U. S.) 336, 348, 13 L. ed. 164; *Galpin v. Page*, 3 Sawy. 93, 125, 9 Fed. Cas. No. 5,206; *Adams v. Heckscher*, 80 Fed. 742.

[b] **A decree annulling a deed on establishing title to land**, by its own force is to that extent in rem. *Ark. McLaughlin v. McCrory*, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56. *Cal. McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421. *Ind.*—*Essig v. Lower*, 120 Ind. 239, 21 N. E. 1090. *Ia.*—*Ruppin v. McLachlan*, 122 Iowa 343, 98 N. W. 153. See the title “**Quieting Title.**”

[c] **Proceedings to wind up and dispose of a partnership** are substantially in rem. *Galpin v. Page*, 3 Sawy. 93, 125, 9 Fed. Cas. No. 5,206.

[d] **A proceeding to set aside a homestead** is in rem. *In re Pearce*, 43 Tex. Civ. App. 398, 96 S. W. 1094.

Proceedings to terminate a life estate, see 18 STANDARD PROC. 627, note 39.

[e] **A proceeding by heirs to recover escheated property** is in the nature of a proceeding in rem. *State v. Wygall*, 51 Tex. 621, 632.

7. **Jurisdiction of other courts where property has been seized**, see 17 STANDARD PROC. 805.

8. *Stroupper v. McCauley*, 45 Ga. 74, 78.

9. See the titles “**Attachment;**” “**Liens;**” “**Mortgages.**”

10. **Admiralty jurisdiction**, see 1 STANDARD PROC. 374.

11. *Stroupper v. McCauley*, 45 Ga. 74, except as to outlawry.

12. See 17 STANDARD PROC. 685; 10 STANDARD PROC. 474; 6 STANDARD PROC. 810.

13. **U. S.**—*Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Mankin v. Chandler*, 2 Brock. 125, 16 Fed. Cas. No. 9,030, general proclamation of the

service on particular individuals is not required.¹⁴ In proceedings quasi in rem, a particular defendant must be cited to appear, either by summons or publication.¹⁵ But notice to other persons is not given and would not be sufficient.¹⁶

IV. PLEADINGS.—The pleadings in proceedings in rem depend entirely upon the character of the action and the forum in which it prosecuted.¹⁷

V. JOINDER OF ACTIONS.—A joinder of proceedings in rem and in personam is sometimes permitted.¹⁸

VI. APPEARANCE.—In proceedings strictly in rem, any person who may be affected by the decision may appear in the proceeding.¹⁹

VII. CHANGE OF FORM OF REMEDY.—A suit in rem may be changed to one in personam by amendment or stipulation of the parties.²⁰ A suit quasi in rem becomes a suit in personam on the appearance of the defendant.²¹ But a delivery of money to the clerk of court does not change an action from one in personam to one in rem.²²

VIII. RELIEF AND JUDGMENT.—The relief sought in suits in rem is against the thing itself and does not extend to the person,²³

seizure. **Mass.**—See *Shores v. Hooper*, 153 Mass. 228, 233, 26 N. E. 846, 11 L. R. A. 308. **Mo.**—*Bartero v. Real Est. Sav. Bank*, 10 Mo. App. 76. **Neb.** *Peters v. Dunnells*, 5 Neb. 460. **N. J.** *Hill v. Henry*, 66 N. J. Eq. 150, 57 Atl. 554. **Vt.**—*Woodruff v. Taylor*, 20 Vt. 65.

See 1 STANDARD PROC. 548.

[a] The manner of the notification is immaterial but the notification is indispensable. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914.

14. See 17 STANDARD PROC. 683.

[a] Jurisdiction of the persons is not essential to relief in proceedings in rem. *Kean v. Rogers* (Iowa), 118 N. W. 515.

15. **U. S.**—*Freeman v. Alderson*, 119 U. S. 185, 188, 7 Sup. Ct. 165, 30 L. ed. 372; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914. **Fla.**—*Lucy v. Deas*, 59 Fla. 552, 52 So. 515. **Mo.**—*Bartero v. Real Est. Sav. Bank*, 10 Mo. App. 76. **N. J.**—*Hill v. Henry*, 66 N. J. Eq. 150, 57 Atl. 554. **Tenn.**—*Byram v. McDowell*, 15 Lea 581. **Tex.**—*Connell v. Nicky* (Tex. Civ. App.), 167 S. W. 313.

See 17 STANDARD PROC. 683, 688; 6 STANDARD PROC. 812; 3 STANDARD PROC. 679, et seq.

[a] Constructive service may answer in all actions which are substantially proceedings in rem. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Hill v. Henry*, 66 N. J. Eq. 150, 57 Atl.

554. See also the title "Service of Process and Papers."

16. *Bartero v. Real Est. Sav. Bank*, 10 Mo. App. 76.

17. See titles dealing with particular kind of action involved.

Libel in admiralty, see 1 STANDARD PROC. 450.

18. *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681. See 1 STANDARD PROC. 438.

Joinder generally, see the title "Joinder of Actions."

19. *Cunningham v. Shanklin*, 60 Cal. 118, 125 (quot. Greenl. Ev.); *Buchanan v. Briggs*, 2 Yeates (Pa.) 232. See 1 STANDARD PROC. 501; 6 STANDARD PROC. 825, and titles dealing with particular classes of rem proceedings. Compare *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265.

Default of appearance in proceeding quasi in rem, see 6 STANDARD PROC. 804, 805.

[a] The owner of the res has a right to appear and be heard. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Reilly v. Stephenson*, 62 Mich. 509, 29 N. W. 99.

20. See 1 STANDARD PROC. 420, 477.

21. *Cole v. Cunningham*, 133 U. S. 107, 116, 10 Sup. Ct. 269, 33 L. ed. 538. See 6 STANDARD PROC. 813; 10 STANDARD PROC. 475.

22. *Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160.

23. *Hill v. Henry*, 66 N. J. Eq. 150,

even though the owner of the res appears.²⁴ In proceedings quasi in rem, the interest of the defendant alone is sought to be affected,²⁵ and the judgment must be restricted to the property before the court unless the defendant appears.²⁶ A judgment strictly in rem binds all the world as to matters properly adjudged and as to the necessary consequences thereof,²⁷ but a judgment "quasi in rem" as that term is ordinarily used,²⁸ is only conclusive between the parties.²⁹ While a judgment in rem may be vacated on proper application,³⁰ neither a judgment in rem nor quasi in rem is subject to collateral attack if the court had jurisdiction.³¹ A judgment in rem cannot be made the foundation of an action against the defendant.³² And an unsatisfied judgment against the res cannot be pleaded in bar of a recovery in personam on the same cause of action or vice versa.³³

57 Atl. 554; *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681. See 1 STANDARD PROC. 548.

[a] **Cannot be enforced against other property of owner of res.** *Toby v. Brown*, 11 Ark. 308.

24. See 6 STANDARD PROC. 810, 825.

25. *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372; *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681.

26. **U. S.**—*Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. **Ky.**—*Carden v. Dearing*, 14 Ky. L. Rep. 78. **Minn.** *Smith v. Smith*, 123 Minn. 431, 144 N. W. 138, 52 L. R. A. (N. S.) 1061. **Pa.**—*Megee v. Beirne*, 39 Pa. 50, 61. **Tex.**—*Ward v. Green* (Tex. Civ. App.), 28 S. W. 574. **W. Va.**—*Dulin v. McCaw*, 39 W. Va. 721, 729, 20 S. E. 681.

See I, also 3 STANDARD PROC. 728.

[a] **Form of Judgment.**—See 17 STANDARD PROC. 1059, and 6 STANDARD PROC. 824; 3 STANDARD PROC. 728.

27. **Ala.**—*McCann v. Ellis*, 172 Ala. 60, 55 So. 303; *Huntsville v. Goodenrath*, 13 Ala. App. 579, 592, 68 So. 676. **Fla.**—*Torrey v. Bruner*, 60 Fla. 365, 53 So. 337. **Ill.**—*American Woolen Co. v. Leshner*, 267 Ill. 11, 107 N. E. 882. **Me.** *Martin v. Darling*, 78 Me. 78, 3 Atl. 118. **Mo.**—*Bartero v. Real Est. Sav. Bank*, 10 Mo. App. 76. **Mont.**—*Gassert v. Strong*, 38 Mont. 18, 33, 98 Pac. 497. **Tex.**—*Scott v. Scott* (Tex. Civ. App.), 170 S. W. 273. **W. Va.**—*Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681.

See 14 STANDARD PROC. 969.

Foreign judgments in rem, see 15 STANDARD PROC. 691.

[a] Without reference to actual presence or participation in the pro-

ceedings. *Bartero v. Real Est. Sav. Bank*, 10 Mo. App. 76.

[b] **Because all persons interested are parties or may be parties to the suit.** *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 312, 4 L. ed. 381.

[c] **Extent of Rule.**—A judgment in rem where there has been no contest or litigation is res adjudicata with respect to the matter or res actually involved in the proceeding and is as to any fact which affected the particular matter or res involved in it and this is as far as it operates. *In re Blake's Estate*, 157 Cal. 448, 108 Pac. 287. See also *Tilt v. Kelsey*, 207 U. S. 43, 28 Sup. Ct. 1, 52 L. ed. 95; *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265, and "Res Judicata."

28. See *supra*, I.

29. **U. S.**—*Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; *Boswell's Lessee v. Otis*, 9 How. 336, 348, 13 L. ed. 164. **Ga.**—*Stroupper v. McCauley*, 45 Ga. 74. **Mo.**—*Bartero v. Real Est. Sav. Bank*, 10 Mo. App. 76. **N. J.**—*Hill v. Henry*, 66 N. J. Eq. 150, 57 Atl. 554. **Vt.**—*Woodruff v. Taylor*, 20 Vt. 65, 76.

30. See 15 STANDARD PROC. 198.

31. See 15 STANDARD PROC. 400, et seq., and 3 STANDARD PROC. 673.

Foreign divorce decrees, see 15 STANDARD PROC. 670.

32. *Quarl v. Abbett*, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662.

33. **U. S.**—*The Cerro Gordo*, 54 Fed. 391. **Ark.**—*Toby v. Brown*, 11 Ark. 308. **Kan.**—See *Hes v. Elledge*, 18 Kan. 296. **Pa.**—*The Odorilla v. Baizley*, 128 Pa. 283, 18 Atl. 511. **Tex.**—*Ward v. Green* (Tex. Civ. App.), 28 S. W. 574.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION. — See Supplementary Proceedings.

PROCESS

By the Editorial Staff.

I. DEFINITION AND DISTINCTIONS, 682

II. NECESSITY FOR PROCESS, 687

- A. *In General*, 687
- B. *Upon Subsequent Pleadings*, 691
 - 1. *In General*, 691
 - 2. *Amendments*, 691

III. ISSUANCE, 692

- A. *In General*, 692
- B. *Conditions Precedent*, 695
- C. *By Whom Issued*, 697
- D. *Time To Issue*, 698
- E. *Territorial Limitations*, 699
- F. *Praeipice*, 702

IV. FORM AND SUFFICIENCY, 702

- A. *In General*, 702
- B. *Style*, 708
- C. *Direction*, 709
- D. *Designation of Parties*, 712
 - 1. *Necessity of Naming Parties*, 712
 - 2. *Manner of Stating Names*, 713
 - 3. *Misnomer*, 716
 - a. *In General*, 716
 - b. *Of the Plaintiff*, 717
 - c. *Of Defendant*, 717
 - 4. *Amendments*, 721
- E. *Designation of the Court*, 724
- F. *Time for Appearance*, 726
 - 1. *In General*, 726
 - 2. *Necessity of Stating Correct Date*, 728
 - a. *In General*, 728
 - b. *Less or Greater Than Statutory Period*, 730
 - 3. *Form and Sufficiency of Statement*, 731
- G. *Nature of Cause of Action*, 733

- H. *Consequences of Default*, 735
- I. *Teste*, 737
- J. *Signature*, 739
- K. *Seal*, 744
- L. *Date*, 750
- M. *Endorsements*, 751
- N. *Additional Requirements*, 755

V. SUPPLYING LOST PROCESS, 756

VI. ALTERATION OF PROCESS, 757

VII. ALIAS AND OTHER ADDITIONAL PROCESS, 760

- A. *In General*, 760
- B. *Comparison of Common Law and Code Alias*, 761
- C. *The Form*, 765
- D. *Prerequisites*, 766
 - 1. *In General*, 766
 - 2. *Necessity of Order for Alias*, 767

VIII. RAISING AND CURING OBJECTIONS, 768

- A. *Objections*, 768
 - 1. *In General*, 768
 - 2. *Time To Object*, 769
 - 3. *Form of Objection*, 770
 - 4. *Collateral Attack*, 772
 - 5. *Who May Attack Process*, 772
 - 6. *Sufficiency of Plea in Abatement*, 772
 - 7. *Issues on Proceedings To Abate*, 773
 - 8. *Ruling Upon Objection*, 774
 - 9. *Effect of Ruling on the Action*, 775
 - 10. *Waiver of Objections*, 776
- B. *Amendments*, 777
 - 1. *In General*, 777
 - 2. *Changing Character of Process*, 782
 - 3. *Discretion of Court*, 783
 - 4. *Time of Amendment*, 784
 - a. *In General*, 784
 - b. *Amendment After Return*, 785
 - 5. *Notice of Amendment*, 785
 - 6. *Effect of Amendment*, 786
 - 7. *Necessity of Actual Correction*, 787

IX. ABUSE OF PROCESS, 787

- A. *In General*, 787

B. *Remedies*, 7871. *Generally*, 7872. *Action for Abuse of Process*, 788a. *Nature of Action*, 788(I.) *Distinctions*, 788(II.) *Elements*, 792b. *Against Whom Maintainable*, 794c. *Time When Maintainable*, 795d. *Form of Action*, 795e. *Pleadings*, 796

CROSS-REFERENCES:

Admiralty;	Ne Exeat;
Assistance, Writs of;	Returns;
Arrest in Civil Cases;	Seire Facias;
Attachment;	Service of Process and Papers;
Audita Querela;	Subpoena;
Garnishment;	Warrants;
Judgments and Decrees,	Writ of Entry.
Enforcement of;	

In particular actions or proceedings, see the specific titles.

Issuance of process as commencement of action, see the title "Suits and Actions."

For forms, see 9 STANDARD PROC. 1002, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION AND DISTINCTIONS.—The word "process" as a legal term has a very comprehensive signification.¹ Its legal meaning varies according to the context, subject-matter and spirit of

1. Ala.—*Ex parte Hill*, 165 Ala. 365, 51 So. 786. Ga.—*Savage v. Oliver*, 110 Ga. 636, 36 S. E. 54. Minn.—*Wolf v. McKinley*, 65 Minn. 156, 68 N. W. 2. [a] "One of its definitions is, that it is a writ, warrant, subpoena, or other formal writing issued by authority of law." Ga.—*Savage v. Oliver*, 110 Ga. 636, 36 S. E. 54; *Colquitt Nat. Bank v. Poitvint*, 15 Ga. App. 329, 83 S. E. 198. Ia.—*Gollobitsch v. Ranibon*, 84 Iowa 567, 51 N. W. 48. N. J.—*In re Martin*, 86 N. J. Eq. 265, 98 Atl. 510. Pa.—*Philadelphia v. Campbell*, 11 Phila. 163.

[b] "'Compulsory process for obtaining witnesses,' (1) means the right to invoke the aid of the law to compel the personal attendance of witnesses at the trial, when they are within the jurisdiction of the court." *Graham v. State*, 50 Ark. 161, 6 S. W. 721. (2) It "means not only the ordinary subpoena, but a warrant of arrest or attachment for such witnesses as failed to obey, or avoided service of the first subpoena or recognizance." *Powers v. Com.*, 114 Ky. 237, 272, 70 S. W. 644, 1050, 71 S. W. 494.

[c] Process Is Not a Pleading.

the statute in which it appears.² In its broadest sense, the term comprehends all the acts of the court from the beginning of the proceeding to its end;³ but in a stricter sense it is applied to the several judicial writs in an action,⁴ and was originally so named because it proceeded from a court.⁵ As a generic name for judicial writs,⁶ it is used to indicate the means⁷ by which the defendant is compelled to

Hackney v. Schow, 21 Tex. Av. App. 613, 53 S. W. 713.

2. **U. S.**—United States v. Murphy, 82 Fed. 893, 899; Pennington v. Lowenstein, 19 Fed. Cas. No. 10,938. **Ga.** Colquitt Nat. Bank v. Poitvint, 15 Ga. App. 329, 83 S. E. 198. **Pa.**—Philadelphia v. Campbell, 11 Phila. 163. **Wis.**—Carey v. German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267; Wis. Porter v. Vandercook, 11 Wis. 70.

[a] Within the Meaning of the Laws of Congress.—“The summons, notice, writ, or whatever it may be called, by virtue of which a defendant is required to come into court and answer, litigate his rights, and submit to the personal judgment of the court, must be ‘process within the meaning of the law of congress.’” Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252.

[b] Under State Constitution.—The word process as used in the constitution means all such writs whether original, mesne or final, by which the authority of the state is exerted in obtaining jurisdiction over the person or property of the citizen. Hinkley v. St. Anthony Falls W. Power Co., 9 Minn. 55.

3. **U. S.**—Marvin v. United States, 44 Fed. 405, 410; McBratney v. Usher, 1 Dill. 367, 15 Fed. Cas. No. 8,661. **Conn.**—Palmer v. Allen, 5 Day 193. **Fla.**—Gilmer v. Bird, 15 Fla. 410. **Ill.**—Curry v. Hinman, 11 Ill. 420. **Kan.**—McKenna v. Cooper, 79 Kan. 847, 101 Pac. 662. **Minn.**—Wolf v. McKinley, 65 Minn. 156, 68 N. W. 2; Hanna v. Russell, 12 Minn. 80; Dorman v. Bayley, 10 Minn. 383. **N. M.**—Tipton v. Cordova, 1 N. M. 383. **N. Y.**—Taylor v. Porter, 4 Hill 140, 40 Am. Dec. 274; People ex rel. Johnson v. Nevins, 1 Hill 154, 169; Perry v. Lorillard Fire Ins. Co., 6 Lans. 201. **Ohio.**—State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 60 Am. St. Rep. 756, 38 L. R. A. 519.

[a] “‘Process’ does not necessarily mean ‘writ’ or ‘summons,’ but is often

used in the sense of ‘proceedings.’” Wolf v. McKinley, 65 Minn. 156, 68 N. W. 2. See also McBratney v. Usher, 1 Dill. 367, 15 Fed. Cas. No. 8,661.

4. **U. S.**—Wayman v. Southard, 10 Wheat. 1, 27, 6 L. ed. 253; United States v. Murphy, 82 Fed. 893, 899. **Ala.**—Birmingham D. G. Co. v. Bledsoe, 113 Ala. 418, 21 So. 403. **Ill.**—Curry v. Hinman, 11 Ill. 420. **Kan.**—McKenna v. Cooper, 79 Kan. 847, 101 Pac. 662. **Ky.**—Epperson v. Graves, 3 Ky. L. Rep. 527. **Mich.**—Forbes v. Darling, 94 Mich. 621, 54 N. W. 385; Tweed v. Metcalf, 4 Mich. 579, 588. **Minn.**—Hanna v. Russell, 12 Minn. 80. **N. Y.**—People ex rel. Johnson v. Nevins, 1 Hill 154, 169; Perry v. Lorillard Fire Ins. Co., 6 Lans. 201. **Ore.**—Whitney v. Blackburn, 17 Ore. 564, 571, 21 Pac. 874, 11 Am. St. Rep. 857. **Wis.**—Sprague v. Birchard, 1 Wis. 457, 60 Am. Dec. 393.

5. **Ia.**—City of Davenport v. Bird, 34 Iowa 524. **La.**—Fitzpatrick v. New Orleans, 27 La. Ann. 457. **Me.**—State v. McCann, 67 Me. 372. **Minn.**—Dorman v. Bayley, 10 Minn. 383. **Pa.**—Philadelphia v. Campbell, 11 Phila. 163.

6. 3 Bl. 279, and the following: **Minn.**—Dorman v. Bayley, 10 Minn. 383. **Mo.**—Horton v. Kansas City, F. S. & G. Ry. Co., 26 Mo. App. 349. **S. C.**—Southern Cotton Oil Co. v. Hewlett, 107 S. C. 532, 93 S. E. 195.

7. **U. S.**—Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252. **Ga.**—Neal-Millard Co. v. Owens, 115 Ga. 959, 42 S. E. 266. **Minn.**—Hinkley v. St. Anthony Falls W. Power Co., 9 Minn. 55. **N. J.**—In re Martin, 86 N. J. Eq. 265, 98 Atl. 510. **N. Y.**—Utica City Bank v. Buel, 17 How. Pr. 498, 9 Abb. Pr. 355; Ackermann v. Berriman, 61 Misc. 165, 114 N. Y. Supp. 937. **Ohio.**—State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551, 60 Am. St. Rep. 756, 38 L. R. A. 519. **Pa.**—Philadelphia v. Campbell, 11 Phila. 163.

[a] “In a narrower sense it is ‘the

appear in court, or by which the court's orders are enforced.⁸ In modern practice the terms "process" and "writ of summons" are often used interchangeably,⁹ but the summons issued by a party is not technically process, within the meaning of constitutional provisions requiring certain formalities in "process."¹⁰

Original Process. — The technical "original writ" as used in the English practice was never known in this country,¹¹ hence by "original

means of compelling a defendant to appear in court, after suing out the original writ, in civil and after indictment, in criminal cases" (Bouvier).'' *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551, 60 Am. St. Rep. 756, 38 L. R. A. 519.

[b] "Process is the means whereby a court compels the appearance of a defendant before it or a compliance with its demands." *Neal-Millard Co. v. Owens*, 115 Ga. 959, 42 S. E. 266; *Ackermann v. Berriman*, 61 Misc. 165, 114 N. Y. Supp. 937.

[c] **Any means of acquiring jurisdiction**, whether by writ or notice, is properly denominated process. *Wilson v. St. Louis & S. F. R. Co.*, 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624; *In re Martin*, 86 N. J. Eq. 265, 98 Atl. 510. See also *Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. 252; *Dwight v. Merritt*, 4 Fed. 614, 18 Blatchf. (U. S.) 305, 59 How. Pr. 320.

8. **Ala.**—*Ex parte Hill*, 165 Ala. 365, 51 So. 786. **Ark.**—*Atkinson v. Pittman*, 47 Ark. 464, 2 S. W. 114. **Ga.** *Colquitt Nat. Bank v. Poitvint*, 15 Ga. App. 329, 83 S. E. 198. **Mo.**—*Horton v. Kansas City F. S. & G. Ry. Co.*, 26 Mo. App. 349. **N. J.**—*Weinstein v. Herman*, 81 N. J. Eq. 236, 86 Atl. 974.

[a] "In a broad sense . . . 'process' . . . includes any and every writ, rule, order, notice, or decree, including any process of execution that may issue in or upon any action, suit, or legal proceedings," though by Georgia statute execution is not included. *Colquitt Nat. Bank v. Poitvint*, 15 Ga. App. 329, 83 S. E. 198.

[b] "A precept is a command or mandate in writing of equal importance with a writ or process." *Ackermann v. Berriman*, 61 Misc. 165, 114 N. Y. Supp. 937.

9. **Mo.**—*Wilson v. St. Louis & St. F. Ry. Co.*, 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624; *Horton v.*

Kansas City F. S. & G. Ry. Co., 26 Mo. App. 349. **N. Y.**—*Ackermann v. Berriman*, 61 Misc. 165, 114 N. Y. Supp. 937. **Wis.**—*Carey v. German American Ins. Co.*, 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267.

[a] "A summons, or notice to the defendant, for the commencement of a suit, is certainly process, quite as much as a *capias* or a subpoena to appear and answer is process," (the statute requiring such summons to issue from the court.) *Dwight v. Merritt*, 4 Fed. 614.

10. **Colo.**—*Comet Consol. Min. Co. v. Frost*, 15 Colo. 310, 25 Pac. 506. **Fla.**—*Gilmer v. Bird*, 15 Fla. 410. **Ia.** *Raher v. Raher*, 150 Iowa 511, 129 N. W. 494, Ann. Cas. 1913D, 680, 35 L. R. A. (N. S.) 292. **Minn.**—*Hanna v. Russell*, 12 Minn. 80. **S. C.**—*Southern Cotton Oil Co. v. Hewlett*, 107 S. C. 532, 93 S. E. 195.

[a] "The process of the court, in its narrowest sense, means the writs and mandates of the court, under the seal thereof." *United States v. Murphy*, 82 Fed. 893, 899.

[b] **Notice of Suit Is Not Necessarily Process.**—"There is no definition of process given by any accepted authority which implies that any writ or method by which a suit is commenced is necessarily process." *Gilmer v. Bird*, 15 Fla. 410, *quoted in the following*: **Colo.**—*Comet Consol. Min. Co. v. Frost*, 15 Colo. 310, 25 Pac. 506. **Nev.**—*Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, 53 Pac. 597. **Ore.** *Bailey v. Williams*, 6 Ore. 71.

11. **U. S.**—*Pullman's Palace Car Co. v. Washburn*, 66 Fed. 790; *Wolf v. Cook*, 40 Fed. 432. **D. C.**—*Parsons v. Hill*, 15 App. Cas. 532, 541. **Me.** *Pressey v. Snow*, 81 Me. 288, 17 Atl. 71. **Mass.**—*Clark v. Paine*, 11 Pick. 66. **N. J.**—*Ferguson v. State*, 31 N. J. L. 289.

[a] "An original writ (1) issued out of chancery, and in the name of the king, the 'fountain of all justice'.

process," as used in the American practice, is meant that by which a party is brought into court.¹² Such writs, however, are now more generally classified with "mesne process" notwithstanding that nothing precedes them.¹³

Mesne Process. — Mesne process, though formerly used to designate such interlocutory writs as were issued after the suit had been commenced,¹⁴ is now generally used to mean all writs preceding the final process.¹⁵

It was a grant of jurisdiction from the sovereign to the court to which it was returnable; a sort of commission to the court of law to hear the cause. It was called by Coke 'the heart-strings of the common law.'" Wolf *v. Cook*, 40 Fed. 432. (2) With us the judicial power has always been an independent, co-ordinate branch of the government. It never required any special license or authority from any executive, by way of original writ or otherwise, to exercise its functions. *Parsons v. Hill*, 15 App. Cas. (D. C.) 532, 541.

[b] "At common law, (1) the distinction between original and judicial writs was of such a substantial character that no degree of similarity touching the proceedings following their issue was sufficient to confound them." *Pullman's Palace Car Co. v. Washburn*, 66 Fed. 790. (2) "There were two classes of writs, the original writs issuing out of the court of chancery and returnable into the common law courts, and judicial writs, issuing out of, as well as returnable to, the common law courts." *Fisher, Sons & Co. v. Crowley*, 57 W. Va. 312, 50 S. E. 422.

[c] The chancellor who issued the original writs, was the "King's Secretary, the Chaplain of his Chapel, and the Keeper of his Seal," and not a chancellor of the court of chancery. *Ker. Eq. Jur.* 23; *Perry Common Law Pl.* 140.

[d] "In our practice, a simple writ of summons, or a *capias ad respondendum*, a form of proceedings derived to us from the English King's Bench, was the usual mode for the commencement of suits; and these two, which were in form executive, and not judicial writs, although actually issued by the courts, took the place of the old original writ." *Parsons v. Hill*, 15 App. Cas. (D. C.) 532, 541.

12. **U. S.**—*Oglesby v. Attrill*, 12 Fed. 227. **Ala.**—*Birmingham D. G. Co.*

v. Bledsoe, 113 Ala. 418, 21 So. 403. **Conn.**—*Hotchkiss' Appeal*, 32 Conn. 353. **Kan.**—*Jones v. Marshall*, 3 Kan. App. 529, 43 Pac. 840. **Me.**—*Pressey v. Snow*, 81 Me. 288, 17 Atl. 71. **Mass.** *Clark v. Paine*, 11 Pick. 66. **Tenn.** *White v. State*, 3 Heisk. 338.

13. *Birmingham D. G. Co. v. Bledsoe*, 113 Ala. 418, 21 So. 403; *Hirshiser v. Tinsley*, 9 Mo. App. 339.

[a] "Process is defined by Blackstone to be the means of compelling a defendant to appear in court, and although literally, perhaps, it can only be strictly characterized as the initial step in a cause, it has come to be indicated by the two terms, mesne and final, which are used to designate the two stages in the progress of a cause in which it is employed." *Utica City Bank v. Buel*, 17 How. Pr. (N. Y.) 498.

14. **Ala.**—*Birmingham D. G. Co. v. Bledsoe*, 113 Ala. 418, 21 So. 403. **Mass.**—*Place v. Washburn*, 163 Mass. 530, 40 N. E. 853. **N. J.**—*Ferguson v. State*, 31 N. J. L. 289.

[a] The term originally meant (1) any writ issued between the original writ at common law and the execution. Since the original writ is not used here, all writs preceding the execution are mesne writs. *Ferguson v. State*, 31 N. J. L. 289. (2) "The term 'mesne process' formerly meant any intermediate process which issued, pending the suit, upon some collateral interlocutory matter; afterwards, it was used in contradistinction to final process, and this is the sense in which it is generally used in our statutes." *Place v. Washburn*, 163 Mass. 530, 40 N. E. 853.

15. **U. S.**—*Pennington v. Lowenstein*, 19 Fed. Cas. No. 10,938. **Ala.** *Birmingham D. G. Co. v. Bledsoe*, 113 Ala. 418, 21 So. 403. **Ga.**—*Cosgrave v. Mitchell*, 74 Ga. 824. See *Colquitt Nat. Bank v. Poitvint*, 15 Ga. App. 329, 83 S. E. 198. **Mass.**—*Place v. Washburn*, 163 Mass. 530, 40 N. E. 853. **Mo.**—*Hirshiser v. Tinsley*, 9 Mo.

Final Process. — Final process, of course, refers to the writ of execution or other mandate necessary to secure the benefits of the suit to the successful party.¹⁶

Process To Commence Suit. — Process to commence a suit is the means of compelling a defendant to appear in court.¹⁷ For this purpose a summons, handed down from the common law,¹⁸ or a citation, derived from the civil law,¹⁹ is the process generally used in modern practice.²⁰

Summons is a process whereby parties defendant are brought into court so as to give the court jurisdiction of their persons.²¹ It is sometimes in the form of a writ commanding an officer to notify a party to appear,²² or it may be a mere notice addressed to the de-

App. 339. **N. J.**—*Ferguson v. State*, 31 N. J. L. 289. **E. I.**—*Arnold v. Chapman*, 13 R. I. 586. **Vt.**—*Aldrich v. Weeks*, 62 Vt. 89, 19 Atl. 115.

[a] "The summons or the *capias*, since the disuse of the process by original, is usually spoken of as *mesne process* where, under the existing practice, it is actually primary process and not intermediate process at all." *Hirshiser v. Tinsley*, 9 Mo. App. 339.

[b] It is put in contradistinction to final process. **U. S.**—*Pennington v. Lowenstein*, 19 Fed. Cas. No. 10,938. **N. Y.**—*Utica City Bank v. Buel*, 17 How. Pr. 498, 9 Abb. Pr. 385. **R. I.**—*Arnold v. Chapman*, 13 R. I. 586.

[c] As used in statutes, the meaning of the term *mesne process* depends upon the intention of the legislature. *Pennington v. Lowenstein*, 19 Fed. Cas. No. 10,938.

[d] The term "*mesne process*" has no application to a notice of appeal from the justice court, which the statute requires to be served upon the opposite party when an appeal is taken. Nor is it original process. *Horton v. Kansas City F. S. & G. Ry. Co.*, 26 Mo. App. 349.

16. **Ala.**—*Birmingham D. G. Co. v. Bledsoe*, 113 Ala. 418, 21 So. 403. **Ark.**—*Atkinson v. Pittman*, 47 Ark. 464, 2 S. W. 114. **Ky.**—*Epperson v. Graves*, 3 Ky. L. Rep. 527. **N. J.**—*Weinstein v. Herman*, 81 N. J. Eq. 236, 86 Atl. 974. **N. C.**—*Curllee v. Thomas*, 74 N. C. 51. **Pa.**—*Philadelphia v. Campbell*, 11 Phila. 163. **Tenn.**—*White v. State*, 3 Heisk. 338. **Vt.**—*Aldrich v. Weeks*, 62 Vt. 89, 19 Atl. 115.

See the title "**Judgments and Decrees, Enforcement of.**"

[a] "By final process the judgments of the courts are executed." *White v. State*, 3 Heisk. (Tenn.) 338.

[b] "A decree for sale in the

hands of a master in chancery is equivalent to an execution in the hands of a sheriff. Each is a 'process.'" *Weinstein v. Herman*, 81 N. J. Eq. 236, 86 Atl. 974.

17. *White v. State*, 3 Heisk. (Tenn.) 338.

18. *Ackerman v. Berriman*, 61 Misc. 165, 114 N. Y. Supp. 937.

19. *Carpenter v. Anderson*, 33 Tex. Civ. App. 484, 491, 77 S. W. 291.

[a] The word "*citation*" in the civil law and ecclesiastical courts means the original writ by which a defendant is notified to appear and answer the action. *Leavitt v. Leavitt*, 135 Mass. 191.

20. See *supra* this section the catchlines "*Original Process*" and "*Mesne Process*."

[a] The statute may provide other notice, in addition to the regular form of process. *Carpenter v. Anderson*, 33 Tex. Civ. App. 484, 491, 77 S. W. 291.

[b] According to the English practice the *capias* amounts to nothing more than a summons here, and there is neither arrest of the person nor attachment of property in ordinary cases. *Brigham v. Este*, 2 Pick. (Mass.) 420.

21. **Cal.**—*Nellis v. Justice's Court*, 20 Cal. App. 394, 129 Pac. 472. **Mo.**—*Riesterer v. Horton Land & L. Co.*, 160 Mo. 141, 155, 61 S. W. 238. **S. C.**—*Wren v. Johnson*, 62 S. C. 533, 545, 40 S. E. 937.

[a] A summons is not a writ against the body; it is only a notice. *Grove v. Campbell*, 9 Yerg. (Tenn.) 7.

[b] A summons is an original process by which the court obtains jurisdiction of the person of the defendant. *Jones v. Marshall*, 3 Kan. App. 529, 43 Pac. 840.

22. *Johns v. Phoenix Nat. Bank*, 6

fendant, giving him information that a certain proceeding has been commenced for a certain purpose.²³ It is issued by the parties under some statutes, while under others it is issued by the clerk of the court.²⁴

A citation is a writ issued out of a court of competent jurisdiction commanding that a person therein named do certain things therein mentioned.²⁵ It serves the purpose of the common law summons.²⁶

Process as Part of the Record.—The writ is part of the record in some states, and in pleading to it, over need not be craved;²⁷ elsewhere process is not considered a part of the record.²⁸

II. NECESSITY FOR PROCESS.—A. IN GENERAL.—As a general rule, process is a requisite to cognizance of causes by the courts.²⁹

Ariz. 290, 56 Pac. 725; *Bowyer v. Knapp*, 15 W. Va. 277.

[a] **Distinction Between Summons and Notice.**—"A summons is directed to an officer and contains a mandate to which his return of 'executed' is a response that the thing commanded has been done. A notice is not directed to any officer, but to the party on whom it is to be served. It contains no mandate." *Bowyer v. Knapp*, 15 W. Va. 277.

23. **Cal.**—*Nellis v. Justice Court*, 20 Cal. App. 394, 129 Pac. 472. **Ore.** *Whitney v. Blackburn*, 17 Ore. 564, 571, 21 Pac. 874, 11 Am. St. Rep. 857. **S. C.**—*Prince v. Dickson*, 39 S. C. 477, 18 S. E. 33.

[a] Summons need not be subscribed and sealed by the clerk, though the constitution prescribes that all writs shall be so executed, since constitution does not define "writ." The code abolished the formal writ and processes issued by an officer and requires summons to be signed by plaintiff or his attorney. *Southern Cotton Oil Co. v. Hewlett*, 107 S. C. 532, 93 S. E. 195.

24. See *infra*, III, C.

25. **Ariz.**—*Johns v. Phoenix Nat. Bank*, 6 Ariz. 290, 56 Pac. 725. **Nev.** *Deegan v. Deegan*, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742. **Tex.**—*Perez v. Perez*, 59 Tex. 322; *Carpenter v. Anderson*, 33 Tex. Civ. App. 484, 491, 77 S. W. 291.

[a] "A citation is a writ of the court addressed to an officer of the court and commands him to do certain things." *Carpenter v. Anderson*, 33 Tex. Civ. App. 484, 77 S. W. 291.

[b] "The ancient distinction between a summons and a citation cannot, under our system, be determinative of the form (of writ) to be employed. Each jurisdiction determines

that matter for itself." *Johns v. Phoenix Nat. Bank*, 6 Ariz. 290, 56 Pac. 725.

[c] **Citation and notice distinguished**, see *Perez v. Perez*, 59 Tex. 322.

26. *Leavitt v. Leavitt*, 135 Mass. 191; *Metz v. Bremond*, 13 Tex. 394; *Smithers v. Smith*, 35 Tex. Civ. App. 508, 80 S. W. 646.

[a] By statute the word "citation" may be applied to interlocutory notices issued during the pendency of a suit, and used in a sense entirely different from that which it had under the civil law. *Leavitt v. Leavitt*, 135 Mass. 191.

27. **S. C.**—*Bull v. Traynham*, 3 Rich. L. 433. **Tenn.**—*Kincaid v. Francis*, Coake 49. **Tex.**—See *Ryan v. Goldfrank, F. & Co.*, 58 Tex. 356.

See 2 STANDARD PROC. 334.

[a] "By express legislative enactment 'process' forms part of the record of the cause." *Armstrong v. Harrison*, 1 Head (Tenn.) 379.

[b] **On Appeal From Justice Court on Executions.**—"The writ, service, pleadings, etc., are always to be treated as a part of the case, when it comes into this court on exceptions. Other documents and writings, used on the trial as matters of evidence, must be specially referred to and made a part of the case, or they will not be noticed." *Wheelock v. Sears*, 19 Vt. 559.

28. *Wibright v. Wise*, 4 Blackf. (Ind.) 137.

29. **Ill.**—*Flexner v. Farson*, 268 Ill. 435, 109 N. E. 327. **Mo.**—*State v. Myers*, 126 Mo. App. 544, 104 S. W. 1146; *Orchard v. National Exchange Bank*, 121 Mo. App. 338, 98 S. W. 824. **Ore.**—*Hough v. Porter*, 51 Ore. 318, 95 Pac. 732, 750, 98 Pac. 1083, 102 Pac. 728. **W. Va.**—*Cooper v. Bennett*,

Its purpose is to give notice of the pendency of the suit,³⁰ the nature of the claim,³¹ when answer shall be filed,³² and other matters³³ which the defendant must know in order to make a defense, and that the court may acquire jurisdiction over his person;³⁴ and, unless appearance is entered voluntarily,³⁵ after a suit has been regularly commenced,³⁶ issuance and service of process are indispensable to such jurisdiction.³⁷ By the terms of some statutes, suit is commenced by

70 W. Va. 110, 73 S. E. 260, Ann. Cas. 1913D, 851; *Moore v. Holt*, 55 W. Va. 507, 47 S. E. 251.

[a] **Summons and regular proceedings** commencing suit are prerequisites to the taking of depositions. *Cooper v. Bennett*, 70 W. Va. 110, 73 S. E. 260, Ann. Cas. 1913D, 851.

[b] **Process the Sole Means of Compelling Appearance.**—"The only way a defendant can be brought into court to answer a cause of action asserted against him is by notice served in the form and manner provided by statute." *State ex rel. Quincy etc. R. R. Co. v. Myers*, 126 Mo. App. 544, 104 S. W. 1146; *White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

[c] **Cognizance of causes** must be obtained by requisite process and pleading. *Moore v. Holt*, 55 W. Va. 507, 47 S. E. 251; *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178; *Ensign Mfg. Co. v. Carroll*, 30 W. Va. 532, 4 S. E. 782.

30. **Ky.**—*Keathley v. Stump*, 147 Ky. 406, 144 S. W. 87. **Mo.**—*State v. Myers*, 126 Mo. App. 544, 104 S. W. 1146. **Ohio.**—*Williams' Admr. v. Welton's Admr.*, 28 Ohio St. 451; *Walter v. Drapp*, 7 Ohio N. P. 232, 8 Ohio Dec. 705. **Ore.**—*Smith v. Ellendale Mill Co.*, 4 Ore. 70. **Tex.**—*Metz v. Bremond*, 13 Tex. 394; *Smithers v. Smith*, 35 Tex. Civ. App. 508, 80 S. W. 646.

[a] **The office of leading process** in general is to bring the defendants before the court for the purpose of answering the plaintiff's demand. *Cheatham v. Hodges*, Peck (Tenn.) 177.

31. **N. Y.**—*McCoun v. New York C. & H. R. Co.*, 50 N. Y. 176. **Ohio** *Brewster v. Anderson*, 1 Ohio Cir. Ct. 479, 1 Ohio Cir. Dec. 268. **Ore.** *Smith v. Ellendale Mill Co.*, 4 Ore. 70. **S. D.**—*Bradey v. Mueller*, 22 S. D. 534, 118 N. W. 1035.

32. *Phillips v. Lemoyne*, 4 Ark. 144; *Brewster v. Anderson*, 1 Ohio Cir. Ct.

479, 1 Ohio Cir. Dec. 268; *Walter v. Drapp*, 7 Ohio N. P. 232, 8 Ohio Dec. 705.

33. **U. S.**—*Emmons v. Marbelite Plaster Co.*, 193 Fed. 181. **Ark.**—*Phillips v. Lemoyne*, 4 Ark. 144. **Mo.**—*Pacific Mut. Life Ins. Co. v. Mansur* (Mo. App.), 118 S. W. 1193. **N. Y.**—*McCoun v. New York C. & H. R. Co.*, 50 N. Y. 176. **Ore.**—*Smith v. Ellendale Mill Co.*, 4 Ore. 70. **S. D.**—*Bradey v. Mueller*, 22 S. D. 534, 118 N. W. 1035.

[a] **The purpose of the summons** is to bring the defendant into court, and inform him of the necessity of an appearance. *Emmons v. Marbelite Plaster Co.*, 193 Fed. 181.

34. **Cal.**—*Nellis v. Justices' Court*, 20 Cal. App. 394, 129 Pac. 472. **Fla.** *Pearce v. Thackeray*, 13 Fla. 574. **S. D.** *Bradey v. Mueller*, 22 S. D. 534, 118 N. W. 1035. **Va.**—*Blanton v. Carroll*, 86 Va. 539, 10 S. E. 329.

35. **Ga.**—*Neal-Millard Co. v. Owens*, 115 Ga. 959, 42 S. E. 266. **Ill.**—*Smith v. Trimble*, 27 Ill. 152. **Mont.**—*Duluth Brew. & M. Co. v. Allen*, 51 Mont. 89, 149 Pac. 494. **Ohio.**—*Lambert v. Sample*, 25 Ohio St. 336. **W. Va.**—*Cooper v. Bennett*, 70 W. Va. 110, 73 S. E. 260, Ann. Cas. 1913D, 851; *Hunter's Exrs. v. Stewart*, 23 W. Va. 549.

See also 2 STANDARD PROC. 536.

36. See *Burditt v. Howth*, 45 Tex. 466; *Moore v. Holt*, 55 W. Va. 507, 47 S. E. 251.

[a] **Service of copy of complaint only** without process, does not commence suit. *Korona v. Piknik*, 58 Misc. 315, 110 N. Y. Supp. 867. See the title "**Suits and Actions.**"

37. **U. S.**—*Hassell v. Wilcox*, 130 U. S. 493, 504, 9 Sup. Ct. 590, 32 L. ed. 1001; *Smith v. Woolfolk*, 115 U. S. 143, 149, 5 Sup. Ct. 1177, 29 L. ed. 357; *Windsor v. McVeigh*, 93 U. S. 274, 278, 279, 23 L. ed. 914; *Earle v. McVeigh*, 91 U. S. 503, 507, 510, 23 L. ed. 398; *Cooper v. Reynolds*, 10 Wall. 308, 317, 19 L. ed. 931. **Ga.**—*Brown v. Tomberlin*, 137 Ga. 596, 73 S. E. 947; *Neal-Millard Co. v. Owens*, 115 Ga. 959,

the issuance and service of summons,³⁸ and under such a statute it has been held that the issuance of the summons is jurisdictional and cannot be waived.³⁹ But where the action is commenced by the filing of the complaint,⁴⁰ the issuance of summons may be waived.⁴¹ Under statutes providing that suit is commenced by service of summons, but that when it is made to appear that the defendant cannot be found, an order may be made for publication, the summons must first issue as a prerequisite to jurisdiction by such publication,⁴² unless the prescribed affidavit shows that the defendant is not within reach of process and cannot be personally served.⁴³ A summons generally must issue with or precede provisional remedies, in order to give jurisdiction to the court.⁴⁴

42 S. E. 266. **ILL.**—*Flexner v. Farson*, 268 Ill. 435, 109 N. E. 327. **IA.**—*Sleeper v. Killion*, 166 Iowa 205, 147 N. W. 314. **N. Y.**—*McClure Newspaper Syndicate v. Times Printing Co.*, 164 App. Div. 108, 149 N. Y. Supp. 443. **OHIO** *Lambert v. Sample*, 25 Ohio St. 336. **W. VA.**—*Cooper v. Bennett*, 70 W. Va. 110, 73 S. E. 260, Ann. Cas. 1913D, 851.

See 17 STANDARD PROC. 678; also the title "Service of Process and Papers."

[a] **Service of a rule to show cause** as adequate notice under due process clause of constitution, see *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 238, 20 Sup. Ct. 620, 44 L. ed. 747; *Kennard v. State ex rel. Morgan*, 92 U. S. 480, 23 L. ed. 478.

[b] **Knowledge of the action** on the part of the defendant, will not supply the place of a summons. **CAL.** *Peabody v. Phelps*, 9 Cal. 213. **IND.** *Vogel v. Brown*, 112 Ind. 299, 14 N. E. 77, 2 Am. St. Rep. 187. **LA.**—*Caldwell v. Glenn*, 6 Rob. 9. **WASH.**—*Interior Warehouse Co. v. Hays*, 91 Wash. 507, 158 Pac. 99. See 17 STANDARD PROC. 682.

[c] **Service of petition without process** (1) does not give jurisdiction. *Neal-Millard Co. v. Owens*, 115 Ga. 959, 42 S. E. 266; *Korona v. Piknik*, 58 Misc. 315, 110 N. Y. Supp. 867. (2) And in such case process cannot be supplied by amendment at the trial term and service perfected. *Neal-Millard Co. v. Owens*, 115 Ga. 959, 42 S. E. 266; *Nicholas v. British American Assur. Co.*, 109 Ga. 621, 34 S. E. 1004; *Ross v. Jones*, 52 Ga. 22.

[d] **To render jurisdiction effectual**, it is necessary that the thing in controversy or the parties interested, should be subjected to the process of the court. *Flexner v. Farson*, 268 Ill.

435, 109 N. E. 327. See 17 STANDARD PROC. 678, et seq.

38. **N. Y.**—*Jackson v. Brooks*, 14 Wend. 649. **N. C.**—*Peters Groc. Co. v. Collins Co.*, 142 N. C. 174, 55 S. E. 90; *Webster v. Sharpe*, 116 N. C. 466, 21 S. E. 912. **S. D.**—*Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221.

See the title "Suits and Actions."

39. *Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221. But see generally 17 STANDARD PROC. 674, 691.

For waiver of process by garnishee, see 10 STANDARD PROC. 497, 598, et seq.

40. See *infra*, III, D, and the title "Suits and Actions."

41. *Duluth Brew. Co. v. Allen*, 51 Mont. 89, 149 Pac. 494; See *Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221; and also 2 STANDARD PROC. 522; 17 STANDARD PROC. 682.

42. *Peters Groc. Co. v. Collins Co.*, 142 N. C. 174, 55 S. E. 90; *Bert v. Fellows*, 131 N. C. 599, 42 S. E. 951.

43. *Peters Groc. Co. v. Collins Co.*, 142 N. C. 174, 55 S. E. 90; *Best v. British & American Mortg. Co.*, 128 N. C. 351, 38 S. E. 923; *Harrington v. Heath*, 15 Ohio 483; *Walters v. Drapp*, 7 Ohio N. P. 232, 8 Ohio Dec. 705.

44. **CAL.**—*Low v. Henry*, 9 Cal. 538, 552. **KAN.**—*Kennedy v. Beck*, 15 Kan. 555. **KY.**—*Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477. **MO.**—*Tiede v. Fuhr*, 264 Mo. 622, 175 S. W. 910. **MONT.** *Duluth Brew. Co. v. Allen*, 51 Mont. 89, 149 Pac. 494. **N. Y.**—*Mills v. Corbett*, 8 How. Pr. 500. **N. C.**—*Penniman v. Daniel*, 91 N. C. 431. **ORE.** *White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

[a] **An answer to the merits may waive** the irregularity, when it is due to an error of the clerk. *Kennedy v. Beck*, 15 Kan. 555.

To confer jurisdiction the process must be valid,⁴⁵ though not necessarily entirely free from defects;⁴⁶ and if merely defective it brings the defendant into court and will support a judgment by default.⁴⁷ If published notice contains all the statute requires, mere formal defects not calculated to mislead will not prevent the attaching of jurisdiction.⁴⁸

[b] **The subsequent issuance of a summons** cannot give effect to what was void in the "beginning" and give validity to an attachment issued before the issuance of a summons. *Sharman v. Huot*, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645; *Duluth Brew. Co. v. Allen*, 51 Mont. 89, 149 Pac. 494.

45. **Conn.**—*Case v. Humphrey*, 6 Conn. 130, 139. **Ga.**—*Moss v. Strickland*, 138 Ga. 539, 75 S. E. 622. **Ind.** See *Goodwine v. Barnett*, 2 Ind. App. 16, 28 N. E. 115. **Kan.**—*Kelso v. Norton*, 74 Kan. 442, 87 Pac. 184. **Mo.** *Tiede v. Fuhr*, 264 Mo. 622, 175 S. W. 910; *Van Natta v. Harroun* R. E. Co., 221 Mo. 373, 120 S. W. 738; *Christian v. Williams*, 111 Mo. 429, 20 S. W. 96. **N. Y.**—*Newcombe v. Cohn*, 33 Misc. 602, 67 N. Y. Supp. 930. **Ore.** *Hunsaker v. Coffin*, 2 Ore. 107. **Vt.** *Roy v. Phelps*, 83 Vt. 174, 75 Atl. 13.

See 15 STANDARD PROC. 441; and also *infra*, VIII.

Presumption as to process, see 15 STANDARD PROC. 426, 428.

[a] **The Defendant Is Not Required To Obey Void Process.**—*Stayton v. Newcomer*, 6 Ark. 451, 44 Am. Dec. 524; *Cave Houston*, 65 Tex. 619, 622; *Blake v. Vesey* (Tex. Civ. App.) 143 S. W. 221.

46. **U. S.**—*Von Arx v. Boone*, 193 Fed. 612, 113 C. C. A. 480. **Idaho.**—*Ridenbaugh v. Sandlin*, 14 Idaho 472, 94 Pac. 827, 125 Am. St. Rep. 175; *McKnight v. Grant*, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287. **Ia.** *DeTar v. Boone County*, 34 Iowa 488. **Neb.**—*Krotter & Co. v. Norton*, 84 Neb. 137, 120 N. W. 923. **N. Y.**—*Gribbon v. Freel*, 93 N. Y. 93, 65 How. Pr. 273, 2 McCarty Civ. Proc. 482; *Conroy v. Bigg*, 109 N. Y. Supp. 914. **N. D.** *Goldstein v. Peter Fox Sons Co.*, 22 N. D. 636, 135 N. W. 180, 40 L. R. A. (N. S.) 566. **Ore.**—*Lane v. Ball*, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975. **W. Va.**—*Town of Point Pleasant v. Greenlee*, 63 W. Va. 207, 60 S. E. 601, 129 Am. St. Rep. 971; *Hansford v. Tate*, 61 W. Va., 207, 56 S. E. 372;

Hopkins v. Baltimore & O. Ry. Co., 42 W. Va. 535, 26 S. E. 187. **Wyo.** *Clause v. Columbia Sav. & Loan Assn.*, 16 Wyo. 450, 95 Pac. 54.

See 17 STANDARD PROC. 681, note 72; 15 STANDARD PROC. 441.

[a] **Not every irregularity or imperfection** (1) in summons or service will deprive the courts of jurisdiction, though it justify or require the setting aside of the process on direct attack. *Clause v. Columbia Sav. & Loan Assn.*, 16 Wyo. 450, 95 Pac. 54. (2) "A defect in the form or matter of a summons, not absolutely destructive of its validity, though material and sufficient to cause reversal of the judgment, does not deprive the court of jurisdiction, and therefore does not expose the judgment to collateral impeachment." *Lane v. Ball*, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975.

[b] **The vitality and sufficiency of the writ** cannot in all cases and at all times be tested by the strength of the summons to withstand the assault of a motion to quash. *Ridenbaugh v. Sandlin*, 14 Idaho 472, 94 Pac. 827, 125 Am. St. Rep. 175.

As to form and sufficiency of process see *infra* IV; VIII.

47. *Cave v. Houston*, 65 Tex. 619, 622; *Blake v. Vesey* (Tex. Civ. App.), 143 S. W. 221. But see 14 STANDARD PROC. 863.

48. **U. S.**—*Von Arx v. Boone*, 193 Fed. 612, 113 C. C. A. 480. **Ala.** *Moore v. Horn*, 5 Ala. 234. **Cal.**—*Hibernia Sav. & L. Soc. v. Matthai*, 116 Cal. 428, 48 Pac. 370. **Ill.**—*Clark v. Marfield*, 77 Ill. 258; *National Ins. Co. v. Chamber of Commerce*, 69 Ill. 22. **Ia.** *Blair v. Wolf*, 72 Iowa 246, 33 N. W. 669. **Minn.**—*Lane v. Innes*, 43 Minn. 137, 45 N. W. 4. **Wash.**—*Cunningham v. Spokane Hydr. Min. Co.*, 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113. **Wis.**—*Frisk v. Reigelman*, 75 Wis. 499, 508, 43 N. W. 1117, 44 N. W. 766, 17 Am. St. Rep. 198.

Publication, see the title "Service of Process and Papers."

B. UPON SUBSEQUENT PLEADINGS.—1. In General.—The filing of a supplemental petition does not require the issuance of new process.⁴⁹ But when a petition, upon being stricken out, is refiled,⁵⁰ or, after dismissal, an action is redocketed,⁵¹ new process is necessary. The appearance of a defendant to a cross-bill is enforced in the same manner as to the original bill,⁵² and in the absence of an appearance process must issue.⁵³ But if the party against whom the cross-suit is brought is already in court, new process is generally not necessary,⁵⁴ though the practice in some states requires it⁵⁵ when the cross-complaint sets up new matter not related to that of the original action.⁵⁶ Process on a counterclaim is not necessary.⁵⁷

2. Amendments.—Parties before the court must take notice of amendments,⁵⁸ and a defendant once cited is bound by all amendments which do not set up a new or additional cause of action.⁵⁹

49. *Moshell v. Reed*, 30 Ky. L. Rep. 10, 97 S. W. 372.

50. *Stevens v. White*, 2 Ohio Dec. (Reprint) 107.

51. *Second Nat. Bank v. Prichard*, 172 Ky. 190, 189 S. W. 14; *Phillips v. Arnett*, 164 Ky. 426, 175 S. W. 660.

[a] But an amended cross-complaint, filed by leave after the original had been stricken out, requires no new process. *Kahle v. Crown Oil Co.*, 180 Ind. 131, 100 N. E. 681.

52. *Miss.*—*Thomason v. Neeley*, 50 Miss. 310. *Ore.*—*Hough v. Porter*, 51 Ore. 318, 95 Pac. 732, 750, 98 Pac. 1083, 102 Pac. 728. *Tex.*—*Harris v. Schlinke*, 95 Tex. 88, 65 S. W. 172.

53. *U. S.*—*Lowenstein v. Glidewell*, 5 Dill. 325, 15 Fed. Cas. No. 8,575. *Ala.*—*Hudspeth v. Thomason*, 46 Ala. 470. *Ky.*—*Ward v. Davidson*, 2 J. J. Marsh. 443. *Miss.*—*Thomason v. Neeley*, 50 Miss. 310. *Tex.*—*Harris v. Schlinke*, 95 Tex. 88, 65 S. W. 172; *Mayhew & Co. v. Harrell*, 57 Tex. Civ. App. 509, 122 S. W. 957.

See 6 STANDARD PROC. 259.

54. *Colo.*—*Barnes v. Colorado Springs & C. C. D. Ry. Co.*, 42 Colo. 461, 94 Pac. 570. *Kan.*—*Lawson v. Rush*, 80 Kan. 262, 101 Pac. 1009. *Mo.*—*Tucker v. St. Louis Life Ins. Co.*, 63 Mo. 588, 595. *Tex.*—*Deutschmann v. Ryan* (Tex. Civ. App.), 148 S. W. 1140.

[a] Where the practice is to serve a copy of the pleading upon the adverse party, no summons need accompany the copy of the cross-complaint. *Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 975.

[b] A plaintiff who has abandoned his own suit must be served with pro-

cess upon the filing of a cross-bill. *Thomason v. Neeley*, 50 Miss. 310; *Harris v. Schlinke*, 95 Tex. 88, 65 S. W. 172.

55. *Ark.*—*Miller v. Mattison*, 105 Ark. 201, 150 S. W. 710. *Ga.*—*Brown v. Tomberlin*, 137 Ga. 596, 73 S. E. 947. *Ind.*—*Shaul v. Rinker*, 139 Ind. 163, 166, 38 N. E. 593; *Fletcher v. Holmes*, 25 Ind. 458, 465. *Ore.*—*Hough v. Porter*, 51 Ore. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

See 6 STANDARD PROC. 295.

56. *Ark.*—*Arbaugh v. West*, 127 Ark. 98, 192 S. W. 171. *Ill.*—*La Forge v. Binns*, 125 Ill. App. 527. *Ind.*—*Benbow v. Studebaker*, 51 Ind. App. 450, 99 N. E. 1033.

[a] When the subject matter is related to that of the original complaint, new process is not necessary as to those already in court. *Hedges v. Mehring* (Ind. App.), 115 N. E. 433; *Eisman v. Whalen*, 39 Ind. App. 350, 79 N. E. 514, 1072.

57. See *Louisville Title Co. v. Darnell's Committee*, 149 Ky. 312, 148 S. W. 369.

58. *Mo.*—*St. Louis v. Gleason*, 15 Mo. App. 25, 29. *Neb.*—*Healy v. Aultman & Co.*, 6 Neb. 349. *N. Y.*—*Bond v. Howell*, 11 Paige 233. *Tex.*—*Haynes v. Rice*, 33 Tex. 167. *W. Va.*—*Phelps v. Smith*, 16 W. Va. 522.

59. *Kan.*—*Manspeaker v. Bank of Topeka*, 4 Kan. App. 768, 46 Pac. 1012. *Ky.*—*Gray v. Alderson's Admr.*, 123 S. W. 317; *Highland Land & Bldg. Co. v. Audas*, 33 Ky. L. Rep. 214, 110 S. W. 325. *Tex.*—*Hill v. State* (Tex. Civ. App.), 190 S. W. 255. *Va.*—*Norfolk & W. Ry. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465. *W. Va.*—*Brown v.*

But if there is no appearance, process must issue upon an amended pleading which presents a new and distinct cause of action.⁶⁰ The insertion of omitted jurisdictional allegations requires no new process.⁶¹ Process must be issued, of course, against new parties brought in by amendment,⁶² but a change of parties plaintiff,⁶³ or defendant,⁶⁴ does not generally require new process to those already served.

III. ISSUANCE.—A. **IN GENERAL.**—The issuance of process is a ministerial act,⁶⁵ regulated and governed by the positive provisions of the statutes.⁶⁶ The original process to commence an action is issued at the instance of the plaintiff or his attorney,⁶⁷ and no order of the

Cook, 77 W. Va. 356, 87 S. E. 454, L. R. A. 1916D, 220; *Smith's Admr. v. Nelson Bros. & Co.*, 69 W. Va. 550, 72 S. E. 646, Ann. Cas. 1913B, 829.

See generally the title "**New Cause of Action or Defense.**"

[a] **Notice of amendments filed in vacation** must be given as required by statute, though the defendant had filed exceptions to the original petition. *Goggan v. Morrison* (Tex. Civ. App.), 163 S. W. 119.

60. **Ky.**—*Daugherty v. Northern Coal & Coke Co.*, 174 Ky. 423, 192 S. W. 501; *Metropolitan Trust Co. v. Tracy*, 171 Ky. 781, 188 S. W. 782; *United States Fidelity & G. Co. v. Carter*, 26 Ky. L. Rep. 665, 82 S. W. 380; *Cecil v. Sowards*, 10 Bush 96. **Mo.** *Smith v. Kiene*, 231 Mo. 215, 132 S. W. 1052. **Tex.**—*Hill v. State* (Tex. Civ. App.), 190 S. W. 255.

[a] **By traversing new allegation**, appearance is entered equivalent to service. *Fearon Lumb. Co. v. Lawson*, 166 Ky. 123, 178 S. W. 1121.

61. **U. S.**—*Goodman v. Ft. Collins*, 164 Fed. 970, 91 C. C. A. 98. **Ky.** *Rittenhouse v. Swango's Admr.*, 128 S. W. 299. **Neb.**—*Schuyler Nat. Bank v. Bollong*, 28 Neb. 684, 692, 45 N. W. 164.

62. **Mo.**—*Orchard v. National Exchange Bank*, 121 Mo. App. 338, 98 S. W. 824. **N. Y.**—*Romanoski v. Union Ry. Co.*, 30 Misc. 830, 61 N. Y. Supp. 1097. **Okl.**—*Moore v. Donahew*, 3 Okla. 396, 41 Pac. 579. **Ore.**—*Hough v. Porter*, 51 Ore. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. **Tenn.**—*Jones v. Cloud*, 4 Coldw. 236.

[a] **Amended petition which corrects names of parties** requires new process, where there has been no appearance. *Southern Pac. Co. v. Block*, 84 Tex. 21, 19 S. W. 200; *Carlton v. Miller*, 2 Tex. Civ. App. 619, 21 S. W. 697.

63. *Roberson v. McIlhenny*, 59 Tex.

615; *Pecos & N. T. Ry. Co. v. Porter*, (Tex. Civ. App.), 156 S. W. 267.

[a] **The addition of another plaintiff** does not make a new cause of action so as to require new process. *Roberson v. McIlhenny*, 59 Tex. 615; *Pecos & N. T. Ry. Co. v. Porter* (Tex. Civ. App.), 156 S. W. 267.

[b] **Dropping the name of one plaintiff** by amendment, does not necessitate new process. *Pecos & N. T. Ry. Co. v. Porter* (Tex. Civ. App.), 156 S. W. 267.

[c] **On changing character in which the plaintiff sues**, from representative to individual, new process is not necessary. *Johnson v. Phoenix Bridge Co.*, 121 N. Y. Supp. 699. See also *Person v. Fidelity, etc. Co.*, 92 Fed. 965, 35 C. C. A. 117; *Studer v. Roberts*, 132 Tenn. 599, 179 S. W. 131; *Love v. Southern R. Co.*, 108 Tenn. 104, 65 S. W. 475, 55 L. R. A. 471.

64. *Three Forks City Co. v. Com.*, 20 Ky. L. Rep. 149, 45 S. W. 353.

65. **Ark.**—*Whiting v. Beebe*, 12 Ark. 421, 535. **Conn.**—*Windham v. Hampton*, 1 Root 175. **Ga.**—*Savage v. Oliver*, 110 Ga. 636, 36 S. E. 54; *Drawdy v. Littlefield*, 75 Ga. 215. **Idaho.**—*Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho 681, 95 Pac. 825. **N. C.**—*Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633. **Pa.**—*Harden v. Roberts*, 9 Pa. Co. Ct. 160. **Tex.**—*Sun Mut. Ins. Co. v. Holland*, 2 Wills. Civ. Cas., §443. **Vt.**—*Vermont Mut. Fire Ins. Co. v. Cummings*, 11 Vt. 503.

As to justice courts, see 17 STANDARD PROC. 1011.

66. **Cal.**—*Nellis v. Justices' Court*, 20 Cal. App. 394, 129 Pac. 472. **Mich.** *Fletcher v. Morrell*, 78 Mich. 176, 44 N. W. 133. **Ohio.**—*Smith v. Whittlesey*, 19 Ohio Cir. Ct. 412, 10 Ohio Cir. Dec. 377; *Daum v. Kehnast*, 18 Ohio Cir. Ct. 7, 9 Ohio Cir. Dec. 867.

67. **Colo.**—*Steves v. Carson*, 2 Colo. App. 200, 30 Pac. 1101. **Ind.**—*Town*

court therefor is necessary:⁶⁸ other process found necessary to a proper disposition of a case may be awarded by the court.⁶⁹ To constitute an issuance, the process must be made out, properly tested, and delivered to the proper officer,⁷⁰ or, under some statutes, to a disinterested third person,⁷¹ to be executed by him, and it must be accompanied by all papers necessary to a valid service.⁷² A process simply filled out and left lying in an office is not issued.⁷³ However, the delivery need not be directly from the clerk to the officer, but may be through the medium of some other person.⁷⁴

of *Knox v. Golding*, 46 Ind. App. 634, 91 N. E. 857. **Neb.**—*Adair County Bank v. Forrey*, 74 Neb. 811, 105 N. W. 714. **Vt.**—*State v. Shaw*, 73 Vt. 149, 167, 50 Atl. 863. **W. Va.**—*Abney v. Ohio Lumber & Min. Co.*, 45 W. Va. 446, 32 S. E. 256.

See the title "Praeceptum."

[a] **Oral Direction Is Sufficient.**—*Town of Knox v. Golding*, 46 Ind. App. 634, 91 N. E. 857, 92 N. E. 936.

[b] **Plaintiff has control of all process ordered by him to be issued.** **Ind.**—*State v. Boyd*, 63 Ind. 428. **N. H.**—*Ranlett v. Blodgett*, 17 N. H. 298, 43 Am. Dec. 603; *Clindenin v. Allen*, 4 N. H. 385. **N. Y.**—*Root v. Wagner*, 30 N. Y. 9, 86 Am. Dec. 348; *Bowie v. Brahe*, 4 Duer 676. **Vt.**—*Cowdery v. Smith*, 50 Vt. 235.

68. *Abney v. Ohio Lumber & Min. Co.*, 45 W. Va. 446, 32 S. E. 256.

69. *Abney v. Ohio Lumb. & Min. Co.*, 45 W. Va. 446, 32 S. E. 256.

Alias process, see *infra*, VII.

70. **Cal.**—*Reynolds v. Page*, 35 Cal. 296. **Haw.**—*Gear v. Henry*, 21 Hawaii 101. **Ill.**—*Pease v. Ritchie*, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566; *Hekla Ins. Co. v. Schroeder*, 9 Ill. App. 472. **Ind.**—*Evans v. Galloway*, 20 Ind. 479. **Ia.**—*Oskaloosa Cigar Co. v. Iowa Cent. Ry. Co.*, 89 N. W. 1065. **Mo.**—*Burton v. Deleplain*, 25 Mo. App. 376. **N. H.**—*Society for Prop. of Gospel v. Whitecomb*, 2 N. H. 227. **N. Y.**—*Jackson v. Brooks*, 14 Wend. 649; *Mills v. Corbett*, 8 How. Pr. 500. **N. D.**—*Smith v. Nicholson*, 5 N. D. 426, 67 N. W. 296. **Ohio**—*Kelley v. Vincent*, 8 Ohio St. 415. **Ore.**—*White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726. **Pa.**—*In re Person's Appeal*, 78 Pa. 145. **Tex.**—*Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820.

[a] **Putting a writ in a pigeon hole in a prothonotary's office, for use of the sheriff is not a delivery to the**

officer. *In re Person's Appeal*, 78 Pa. 145.

71. *Mills v. Corbett*, 8 How. Pr. (N. Y.) 500; *Smith v. Nicholson*, 5 N. D. 426, 67 N. W. 296.

[a] **When in the hands of one authorized to serve it, it is issued.** *Smith v. Nicholson*, 5 N. D. 426, 67 N. W. 296.

72. **U. S.**—See *Perris Irr. Dist. v. Turnbull*, 215 Fed. 562, 132 C. C. A. 74.

Cal.—*Reynolds v. Page*, 35 Cal. 296. **N. H.**—*Clindenin v. Allen*, 4 N. H. 385. **Pa.**—See *Loeb v. Allen*, 32 Pa. Super 137.

[a] **An accompanying certified copy of complaint is necessary to a valid issuance of a summons.** *Reynolds v. Page*, 35 Cal. 296.

73. **Ill.**—*Pease v. Ritchie*, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566. **Mo.**—*Burton v. Deleplain*, 25 Mo. App. 376. **N. C.**—*Webster v. Sharpe*, 116 N. C. 466, 21 S. E. 912.

[a] **The mere writing of a process by the clerk and placing it among the files of his office is not an issuance.** *Pease v. Ritchie*, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566.

[b] **"The very term 'issuing out of court' implies the sending out of the writ."** *Burton v. Deleplain*, 25 Mo. App. 376.

74. **N. C.**—*Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699; *Webster v. Sharpe*, 116 N. C. 466, 21 S. E. 912. **Ohio**—*Kelley v. Vincent*, 8 Ohio St. 415. **Tex.**—*Medlin v. Seideman*, 39 Tex. Civ. App. 553, 88 S. W. 250.

[a] **Process is issued when it is "put out from the clerk's office, by direction and under sanction and authority of the clerk, and given to the officer for the purpose of being served. If it was sent out or handed to some one else to give to the officer for the purpose of being served, this would be an issuing of the summons, but it**

In some jurisdictions the delivery is not complete until the writ actually reaches the hands of the person authorized to serve it,⁷⁵ but elsewhere the issuance is complete when the process is made out and sent to the officer with the absolute intention that it shall be served by him, although it may not have actually come into his hands.⁷⁶

Issuance in Blank Before Suit.—It has been held a proper practice for the clerk to issue in blank to an attorney before suit filed, a summons signed and sealed, to be filled in by the attorney,⁷⁷ though some

must leave the office for this purpose by the direction, or under the sanction and authority, of the clerk." *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699; *Webster v. Sharpe*, 116 N. C. 466, 21 S. E. 912.

[b] **The forwarding of process by mail**, or by messenger, to the officer is a sufficient delivery to constitute an issuance. *Jackson v. Brooks*, 14 Wend. (N. Y.) 649; *Kelley v. Vincent*, 8 Ohio St. 415.

[c] **Delivery of process to the plaintiff or his attorney**, who in turn delivers it to the sheriff, is a constructive delivery to the officer by the clerk. **N. C.**—*Webster v. Sharpe*, 116 N. C. 466, 21 S. E. 912. **Ohio**.—*Kelley v. Vincent*, 8 Ohio St. 415. **Tex.**—*Medlin v. Seideman*, 39 Tex. Civ. App. 553, 88 S. W. 250. But see *Gear v. Henry*, 21 Hawaii 101.

75. **Ia.**—*Butcher v. Brand*, 6 Iowa 235. **N. Y.**—See *Burdick v. Green*, 18 Johns. 14; *Ross v. Luther*, 4 Cow. (N. Y.) 158, 15 Am. Dec. 341. **Ore.**—*White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

[a] **Actual Delivery Is Necessary.** (1) The summons "has no existence to any legal effect until it reaches the officer's hands." *Butcher v. Brand*, 6 Iowa 235. (2) "The statute requires that the summons shall be served by the sheriff, and, without a delivery to him for service, such instrument is not yet endowed with vitality for any purpose." *White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 743.

76. **U. S.**—*Perris Irr. Dist. v. Turnbull*, 215 Fed. 562, 132 C. C. A. 74. **Mich.**—*Howell v. Shepard*, 48 Mich. 472, 12 N. W. 661. **N. J.**—*McCracken v. Richardson*, 46 N. J. L. 50; *Updike v. Ten Broeck*, 32 N. J. L. 105.

[a] **In the Federal Court.**—"Nowhere is it required by statute of the United States that the clerk shall deliver the summons to the marshal for service, and, when the clerk has performed all of the acts prescribed by

Congress for the issuing of writs and processes, the writ or process, as the case may be, is, in our opinion, clearly issued by him. And such have been the rulings upon the subject." *Perris Irr. Dist. v. Turnbull*, 215 Fed. 562, 132 C. C. A. 74. See also *Leas v. Merriman*, 132 Fed. 510; *Jewett v. Garrett*, 47 Fed. 625.

77. **U. S.**—*Jewett v. Garrett*, 47 Fed. 625. **Ala.**—*Slater v. Carter*, 35 Ala. 679. **Mich.**—*Sweet v. Circuit Judge*, 95 Mich. 449, 54 N. W. 951; *Potter v. John Hutchison Mfg. Co.*, 87 Mich. 59, 49 N. W. 517. **N. H.**—*Society for Prop. of Gospel v. Whitecomb*, 2 N. H. 227. **N. C.**—*Croom v. Morrissey*, 63 N. C. 591. But see *Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708. **S. C.**—*Miller v. Hall*, 1 Spears 1.

[a] **No particular suit need be in contemplation.** *Sweet v. Circuit Judge*, 95 Mich. 449, 54 N. W. 951.

[b] **"The clerk is under no obligation to deliver to an attorney a writ signed and sealed in blank, and may very properly refuse to do so; but, if he chooses to trust an attorney with such a writ, it will not be held void for that reason."** *Sweet v. Circuit Judge*, 95 Mich. 449, 54 N. W. 951.

[c] **"All original writs are, in law considered as issuing from the office of the clerk of the court to which they are returnable. . . . For they are required by the constitution, and by statute, to be signed by the clerk of the court, and to be tested by the first judge. . . . For the convenience of the public and the members of the bar, writs in fact go out of the clerk's office in blank and are filled up by the attorneys of the court at home. Yet, in contemplation of the law, the writ and declaration must be considered as issuing from the clerk's office."** *Clindenin v. Allen*, 4 N. H. 385.

[d] **The Attorney Acts as Officer of the Court.**—*Potter v. Hutchinson Mfg. Co.*, 87 Mich. 59, 49 N. W. 517.

statutes obviously do not contemplate or countenance such practice.⁷⁸

An entry of record of the issuance of process is required by some statutes.⁷⁹

B. CONDITIONS PRECEDENT.⁸⁰—The process may issue only from the court having cognizance of the subject matter.⁸¹ All statutory prerequisites to jurisdiction to act in the particular case must be complied with or a court is without power to issue process,⁸² and if issued without such compliance, it is void.⁸³ Where the pleading is "the leading process," the filing of a complaint is a prerequisite to the issuance of a summons by the clerk,⁸⁴ and it may issue only against those named in the pleading.⁸⁵ If the pleading is void for want of

[e] **Practice Abolished in England.**

"A practice like ours formerly prevailed in England of issuing blank writs sealed; but the practice, it is said, led to abuses, which occasioned the general order of 1747, since which blank writs are first filled out and the seal afterwards affixed by the sealer." Eastman v. Morrison, 46 N. H. 136.

78. See the statutes and Abney v. Ohio Lumb. & Min. Co., 45 W. Va. 446, 32 S. E. 256.

79. Merrill v. Townsend, 5 Paige (N. Y.) 80; Miller v. Hall, 1 Spears (S. C.) 1.

[a] **Statute is declaratory only,** and failure to comply therewith does not affect the validity of the process. Miller v. Hall, 1 Spears (S. C.) 1.

80. **Prerequisites to issuance of alias,** see *infra*, VII, D.

81. **Ga.**—Lowrey v. Richmond & D. R. Co., 83 Ga. 504, 10 S. E. 123. **N. H.** See Dearborn v. Twist, 6 N. H. 44. **N. C.**—Moore v. North Carolina R. Co., 67 N. C. 209; Howerton v. Tate, 66 N. C. 431. **Vt.**—Hoyt v. Smith, 83 Vt. 412, 76 Atl. 107; Walsh v. Haswell, 11 Vt. 85.

[a] **On appeal from justice court,** where the service was void, issuance and service of process from the county court gave no jurisdiction. St. Louis & S. F. Ry. Co. v. English (Tex. Civ. App.) 109 S. W. 424.

82. **Minn.**—Hinkley v. St. Anthony Falls W. Power Co., 9 Minn. 55. **Mo.** Tiede v. Fuhr, 264 Mo. 622, 175 S. W. 910. **Wis.**—Kentzler v. Chicago, M. & St. P. Ry. Co., 47 Wis. 641, 3 N. W. 369.

[a] "It is a general rule that, where there is power in a court to hear and determine a case, there is also a power to issue proper process to enforce its orders. Riggs v. Johnson County, 6 Wall. 166, 187, 18 L. ed.

768; Collins County National Bank v. Hughes, 152 Fed. 414, 81 C. C. A. 556." Com. v. New York C. & H. R. R. Co., 206 Mass. 417, 92 N. E. 766.

[b] **Without notice of the taking of depositions** having been first given, a justice of the peace has no jurisdiction to issue a subpoena for a witness. Tiede v. Fuhr, 264 Mo. 622, 175 S. W. 910.

83. **Conn.**—Morse v. Rankin, 51 Conn. 326. **Fla.**—Lord v. F. M. Dowling Co., 52 Fla. 313, 42 So. 585. **Mo.** Tiede v. Fuhr, 264 Mo. 622, 175 S. W. 910. **Tenn.**—See Posey v. McCubbins, 5 Yerg. 235. **Can.**—Bloom v. New York Tailoring Co., 18 Brit. Col. 395.

[a] **Performance after issuance** does not avail. Morse v. Rankin, 51 Conn. 326; Ripley v. Merchants Nat. Bank, 41 Conn. 187; Stevens v. White, 2 Ohio Dec. (Reprint) 107. See also Stanton v. Thompson, 234 Mo. 7, 136 S. W. 698.

[b] **The payment of the entry fee** is not necessary in order to confer jurisdiction on the clerk to issue process. Sweet v. Circuit Judge, 95 Mich. 449, 54 N. W. 951.

84. **Ga.**—Lowrey v. Richmond & D. Ry. Co., 83 Ga. 504, 10 S. E. 123. **Idaho** McKnight v. Grant, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287. **Ill.** Wallahan v. Ingersoll, 117 Ill. 123, 7 N. E. 519. **Ind.**—Hust v. Conn, 12 Ind. 257; Mills v. State, 10 Ind. 114. **N. Y.**—Leetch v. Atlantic Mut. Ins. Co., 4 Daly 518. **Okla.**—Atchison, T. & S. F. Ry. Co. v. Lambert, 31 Okla. 300, 121 Pac. 654, Ann. Cas. 1913E, 329.

[a] **If the case is stricken from the docket,** a summons issued without its reinstatement should be quashed. Park Land & Imp. Co. v. Lane, 106 Va. 304, 55 S. E. 690.

85. **Ga.**—White v. Brown, 10 Ga.

essentials, the process issued thereon is also void,⁸⁶ where the filing of the petition is the first step in the action;⁸⁷ but process issued on a merely defective pleading is not for that reason void.⁸⁸ When leave to issue a writ must be had, the issuance without such leave is a nullity.⁸⁹ Process which requires certain proof as a prerequisite to its issuance, is void if there is an entire absence of proof,⁹⁰ but if the proof is merely insufficient, the authority to act is only erroneously exercised, and the process will be vacated only on direct attack.⁹¹ None of the prerequisites to a warning order,⁹² or to notice by publication,⁹³ can be dispensed with.

App. 530, 73 S. E. 853. **Ill.**—Wallahan v. Ingersoll, 117 Ill. 123, 7 N. E. 519. **Ind.**—Nutting v. Losance, 27 Ind. 37; Jones v. Porter, 23 Ind. 66. **Va.**—Moseley v. Cocke, 7 Leigh (34 Va.) 224.

[a] **Parties Named Only in Process.**

(1) Process against one not named in the pleadings, and in nowise comprehended in the general allegations, will not support a judgment against such person. Moseley v. Cocke, 7 Leigh (34 Va.) 224. (2) But where the names of the plaintiffs as set out in the process included one omitted from the declaration, the variance should have been pleaded in abatement, and was not available first on appeal, and the judgment in favor of such plaintiff, with the others, was proper. Fonville v. Monroe, 74 Ill. 126.

86. **Ark.**—Carrington v. Hamilton, 3 Ark. 416. **Ky.**—Gearhart v. Olmstead, 7 Dana 441. **Ohio.**—White & Co. v. Freese, 13 Ohio Dec. (Reprint) 749, 2 Cinc. Rep. 30; Stevens v. White, 2 Ohio Dec. (Reprint) 107; Kerns v. Roberts, 2 Ohio Dec. (Reprint) 537.

87. Stevens v. White, 2 Ohio Dec. (Reprint) 107.

[a] Where "the writ was the first process, the declaration might be stricken out and still the parties be left in court; there was still a case pending so long as the writ and service had not been set aside; but, under the code, the petition is the first step in an action, without which no other step can be taken; and hence, if this is no petition, there can be no action or parties in court." Stevens v. White, 2 Ohio Dec. (Reprint) 107.

88. Goodman v. Ft. Collins, 164 Fed. 970, 91 C. C. A. 98; Rowley v. Shepardson, 85 Vt. 266, 81 Atl. 917.

89. **Cal.**—Baldwin v. Foster, 157 Cal. 643, 108 Pac. 714; Nellis v. Justices' Court, 20 Cal. App. 394, 129

Pac. 472. **Ga.**—Moss v. Strickland, 138 Ga. 539, 75 S. E. 622. **Ind.**—Nutting v. Losance, 27 Ind. 37; Jones v. Porter, 23 Ind. 66. **Can.**—Bloom v. New York Tailoring Co., 18 Brit. Col. 395.

See *infra*. VII, D, 2.

[a] But if no order is needed to empower the clerk to issue a further summons, the validity of such an order, if made, is immaterial. Emmons v. Marbelite Plaster Co., 193 Fed. 181.

[b] It is not the office of an order for publication also to direct a summons to issue; it presupposes the existence of the summons. Coffin v. Bell, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738.

90. Lord v. F. M. Dowling Co., 52 Fla. 313, 42 So. 585; Stevens v. White, 2 Ohio Dec. (Reprint) 107.

91. Lord v. F. M. Dowling Co., 52 Fla. 313, 42 So. 585.

92. Clark v. Raison, 126 Ky. 486, 104 S. W. 342; Brownfield v. Dyer, 7 Bush (Ky.) 505.

[a] "Orders of warning have taken the place of orders of publication under the old practice." Clark v. Raison, 126 Ky. 486, 104 S. W. 342.

[b] By omission of defendant's name, in a warning order, the party is not brought into court. Clark v. Raison, 126 Ky. 486, 104 S. W. 342.

[c] **Affidavit.**—A substantial allegation in the affidavit of the prerequisites is sufficient. Kreiger v. Sonne, 151 Ky. 739, 152 S. W. 936; Brownfield v. Dyer, 7 Bush (Ky.) 505.

[d] **Order for publication made by clerk is void**, where the statute requires it to be made by the court. Warriek v. McCormick, 150 Ky. 800, 150 S. W. 1027; Van Natta v. Harroun Real Est. Co., 221 Mo. 373, 120 S. W. 738.

93. **Idaho.**—Harpold v. Doyle, 16 Idaho 671, 102 Pac. 158. **Ky.**—Clark

C. BY WHOM ISSUED.—By statutory provision process is generally issued by the clerk of the court,⁹⁴ or his deputy,⁹⁵ though other persons are sometimes authorized to issue it.⁹⁶ The fact that the officer issuing a summons is a party to the suit does not invalidate the process,⁹⁷ though the contrary has been held.⁹⁸ In some states the summons is issued by the plaintiff or his attorney.⁹⁹ Some statutes expressly prohibit sheriffs from making process or writs;^{99½} and

v. Raison, 126 Ky. 486, 104 S. W. 342. *Redwine v. Underwood*, 101 Ky. 190, 40 S. W. 462; *Brownfield v. Dyer*, 7 Bush 505. **Mich.**—*Colton v. Rupert*, 60 Mich. 318, 27 N. W. 520. **Mo.** *Stanton v. Thompson*, 234 Mo. 7, 136 S. W. 698; *Van Natta v. Harroun Real Estate Co.*, 221 Mo. 373, 120 S. W. 738. **N. Y.**—*Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841; *Towsley v. McDonald*, 32 Barb. 604. **Okla.**—*Richardson v. Howard*, 51 Okla. 240, 151 Pac. 887.

See 15 STANDARD PROC. 445, et seq.

94. Cal.—*Nellis v. Justices' Court*, 20 Cal. App. 394, 129 Pac. 472. **Ohio** *In re Gorey*, 2 Ohio N. P. (N. S.) 389; *Collins v. Baltimore & O. R. R. Co.*, 7 Ohio N. P. 270, 7 Ohio Dec. 445. **Tex.**—*Gulf C. & S. F. Ry. Co. v. Hume Bros.*, 87 Tex. 211, 27 S. W. 110; *Hallman v. Campbell*, 57 Tex. 54. **W. Va.** *Abney v. Ohio Lumber Co.*, 45 W. Va. 446, 32 S. E. 256.

See also *infra*, IV, J.

[a] **A judge may not issue process**, where a clerk has been regularly appointed, though the statute permits the judge to exercise his option as to performing clerical duties himself or appointing a clerk. *McNeveins v. McNeveins*, 28 Colo. 245, 64 Pac. 199. Compare *Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho 681, 95 Pac. 825.

[b] **Only the Clerk May Issue the Citation.**—*Caufield v. Jones*, 18 Tex. Civ. App. 721, 45 S. W. 741.

95. Ala.—*Yonge v. Broxson*, 23 Ala. 684. **Ga.**—*Goodwyn v. Goodwyn*, 11 Ga. 178. **La.**—*State ex rel. Davis v. Police Jury*, 120 La. 163, 45 So. 47, 124 Am. St. Rep. 430, 14 L. R. A. (N. S.) 794. **Mass.**—*Jacobs v. Measures*, 13 Gray 74. **N. C.**—*Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633. **W. Va.** *Pendleton v. Smith*, 1 W. Va. 16.

[a] **The clerk's name must be subscribed**, by the deputy, or the writ is void. *Pendleton v. Smith*, 1 W. Va. 16.

[b] **Process issued by a de facto officer is valid**, *State v. Police Jury*,

120 La. 163, 45 So. 47, 124 Am. St. Rep. 430, 14 L. R. A. (N. S.) 794; *Calvert W. & B. B. Ry. Co. v. Driskill*, 31 Tex. Civ. App. 200, 71 S. W. 997.

96. Conn.—*Doolittle v. Clark*, 47 Conn. 316. **Ga.**—*Moss v. Strickland*, 138 Ga. 539, 75 S. E. 622. **Idaho.** *Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho 681, 95 Pac. 825.

[a] **Where judge should issue a rule nisi**, a regular process issued by the clerk confers no jurisdiction. *Moss v. Strickland*, 138 Ga. 539, 75 S. E. 622.

[b] **By statute**, when a justice of the peace is disqualified, process may be issued by another justice. *Savage v. Oliver*, 110 Ga. 636, 36 S. E. 54.

97. N. C.—*Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633. **Pa.**—*Kerns v. Huntzinger*, 2 Leg. Rec. 79. **Vt.**—*Vermont Mut. Fire Ins. Co. v. Cummings*, 11 Vt. 503; *Graham v. Todd*, 9 Vt. 166.

[a] **"In the absence of statutory provision to the contrary**, we can see no legal reason why the clerk may not issue the summons and all other process in an action in his own behalf, when he acts only ministerially." *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633.

[b] **By statute**, a clerk pro tem. may be appointed by the court to perform the functions of the regular clerk when the latter is a party to any pending or proposed suit. *Lewis v. Hutchison*, 4 Wills. Civ. Cas. (Tex.) §79, 16 S. W. 654.

98. Doolittle v. Clark, 47 Conn. 316.

99. Colo.—*Comet Consol. Min. Co. v. Frost*, 15 Colo. 310, 25 Pac. 506; *Rand v. Pantagraph Stationery Co.*, 1 Colo. App. 270, 28 Pac. 661. **Fla.**—*Gilmer v. Bird*, 15 Fla. 410. **Ore.**—*White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

99½. Mich.—*Garrison v. Hoyt*, 25 Mich. 509. **N. H.**—*Osgood v. Norris*, 21 N. H. 435. **Vt.**—*Winchell v. Pond*, 19 Vt. 198.

process made in violation of this statute is void.^{99%}

D. TIME TO ISSUE.—In the American practice there are two systems of procedure with reference to the stage in the commencement of a suit at which the summons issues,¹ and this difference often affects the application of general rules to a particular case.² Under one system the issuance of the summons precedes the filing of the declaration, and notifies the defendant that the pleading will thereafter be filed in court,³ while under the other, the process is issued after the filing of the plaintiff's complaint.⁴ Where the pleading is filed first, statutes generally require process to issue within a specified time thereafter,⁵ and for failure in this respect the complaint is prop-

[a] **An alteration of a process** (1) "comes clearly within the purpose and policy of this statute." *Garrison v. Hoyt*, 25 Mich. 509. (2) But it does not apply to the alteration of a writ already perfect, which leaves it substantially the same. *Hunt v. Viall*, 20 Vt. 291.

⁹⁹₄. *Garrison v. Hoyt*, 25 Mich. 509; *Winchell v. Pond*, 19 Vt. 198.

[a] **The statute applies to constables**, as well. *Winchell v. Pond*, 19 Vt. 198.

[b] **Process held not vitiated** by the following acts of the sheriff: (1) inserting the christian name of defendant in a blank left therefor in a summons prepared by plaintiff's attorney (*Osgood v. Norris*, 21 N. H. 435); (2) erasing place of holding court and inserting another. *Hunt v. Viall*, 20 Vt. 291.

1. See the title "**Suits and Actions**," and *supra*, this section.

[a] "**The summons is the leading process** in Tennessee." *Walker v. Cottrell*, 6 Baxt. (Tenn.) 257, 266; *Cheatham v. Hodges*, Peck (Tenn.) 177.

[b] **The Petition Is the Leading Process**.—*Dikes v. Monroe*, 15 Tex. 236.

2. *Parsons v. Hill*, 15 App. Cas. (D. C.) 532, 541; *Lyons v. Donges*, 12 Ohio Dec. (Reprint) 537.

3. Ill.—*Moody v. Thomas*, 79 Ill. 274. Ia.—*Moody v. Taylor*, 12 Iowa 71. Mich.—*Final v. Backus*, 18 Mich. 218. N. H.—*Clindenin v. Allen*, 4 N. H. 385. N. C.—*Battle v. Baird*, 118 N. C. 854, 24 S. E. 668. N. D.—*Gans v. Beasley*, 4 N. D. 140, 59 N. W. 714. R. I.—*Slocomb v. Powers*, 10 R. I. 255. Tenn.—*Nashville & C. R. Co. v. Wade*, 4 Baxt. 444. Va.—*Furst v. Banks*, 101 Va. 208, 43 S. E. 360. W. Va.—*Geiser Mfg. Co. v. Chewing*, 52 W. Va. 523,

44 S. E. 193; *Abney v. Ohio Lumb. & M. Co.*, 45 W. Va. 446, 32 S. E. 256. Wis.—*Gundry v. Whittlesey*, 19 Wis. 211.

See generally the title "**Time To Plead**."

[a] **The summons notifies the defendant**, "that there will be a complaint filed against him at the return term." *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668.

[b] **Under the common law practice** (1) governing the commencement of suits, both in England and in America, "in neither practice was it sought to have, or was it supposed that there could properly be, any pleadings whatever, until both parties, the defendant as well as the plaintiff, were in court;" and though the plaintiff's cause of action was to an extent indicated in the summons or *capias*, or in the *praecipe* given to the clerk of the court, it "was never formerly stated in the shape of a declaration until after the appearance of the defendant in court in response to the summons or *capias*." *Parsons v. Hill*, 15 App. Cas. (D. C.) 532, 541. (2) "All suits, in our common law courts, are commenced either by original writs issuing from the office of the clerk of the court, to which they are respectively returnable, or by petition." *Clindenin v. Allen*, 4 N. H. 385.

4. Cal.—*Bewick v. Muir*, 83 Cal. 368, 23 Pac. 389. Colo.—*Stevens v. Carson*, 2 Colo. App. 200, 30 Pac. 1101. Idaho.—*Hill v. Morgan*, 9 Idaho 718, 76 Pac. 323. N. Y.—*Jacquerson v. Van Erben*, 2 Abb. Pr. 315. Ohio.—*Lyons v. Donges*, 12 Ohio Dec. (Reprint) 537; *Stevens v. White*, 2 Ohio Dec. (Reprint) 107. Tex.—*Dikes v. Monroe*, 15 Tex. 236.

5. U. S.—*United States v. Scheurman*, 218 Fed. 915. Cal.—*Reynolds v.*

erly dismissed,⁶ though the courts may generally, in their discretion, continue the suit and order process issued.⁷

E. TERRITORIAL LIMITATIONS.—At the common law, no writ or process can run beyond the limits of the territorial jurisdiction of the court out of which it issues,⁸ and this is also a part of the statute law of some states.⁹ But the statutes usually provide for the issuance of process to other counties,¹⁰ and prescribe the conditions under which

Page, 35 Cal. 296. **Colo.**—Coombs *v.* Parish, 6 Colo. 296. **Mich.**—See Patterson *v.* Hogstein, 183 Mich. 470, 149 N. W. 1906. **P. R.**—Estate of Chavier *v.* Estate of Giraldez, 15 Porto Rico 145.

[a] **The period runs against an amendment** bringing in new parties, from the filing thereof. Estate of Chavier *v.* Estate of Giraldez, 15 Porto Rico 145.

[b] **If issued in time**, the process need not be delivered to the officer for service within the prescribed period. Perris Irr. Dist. *v.* Turnbull, 215 Fed. 562, 132 C. C. A. 74.

6. U. S.—United States *v.* Scheurman, 218 Fed. 915. **Cal.**—Linden Gravel Min. Co. *v.* Sheplar, 53 Cal. 245; Dupuy *v.* Shear, 29 Cal. 238. **Colo.**—Coombs *v.* Parish, 6 Colo. 296.

[a] **When the delay is at defendant's request**, there can be no dismissal. Cowell *v.* Stuart, 69 Cal. 525, 11 Pac. 57.

7. Cal.—Baldwin *v.* Foster, 157 Cal. 643, 108 Pac. 714. **Colo.**—Steves *v.* Carson, 21 Colo. 280, 40 Pac. 569. **Ga.**—Beach Lumb. Co. *v.* Baxley Banking Co., 8 Ga. App. 251, 68 S. E. 946. **P. R.**—Estate of Chavier *v.* Estate of Giraldez, 15 Porto Rico 145. **Can.**—Sellick *v.* Town of Selkirk, 22 Man. 323, 1 D. L. R. 607; Bloom *v.* New York Tailoring Co., 18 Brit. Col. 395.

[a] **After a long lapse of time**, court may, in its discretion, order process issued. Reese *v.* Kirby, 68 Ga. 825.

8. Ark.—Auditor *v.* Davies, 2 Ark. 494. **Ga.**—Moss *v.* Strickland, 138 Ga. 539, 75 S. E. 622. **Ill.**—Wirtz *v.* Henry, 59 Ill. 109; Aspern *v.* Lamar Ins. Co., 6 Ill. App. 235. **Ind.**—Ham *v.* Rogers, 6 Blackf. 559. **La.**—Evans *v.* Saul, 8 Mart. (N. S.) 247. **Mo.**—Christian *v.* Williams, 111 Mo. 429, 20 S. W. 96. **Ohio.**—Lamont *v.* Home Ins. Co., 9 Ohio Dec. (Reprint) 93; Knight *v.* Buser, 6 Ohio Dec. (Reprint) 772, 8 Am. L. Rep. 28. **Tenn.**—Slatten *v.* Jonson, 4 Hayw. 197. **Va.**—Branch *v.*

Webb, 7 Leigh (34 Va.) 371. **Wis.**—Kentzler *v.* Chicago, M. & St. P. Ry. Co., 47 Wis. 641, 3 N. W. 369.

[a] **Statutory Power is Necessary.** "At the common law all process of all courts is limited to the territory over which their jurisdiction extends, and the power of any court to issue extra-territorial process is not inherent in it, but comes only by express statutory grant." Kentzler *v.* Chicago, M. & St. P. Ry. Co., 47 Wis. 641, 3 N. W. 369.

[b] **A court of equity** may direct a subpoena or summons to be served in any part of the state, unless restricted by statute. Brown *v.* Brown, 10 Neb. 349, 6 N. W. 397.

As to service of process outside the jurisdiction of the court, see the title "Service of Process and Papers;" in justices' courts, see 17 STANDARD PROC. 1021.

9. Carrere *v.* Aucoin, 122 La. 258, 47 So. 598; Amis *v.* Bank of Louisiana, 9 Rob. (La.) 348; State *v.* Citizens' Trust & Guar. Co., 72 W. Va. 181, 77 S. E. 902.

10. Ala.—Jefferson County Sav. Bank *v.* Carland, 195 Ala. 279, 71 So. 126; Drennen & Co. *v.* Jasper Inv. Co., 153 Ala. 322, 45 So. 157. **Ark.**—Elliot *v.* Bank of State, 4 Ark. 437. **La.**—Carrere *v.* Aucoin, 122 La. 258, 47 So. 598; Amis *v.* Bank of Louisiana, 9 Rob. 348. **Mo.**—Christian *v.* Williams, 111 Mo. 429, 20 S. W. 96. **Neb.**—Walker *v.* Stevens, 52 Neb. 653, 72 N. W. 1038. **N. C.**—Moore *v.* North Carolina R. Co., 67 N. C. 209; Howerton *v.* Tate, 66 N. C. 431. **Va.**—Guarantee Co. *v.* First Nat. Bank, 95 Va. 480, 28 S. E. 909; Brown *v.* Chapman, 90 Va. 174, 17 S. E. 855. **W. Va.**—State *v.* Citizens' Trust & Guar. Co., 72 W. Va. 181, 77 S. E. 902; Rorer *v.* Peoples Bldg., etc. Assn., 47 W. Va. 1, 34 S. E. 758; Steele *v.* Harkness, 9 W. Va. 13.

[a] **Where the summons is directed to the defendants**, and not to the officer by whom it is to be served, a

this may be done,¹¹ as well as the matter to be indicated in such process.¹² If there are defendants residing in different counties, and suit is brought where either of them resides, process may usually issue to any other counties where the others may be found,¹³ provided the action is rightly brought in the county in which it is begun.¹⁴ Generally, summons may issue to any county when the property de-

separate summons need not be issued to each county in which any of the defendants reside, but on order of the court the original summons may be forwarded to other counties for further service. *Hancock v. Pruess*, 40 Cal. 572.

Execution to another county, see 15 STANDARD PROC. 760; 18 STANDARD PROC. 133.

11. Ala.—*Jefferson County Sav. Bank v. Carland*, 195 Ala. 279, 71 So. 126; *Drennen & Co. v. Jasper Inv. Co.*, 153 Ala. 322, 45 So. 157. **Ga.**—*Moss v. Strickland*, 138 Ga. 539, 75 S. E. 622. **Ill.**—*Wirtz v. Henry*, 59 Ill. 109. **Mich.**—*People v. Judge of Wayne Circ. Ct.*, 22 Mich. 493. **Okla.**—*Oklahoma City Nat. Bank v. Ez-zard*, 159 Pac. 267. **Va.**—*Brown v. Chapman*, 90 Va. 174, 17 S. E. 855; *Dillard v. Central Virginia Iron Co.*, 82 Va. 734, 1 S. E. 124. **W. Va.**—*State v. Citizens' Trust & Guaranty Co.*, 72 W. Va. 181, 77 S. E. 902; *Rorer v. Peoples Bldg., etc. Assn.*, 47 W. Va. 1, 34 S. E. 758; *Vinal v. Core*, 18 W. Va. 1.

12. Ala.—*Johnson v. King*, 20 Ala. 270; *Mayo v. Stoneum*, 2 Ala. 390. **Ark.**—*Womsley v. Cummins*, 1 Ark. 125. **Ga.**—*Heyman v. Decatur Street Bank*, 16 Ga. App. 14, 84 S. E. 483. **Ill.**—*Orendorff v. Stanberry*, 20 Ill. 89. **Neb.**—*Hobson v. Cummins*, 57 Neb. 611, 78 N. W. 295. **Tenn.**—*Nashville v. Webb*, 114 Tenn. 432, 85 S. W. 404.

13. Ga.—*Beasley v. Smith*, 144 Ga. 377, 87 S. E. 293. **Ill.**—*Aspern v. Lamar Ins. Co.*, 6 Ill. App. 235. **Ind.**—*Chicago & W. I. R. Co. v. Marshall*, 38 Ind. App. 217, 75 N. E. 973; *Ham v. Rogers*, 6 Blackf. 559. **Kan.**—*Hendrix v. Fuller*, 7 Kan. 331. **Ky.**—*Ford v. Logan*, 2 A. K. Marsh. 324. **Mo.**—*Christian v. Williams*, 111 Mo. 429, 20 S. W. 96. **Neb.**—*Hobson v. Cummins*, 57 Neb. 611, 78 N. W. 295; *Belcher v. Palmer*, 35 Neb. 449, 53 N. W. 380; *Bair v. People's Bank*, 27 Neb. 577, 43 N. W. 347. **N. H.**—*Parker v. Barker*, 43 N. H. 35, 80 Am. Dec.

130. Ohio.—*Knight v. Buser*, 6 Ohio Dec. (Reprint) 772, 8 Am. L. Rep. 28; *Steel v. Burgert*, 4 Ohio Dec. (Reprint) 557. **Tenn.**—*Nashville v. Webb*, 114 Tenn. 432, 85 S. W. 404. **Tex.**—*Ward v. Lattimer, Bagby & Co.*, 2 Tex. 245. **W. Va.**—*Vinal v. Core*, 18 W. Va. 1, 20.

[a] **Clerk must issue to county of alleged residence** of defendant, and not to county where suit is filed, when the statute requires the second original to be issued to the county in which nonresident defendants are alleged to reside. *Beasley v. Smith*, 144 Ga. 377, 87 S. E. 293; *Caldwell v. Alexander Seed Co.*, 17 Ga. App. 571, 87 S. E. 843; *Strauss Bros. v. Owens*, 6 Ga. App. 415, 65 S. E. 161.

[b] **Such a statute does not authorize** the clerk to issue process to other counties for other defendants, if jurisdiction is obtained of one defendant outside the county of his residence, under some other provision of the statutes. *Christian v. Williams*, 111 Mo. 429, 20 S. W. 96.

14. Kan.—*Reiff v. Tressler*, 86 Kan. 273, 120 Pac. 360; *Marshall v. Saline River Land & Min. Co.*, 75 Kan. 445, 89 Pac. 905; *New Blue Springs Mill. Co. v. De Witt*, 65 Kan. 665, 70 Pac. 647. **Neb.**—*Adair County Bank v. Forrey*, 74 Neb. 811, 105 N. W. 714. **Ohio.**—*Fostoria v. Fox*, 60 Ohio St. 340, 54 N. E. 370; *Drea v. Carrington*, 32 Ohio St. 595; *Baltimore & O. R. R. Co. v. McPeck*, 16 Ohio Cir. Ct. 87. **Okla.**—*Haynes v. City Nat. Bank*, 30 Okla. 614, 121 Pac. 182.

[a] **Though but a single defendant**, if the action is rightly brought the summons may issue to another county. *Nebraska Mutual Hail Ins. Co. v. Meyers*, 66 Neb. 657, 92 N. W. 572; *Miller v. Meeker*, 54 Neb. 452, 74 N. W. 962.

[b] **On change of venue**, if service of original summons has been quashed, process may issue to county in which suit was first begun. *Niagara Oil Co. v. Jackson*, 48 Ind. App. 238, 91 N. E.

scribed in the complaint is real estate.¹⁵ In a mere personal action for money, there must be not only an actual right to join the resident and nonresident defendants,¹⁶ but the person served in the county where suit is brought must have a substantial interest in the subject of the action.¹⁷ Joint liability,¹⁸ or a liability so far joint that all parties have rights in the same subject matter,¹⁹ justify process to another county. Cross-actions are governed by the same rules as apply to original actions.²⁰ The district courts of the United States cannot send their process into another district, in suits at common law or in equity, and thereby obtain jurisdiction of the person,²¹ except where this limitation has been removed by federal statute;²² and provisions of the state law cannot enlarge the powers of the federal court in this respect.²³

825; *Town of Knox v. Golding*, 46 Ind. App. 634, 91 N. E. 857, 92 N. E. 986.

15. *Gem City Acetylene Generator Co. v. Coblentz*, 86 Ohio St. 199, 99 N. E. 302, Ann. Cas. 1913D, 660.

16. *Kan.*—*Marshall v. Saline River L. & M. Co.*, 75 Kan. 445, 89 Pac. 905. *Ky.*—*Basye v. Brown*, 78 Ky. 553. *Neb.*—*McNeny v. Campbell*, 81 Neb. 754, 116 N. W. 671; *Stull Bros. v. Powell*, 70 Neb. 152, 97 N. W. 249; *Walker v. Stevens*, 52 Neb. 653, 72 N. W. 1038. *Ohio.*—*Knight v. Buser*, 6 Ohio Dec. (Reprint) 772, 8 Am. L. Rec. 28.

17. *Kan.*—*Hembrow v. Winsor*, 87 Kan. 714, 125 Pac. 22; *Reiff v. Tressler*, 86 Kan. 273, 120 Pac. 360; *New Blue Springs Mill. Co. v. De Witt*, 65 Kan. 665, 70 Pac. 647; *Wells v. Patton*, 50 Kan. 732, 33 Pac. 15; *Brenner v. Egly*, 23 Kan. 123. *Neb.*—*Seiver v. Union Pac. R. Co.*, 68 Neb. 91, 93 N. W. 943, 110 Am. St. Rep. 393, 61 L. R. A. 319; *Goldstein v. Fred Krug Brewing Co.*, 62 Neb. 728, 87 N. W. 258. *Ohio.*—*Drea v. Carrington*, 32 Ohio St. 595; *Allen v. Miller*, 11 Ohio St. 374. *Okla.*—*Haynes v. City Nat. Bank*, 30 Okla. 614, 121 Pac. 182.

[a] A mere nominal interest is not sufficient. *Reiff v. Tressler*, 86 Kan. 273, 120 Pac. 360; *Marshall v. Saline River Land & Min. Co.*, 75 Kan. 445, 89 Pac. 905; *Allen v. Miller*, 11 Ohio St. 374.

[b] In equity actions the test is, whether plaintiff can obtain full, suitable and satisfactory relief without joining such party, and binding him by the terms of the decree. *Seiver v. Union Pac. R. Co.*, 68 Neb. 91, 93 N. W. 943, 110 Am. St. Rep. 393, 61 L. R. A. 319.

18. *Ala.*—*Mayo v. Stoneum*, 2 Ala. 390. *Ga.*—*White v. Hart*, 35 Ga. 269. *Kan.*—*Marshall v. Saline River Land & Min. Co.*, 75 Kan. 445, 89 Pac. 905. *Neb.*—*Adair County Bank v. Forrey*, 74 Neb. 811, 105 N. W. 714. *Ohio.*—*Dunn v. Hazlett*, 4 Ohio St. 435; *McDonald v. Boardman*, 17 Ohio Cir. Ct. 209, 9 Ohio Cir. Dec. 533. See *Lytle v. Conover, etc. Co.*, 12 Ohio Dec. 346.

[a] The allegation, without proof, that defendants are jointly liable is insufficient to sustain the jurisdiction of the court over nonresidents. *Dunn v. Hazlett*, 4 Ohio St. 435.

19. *Stull Bros. v. Powell*, 70 Neb. 152, 97 N. W. 249.

[a] Different and several liability are not sufficient. *Penney v. Bryant*, 70 Neb. 127, 96 N. W. 1033.

20. *Muir v. Edelen*, 156 Ky. 212, 160 S. W. 1048; *Farmers' & Merchants' Bank v. Tate*, 96 Neb. 142, 147 N. W. 213.

21. *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *United States v. American Lumb. Co.*, 85 Fed. 827, 29 C. C. A. 431; *Vitkus v. Clyde S. S. Co.*, 232 Fed. 288; *Seidenbach v. Hollowell*, 5 Dill. 382, 21 Fed. Cas. No. 12,635; *Ex parte Graham*, 3 Wash. C. C. 456, 4 Wash. C. C. 221, 10 Fed. Cas. No. 5,657; *Atkins v. Fibre Disintegrating Co.*, 2 Ben. 381, 2 Fed. Cas. No. 602. See *Bourke v. Amison*, 32 Fed. 710.

Service of process in another district, see the title "Service of Process and Papers."

22. *Baker Contract Co. v. United States*, 204 Fed. 390, 122 C. C. A. 560; *Vitkus v. Clyde S. S. Co.*, 232 Fed. 288.

23. *Tauza v. Pennsylvania R. Co.*,

F. **PRAECIPE.**—A treatment of the praecipe will be found elsewhere in this work.²⁴

IV. FORM AND SUFFICIENCY.—A. **IN GENERAL.**²⁵—The form of writs and the manner of commencing actions is generally regulated by statutory provisions²⁶ which either prescribe a set form, or enumerate the essentials of process.²⁷ The code may specially authorize the court to frame its own process when none is prescribed by statute to fit a given case,²⁸ but the general provision should be construed to apply if the language will permit.²⁹ Even without special statutory authority the court may form its own process where none is provided.³⁰ In so far, however, as statutes prescribe the form and

232 Fed. 294; *Vitkus v. Clyde S. S. Co.*, 232 Fed. 288.

24. See the title "**Praecipe.**"

25. In justices' courts, see the title "**Justices of the Peace.**"

Form of particular writs, see particular titles, and also 9 **STANDARD PROC.** 1002, and cross-references there found.

26. **Cal.**—*Doyle v. Hampton*, 159 Cal. 729, 116 Pac. 39; *Nellis v. Justices' Court*, 20 Cal. App. 394, 129 Pac. 472. **Colo.**—*Smith v. Aurich*, 6 Colo. 388. **Kan.**—*Lindsay v. Board of Comrs.*, 56 Kan. 630, 44 Pac. 603. **Me.**—*Pressey v. Snow*, 81 Me. 288, 17 Atl. 71. **Mo.**—*Wilson v. St. Louis & S. F. R. Co.*, 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624. **Ore.**—*North Pacific Cycle Co. v. Thomas*, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636. **Utah.**—*Winters v. Hughes*, 3 Utah 443, 24 Pac. 759.

See generally the title "**Suits and Actions.**"

27. **Ia.**—*Lyon v. Byington*, 10 Iowa 124. **Me.**—*Rollins v. Rich*, 27 Me. 557. **Mass.**—*Cooke v. Gibbs*, 3 Mass. 193. **Neb.**—*McPherson v. First Nat. Bank*, 12 Neb. 202, 10 N. W. 707. **Tex.**—*Simms v. Mears* (Tex. Civ. App.), 190 S. W. 544.

[a] **Construction of Statutes.**—The statute prescribing the requisites of a summons has never been strictly construed. *Lockway v. Modern Woodmen of America*, 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555. See also *Griffing v. Smith*, 26 Colo. App. 220, 142 Pac. 202; *Higley v. Pollock*, 21 Neb. 198, 27 Pac. 895.

[b] "**Every state has the power to prescribe the reasonable notice which shall be given in order to subject a defendant to the jurisdiction of the courts.**" *In re Martin*, 86 N. J. Eq. 265, 98 Atl. 510.

28. *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865. See *Wallahan v. Ingersoll*, 117 Ill. 123, 7 N. E. 519.

29. **Cal.**—*McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865. **Me.**—*Starbird v. Brown*, 84 Me. 238, 24 Atl. 824. **Ore.**—See *Hough v. Porter*, 51 Ore. 318, 95 Pac. 732, 750, 98 Pac. 1083, 102 Pac. 728.

[a] **The conclusion should be avoided that there is no statutory provision for any process at all upon any given class of persons who are otherwise subject to the jurisdiction of the court.** *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865.

[b] **A general provision regulating process in a named class of courts has been held to apply to a court previously created by special act, though the two acts conflict with each other.** *Starbird v. Brown*, 84 Me. 238, 24 Atl. 824.

30. **Ala.**—*Lewis v. Grace*, 44 Ala. 307. **Cal.**—*McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865. **Me.**—*Pattee v. Lowe*, 35 Me. 121. **Mass.**—See *Com. v. New York C. & H. R. R. Co.*, 206 Mass. 417, 92 N. E. 766. **Ore.**—See *Hough v. Porter*, 51 Ore. 318, 95 Pac. 732, 750, 98 Pac. 1083, 102 Pac. 728.

[a] **The Power Comes From the Jurisdiction.**—(1) *Lewis v. Grace*, 44 Ala. 307. (2) "Doubtless if there were no enabling statutes prescribing a process to be used, the courts, being vested by the constitution with jurisdiction of civil actions, could frame suitable writs and direct a reasonable mode of service." *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 130 Pac. 865.

[b] **Where no special form is prescribed, notice in writing, seasonably delivered, stating all the facts of**

contents of process they are usually regarded as mandatory,³¹ though with respect to particular requirements, such for instance as seal and endorsements, the courts are not entirely agreed as to whether compliance is essential.³² A substantial compliance with the direction of the statute is sufficient in most states,³³ though a strict adherence to the statute has sometimes been demanded.³⁴ A jurisdictional process

which it is necessary the party should be informed, is sufficient. *Pattee v. Lowe*, 35 Me. 121.

31. *Cal.*—*Ward v. Ward*, 59 Cal. 139; *Lyman v. Milton*, 44 Cal. 630; *Nellis v. Justices' Court*, 20 Cal. App. 394, 129 Pac. 472. *Colo.*—*Atchison, T. & S. F. Ry. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512; *Smith v. Aurich*, 6 Colo. 388. *Ga.*—*Moss v. Strickland*, 138 Ga. 539, 75 S. E. 622. *Ill.*—*Ames v. Sankey*, 128 Ill. 523, 21 N. E. 579; *Sidwell v. Schumacher*, 99 Ill. 426. *Ky.*—*Yeager v. Groves*, 78 Ky. 278. *Mo.*—*Wilson v. St. Louis & S. F. R. Co.*, 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624; *Orchard v. National Exch. Bank*, 121 Mo. App. 338, 98 S. W. 824. *Mont.*—*Duluth Brew. & M. Co. v. Allen*, 51 Mont. 89, 149 Pac. 494. *Neb.*—*Crowell v. Galloway*, 3 Neb. 215. *Tex.*—*Simms v. Mears* (Tex. Civ. App.), 190 S. W. 544; *Duke v. Spiller*, 51 Tex. Civ. App. 237, 111 S. W. 787. *Wis.*—*Streeter v. Frank*, 3 Pin. 386, 4 Chand. 93.

[a] "This rule applies to that which stands in the place of process and performs its office." *Ames v. Sankey*, 128 Ill. 523, 21 N. E. 579; *Eagan v. Connelly*, 107 Ill. 458.

[b] A process unknown to law is the same as no process at all. *Wilson v. St. Louis & S. F. R. Co.*, 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624.

[c] In a special proceeding, where the statute provides that the process is to be a rule nisi issued by the court, the issuance of the regular process by the clerk confers no jurisdiction. *Moss v. Strickland*, 138 Ga. 539, 75 S. E. 622.

32. See *infra*, this section.

[a] "While there is some conflict of authority upon this subject, yet it is believed that the weight of authority establishes the proposition, that where the law expressly directs that process shall be in a specified form, and issued in a particular manner, such a provision is mandatory." *Sidwell v. Schumacher*, 99 Ill. 426, *quoted*

with approval in *Smith v. Aurich*, 6 Colo. 388.

33. *Ala.*—*Lewis v. Grace*, 44 Ala. 307. *Cal.*—*Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133. *Colo.*—*Kimball v. Castagim*, 8 Colo. 525, 9 Pac. 488; *Barndollar v. Patton*, 5 Colo. 46. *Ga.*—*Telford v. Coggins*, 76 Ga. 683. *Ind.*—*Dunkle v. Elston*, 71 Ind. 585. *La.*—*See Lacour v. Delamarre*, 2 La. Ann. 140. *Md.*—*See Ritter v. Offutt*, 40 Md. 207. *Minn.*—*Lockway v. Modern Woodmen of America*, 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555; *Plano Mfg. Co. v. Kaufert*, 86 Minn. 13, 89 N. W. 1124. *Mont.*—*Duluth Brew. & M. Co. v. Allen*, 51 Mont. 89, 149 Pac. 494. *Nev.*—*Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738; *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. *N. Y.*—*Wiggins v. Richmond*, 58 How. Pr. 376. *R. I.*—*Slocumb v. Powers*, 10 R. I. 255. *Tex.*—*Old Alcalde Oil Co. v. Ludgate* (Tex. Civ. App.), 85 S. W. 453. *Utah.*—*Winters v. Hughes*, 3 Utah 443, 24 Pac. 759. *Wash.*—*Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760. *Wis.*—*Wheeler v. Smith*, 18 Wis. 651.

[a] Degree of Strictness Required.

(1) Though "the summons must contain all that is required by statute, whether deemed important or not" (*Ward v. Ward*, 59 Cal. 139; *Lyman v. Milton*, 44 Cal. 630), (2) "nothing short of a substantial departure therefrom can properly be held fatal." *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760. (3) "While we cannot pronounce this a model, either in form or substance, of the notice required, yet under the liberal intendments of our code practice, it may be regarded as a sufficient compliance with the statute." *Barndollar v. Patton*, 5 Colo. 46.

34. *Ia.*—*Hodges v. Brett*, 4 G. Gr. 245. *See Farmers' Insurance Co. v. Highsmith*, 44 Iowa 330. *Mass.*—*Cooke v. Gibbs*, 3 Mass. 193. *Neb.*—*Crowell v. Galloway*, 3 Neb. 215. *See McPherson v. First Nat. Bank*, 12 Neb. 202,

which does not contain the essentials of the notice required by the statute does not give the court jurisdiction of the defendant;³⁵ but in some states if the summons is sufficient to put defendant on notice of the suit, it is sufficient to sustain a judgment,³⁶ and the rule is general that irregularities in merely formal matters are not fatal to any form of process.³⁷ Courts have not been unanimous as to what

10 N. W. 707. **Okla.**—*State ex rel. Collins v. Park*, 34 Okla. 335, 126 Pac. 242.

[a] Where jurisdiction depends upon the process, the only safe rule is to require a strict observance of the statute. *Hodges v. Brett*, 4 G. Gr. (Ia.) 345.

[b] "It is the duty of attorneys and clerks (1) to be familiar with the method of proceeding to get defendants into court. It should not be considered a hardship to require that a statute prescribing the method by which a defendant is brought in to answer should be strictly followed. Courts should not be expected to construe plain statutes so as to relieve plaintiffs of the duty of following them as written." *State ex rel. Collins v. Parks*, 34 Okla. 335, 126 Pac. 242. (2) "When a statute has prescribed form of a writ, I am not prepared to say that a clerk or attorney has authority to vary from that form." *Cooke v. Gibbs*, 3 Mass. 193. (3) "Lord Ellenborough said, on quashing the writ, 'If the regularly known forms were departed from in one instance, a thousand and whimsical returns might be framed and great confusion introduced,'" quoting from *Reubel v. Preston*, 5 East 291. *Fisher, Sons & Co. v. Crowley*, 57 W. Va. 312, 50 S. E. 422.

35. **U. S.**—*Brown v. Pond*, 5 Fed. 31. **Cal.**—*Nellis v. Justices' Court*, 20 Cal. App. 394, 129 Pac. 472. **Ill.**—*Sidwell v. Schumacher*, 99 Ill. 426. **Kan.**—*Jones v. Marshall*, 3 Kan. App. 529, 43 Pac. 840. **Mo.**—*Orchards v. National Exch. Bank*, 121 Mo. App. 338, 98 S. W. 824. **S. C.**—*Simmons v. Cochran*, 29 S. C. 31, 6 S. E. 859. **Tex.**—*Durham v. Betterton*, 79 Tex. 223, 14 S. W. 1060; *Simms v. Miears* (Tex. Civ. App.), 190 S. W. 544; *Kimmell v. Edwards* (Tex. Civ. App.), 193 S. W. 363.

See 15 STANDARD PROC. 441, 446, et seq.

36. **Ala.**—*Lewis v. Grace*, 44 Ala. 307. **Ind.**—*Pickering v. State*, 106 Ind. 228, 6 N. E. 611; *Freeman v. Paul*, 105

Ind. 451, 5 N. E. 754; *Dunkle v. Elston*, 71 Ind. 585; *Boyd v. Fitch*, 71 Ind. 306; *Ross v. Glass*, 70 Ind. 391. **Miss.**—*Nance v. Webb*, 42 Miss. 268. **Nev.**—*Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. **N. Y.**—*Loring v. Binney*, 38 Hun (N. Y.) 152, 8 Civ. Proc. 297, 3 How. Pr. (N. S.) 120. **N. C.**—*Battle v. Baird*, 118 N. C. 854, 24 S. E. 668. **Ore.**—*North Pac. Cycle Co. v. Thomas*, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

See 15 STANDARD PROC. 441, 442.

[a] If there is some notice (1), though defective, it will protect the judgment as against collateral attack. *Pickering v. State*, 106 Ind. 228, 6 N. E. 611. (2) Though summons was defective, it was issued and signed by the proper officer, and contained information sufficient to warn the company that a judicial proceeding was pending against it in a particular court, and that if it did not appear therein on a certain day and answer the complaint, a copy of which was served with the summons, judgment would be taken against it for a certain amount of money, and was sufficient to confer jurisdiction, and the judgment is good as against collateral attack. *North Pacific Cycle Co. v. Thomas*, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636. (3) "They had notice of the demand against them, of the time and place of trial, of the court in which the trial was to be had, and this was done in the manner prescribed by law. . . . If the mere process was in anything irregular and not wholly void, the parties complaining should have appeared in the court below and there sought to have it corrected." *Lewis v. Grace*, 44 Ala. 307.

[b] "It has been several times held by this court that the only purpose of the summons is to bring the party into court—to notify him that there will be a complaint filed against him at the return term." *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668.

37. **Cal.**—*Newmark & Co. v. Chap-*

parts of a writ are to be considered formal, and what essential.³⁸ Many of the objections which were formerly good as against the ancient writs, are not now of consequence, since the reasoning underlying the older rulings does not apply under the modern practice.³⁹

A different rule is sometimes applied with regard to irregularities in original, mesne and final process,⁴⁰ but these distinctions are not

man, 53 Cal. 557. **Conn.**—*Temple v. Gilbert*, 86 Conn. 335, 85 Atl. 380. **Dak.**—*Star v. Mahan*, 4 Dak. 213, 30 N. W. 169. **Ga.**—*Lowe v. Morris*, 13 Ga. 147. **Idaho.**—*Ridenbaugh v. Sandlin*, 14 Idaho 472, 94 Pac. 827, 125 Am. St. Rep. 161. **Ill.**—*Sidwell v. Schumacher*, 99 Ill. 426. **Minn.**—*Lane v. Innes*, 43 Minn. 137, 45 N. W. 4. **N. Y.**—*Cook v. Kelsey*, 19 N. Y. 412. **Ore.**—*North Pacific Cycle Co. v. Thomas*, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636. **W. Va.**—*Koen v. Fairmount Brew. Co.*, 69 W. Va. 94, 70 S. E. 1098.

See 15 STANDARD PROC. 442, note 95 [b]; and *infra*, VIII, A, 1.

[a] If essentials are present, (1) jurisdiction attaches, even if the form is irregular. *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4; *North Pac. Cycle Co. v. Thomas*, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636. (2) A certified copy of judgment which directs the sheriff to do all that process issued in the most formal and regular manner could have directed him to do, is not void as a process, though not in the statutory form of an execution. *Newmark & Co. v. Chapman*, 53 Cal. 559. (3) "A decree for sale in the hands of a master in chancery is equivalent to an execution in the hands of a sheriff." *Weinstein v. Herman*, 81 N. J. Eq. 236, 86 Atl. 974.

[b] If the form used is not prohibited, though not that prescribed by statute, it may be sufficient. *Lowe v. Morris*, 13 Ga. 147. See *infra*, VIII, A, 1.

38. *Parsons v. Swett*, 32 N. H. 87, 64 Am. Dec. 352; *Reynolds v. Darnell*, 19 N. H. 394.

[a] "There must be an effort to conform to law to entitle to the claim of mere irregularity in process." *Joiner v. Delta Bank*, 71 Miss. 382, 14 So. 464.

[b] The true test of void process occasioned by an irregularity, is that the irregularity must be in the process itself, or in the mode of issuing it. **Ark.**—*Byers v. Fowler*, 12 Ark. 218,

54 Am. Dec. 271. **Mo.**—*Bank of Missouri v. Matson*, 26 Mo. 243, 72 Am. Dec. 208. **N. Y.**—*Woodcock v. Bennet*, 1 Cow. 711, 13 Am. Dec. 568.

[c] "Irregular process (1) is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or nonexistence of some fact or circumstance rendering it improper in such a case." *Jochem v. Cooley*, 176 Fed. 719, 100 C. C. A. 155; *Bryan v. Congdon*, 86 Fed. 221, 29 C. C. A. 670. (2) "Sometimes the term 'irregular process' has been defined to mean process absolutely void, and not merely erroneous and voidable." **Ind.**—*Doe v. Harter*, 2 Ind. 252. **N. Y.**—*Woodcock v. Bennet*, 1 Cow. 711, 735, 13 Am. Dec. 568. **Pa.**—See *Fisher v. Potter*, 2 Miles 147. **Vt.**—*Paine v. Ely*, 1 D. Chip. 37, N. Chip. 14, 24. (3) "But, usually, this term has been applied to all process not issued in strict conformity with the law . . . whether such defects render the process absolutely void or only voidable." *Doe v. Harter*, 2 Ind. 252.

[d] "Void process is defined to be such as was issued without power in the court to award it, or which the court has not acquired jurisdiction to issue in the particular case, or which fails in some material respect to comply with the requisite form of legal process." *Jochem v. Cooley*, 176 Fed. 719, 100 C. C. A. 155.

[e] A Void Process Is Equivalent to No Process.—*Neal-Millard Co. v. Owens*, 115 Ga. 959, 42 S. E. 266.

39. **U. S.**—*Wolf v. Cook*, 40 Fed. 432. **Ark.**—*Renner v. Reed*, 3 Ark. 339. **Ga.**—*Lowe v. Morris*, 13 Ga. 147.

[a] Cessat Ratione Legis, Cessat Lex.—When the reasons for ancient rules surrounding process have ceased, the rule itself necessarily ceases to exist. *Wolf v. Cook*, 40 Fed. 432; *Renner v. Reed*, 3 Ark. 339.

Compare the earlier and later cases cited *infra*, this section.

40. **Ark.**—*Whiting v. Beebe*, 12 Ark. 421, 535. **D. C.**—*Thomson v. Beveridge*,

always of practical value,⁴¹ and where the statutes make no such distinction in prescribing the requisites of process, the court should make none.⁴² Inaccuracies and omissions may be rendered unimportant where the information is given in other papers delivered therewith.⁴³

A variance between the recitals in the writ and the pleading is usually ground for abatement,⁴⁴ but it is nevertheless also an amend-

3 Mackey 170. **Me.**—Bailey v. Smith, 12 Me. 196. **Mont.**—Kipp v. Burton, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325. **N. H.** Parsons v. Swett, 32 N. H. 87, 64 Am. Dec. 352.

See the various subtitles, *infra*.

41. Wolf v. Cook, 40 Fed. 432.

[a] "Original process may be amended as well as any other." Talcott v. Rozenberg, 8 Abb. Pr. (N. S.) 287, 3 Daly (N. Y.) 203.

[b] **Reasons for Distinctions.**—(1) Considering the effect of a lack of seal on a summons, and distinguishing from a former decision (Hutchins v. Edson, 1 N. H. 139), holding that a similar defect in an execution was fatal, (2) the New Hampshire court, in holding that the want of seal on the summons was not fatal, said: "I is obvious, however, that there is an important distinction between the two kinds of writs, because to a writ of final process the defendant has no opportunity to object, by plea or motion, that it wants a . . . constitutional requisite; whereas in the case of mesne process he may plead the defect, or make it the ground of a motion." Parsons v. Swett, 32 N. H. 87, 64 Am. Dec. 352. (3) The Montana supreme court, while holding that a want of seal on an execution was not fatal, and in distinguishing from former decisions of the same court in which the same defect in a summons was held fatal, said: "There is a distinction between a summons and a writ of execution, and by reason of that distinction the cases . . . are not in point in this case,"—the former being a jurisdictional writ, while the sole function of the latter is to carry into effect the judgment of the court. Kipp v. Burton, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325.

42. Mitchell v. Conley, 13 Ark. 414, 420; Gordon v. Bodwell, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341.

43. Ga.—Smith v. Morris, 29 Ga.

339. **Ill.**—Williams v. Williams, 221 Ill. 541, 77 N. E. 928. **Nev.**—Higley v. Pollock, 21 Nev. 198, 27 Pac. 895. **N. Y.**—Brown v. Eaton, 37 How. Pr. 325; Yates v. Blodgett, 8 How. Pr. 278. **Tex.**—Galveston, H. & S. A. Ry. Co. v. Coker (Tex. Civ. App.), 135 S. W. 179. **Va.**—Richmond & D. R. Co. v. Rudd, 88 Va. 648, 14 S. E. 361.

Compare Schuttler v. King, 12 Mont. 149, 30 Pac. 25.

[a] The notice and copy of pleading are treated as one instrument in determining the sufficiency of the information given. Williams v. Williams, 221 Ill. 541, 77 N. E. 928.

[b] **The Rule Is Required by Justice.**—(1) "It is injustice to turn a party out of court or reverse a judgment on a view of the summons *merely technical*, when the summons points to the complaint where the particular statement is made; and if a copy of the complaint is not served on the moving party, he knows where to find it." Bewick v. Muir, 83 Cal. 368, 23 Pac. 389. (2) "To allow the defendant to overlook the complaint and resort to the summons for the cause of action, for no purpose except to make a dilatory and fruitless motion, is to encourage a practice which has already become very troublesome to parties and very annoying to the courts." Brown v. Eaton, 37 How. Pr. (N. Y.) 325, *quoted in* Higley v. Pollock, 21 Nev. 198, 27 Pac. 895.

44. **Ia.**—Culver v. Whipple, 2 G. Gr. 365. **Ky.**—Stapp v. Thomson, 2 Litt. 214. **N. H.**—Stoddard v. Coe, 6 N. H. 160. **N. J.**—Schenck v. Schenck's Exrs., 10 N. J. L. 274. **S. C.**—Bull v. Traynham, 3 Rich. L. 433. **Va.**—Richmond & D. R. Co. v. Rudd, 88 Va. 648, 14 S. E. 361.

[a] A variance which is not prejudicial is not ground for a motion to quash. Rich v. Collins, 12 Colo. App. 511, 56 Pac. 207.

[b] A variance in the wording of the title is of no consequence. Hughes v. Osborn, 42 Ind. 450.

able defect,⁴⁵ as is a variance of the writ from the praecipe.⁴⁶

In setting forth the matter the statute requires, it must not be framed in doubtful or equivocal language,⁴⁷ since lack of certainty cannot be supplied by intendment;⁴⁸ still it is not necessary to use the exact language of the statute.⁴⁹ Ordinarily only such matter as the statute requires need be inserted in the process.⁵⁰ Under the forms used and course of practice in some states, the declaration has been considered as part of the process,⁵¹ as where it is required to be inserted in the original writ,⁵² or a copy thereof must accompany the summons.⁵³

[c] If defendant is misled by the variance, there is ground to set aside. *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895; *Brown v. Eaton*, 37 How. Pr. (N. Y.) 325.

45. Ill.—*Thompson v. Turner*, 22 Ill. 389. Ind.—*Beck v. Williams*, 5 Blackf. 374. Ia.—*Culver v. Whipple*, 2 G. Gr. 365. N. Y.—*Wohlfarth v. National Export Assn.*, 107 N. Y. Supp. 540. W. Va.—*Ryan v. Piney Coal & Coke Co.*, 72 W. Va. 630, 78 S. E. 789.

46. *Culver v. Whipple*, 2 G. Gr. (Iowa) 365.

[a] "Departure by the clerk, in framing the writ, from the instructions given him therefor," was amendable under 8 Hen. VI, cap. 12. *Fisher, Sons & Co. v. Crowley*, 57 W. Va. 312, 50 S. E. 422.

[b] Error of clerk in complying with praecipe may be corrected by an amendment. *Wilkinson v. North East Borough*, 215 Pa. 486, 64 Atl. 734. See *Kennedy v. Beck*, 15 Kan. 555.

47. *Ross v. Ward*, 16 N. J. L. 23.

[a] **Abbreviations and Contractions.** A summons written in doubtful and equivocal contractions and abbreviations, which require words to be transposed and supplied, is insufficient. *Ross v. Ward*, 16 N. J. L. 23.

48. *Wright v. Wilmot*, 22 Tex. 398; *Taylor v. Taylor* (Tex. Civ. App.), 157 S. W. 1184; *McNeil v. Ballinger*, 1 White & W. Civ. Cas. (Tex.), §841. But see *Barnollar v. Patton*, 5 Colo. 46.

49. Colo.—*Kimball v. Castagim*, 8 Colo. 525, 9 Pac. 488. Idaho.—*McKnight v. Grant*, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287. Neb.—*Hurford v. Baker*, 17 Neb. 443, 23 N. W. 339. Tex.—*Cave v. Houston*, 65 Tex. 619.

[a] **Substituted wording** which means the same thing will meet the requirements. *McKnight v. Grant*, 13

Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287; *Hurford v. Baker*, 17 Neb. 443, 23 N. W. 339.

[b] "A writ which commands an unlawful act is bad in form." *Richardson v. Rich*, 66 Me. 249; *Thayer v. Comstock*, 39 Me. 140.

50. Ala.—*Lewis v. Grace*, 44 Ala. 307. Ia.—*Lyon v. Byington*, 10 Iowa 124. La.—*Hemken v. Farmer*, 3 Rob. 155. Neb.—*Hobson v. Cummins*, 57 Neb. 611, 78 N. W. 295. W. Va.—*Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998.

[a] "The summons under the code in no way indicates the cause of action. This is to be learned from the complaint. In this it differs from the writ under the old practice, which did to some extent indicate the plaintiff's cause of action." *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668.

51. Conn.—*Hotchkiss' Appeal*, 32 Conn. 353. Ga.—*Smith v. Morris*, 29 Ga. 339. Ill.—*Williams v. Williams*, 221 Ill. 541, 77 N. E. 928. N. H.—*Clindenin v. Allen*, 4 N. H. 385.

[a] **At common law** the declaration forms no part of the writ, but is produced by the plaintiff after the writ is served. *Ilseley v. Stubbs*, 5 Mass. 280, 285.

[b] **Where papers are required to be annexed** or attached to a process, laying loose papers within the folds of the writ does not make them a part of the writ. *Ballard v. Baneroff*, 31 Ga. 503; *Saco v. Hopkinton*, 29 Me. 268.

52. *Brigham v. Este*, 2 Pick. (Mass.) 420; *Eastman v. Morrison*, 46 N. H. 136; *Clindenin v. Allen*, 4 N. H. 385.

[a] **Without the Declaration the Writ Is Void.**—*Brigham v. Este*, 2 Pick. (Mass.) 420; *Clindenin v. Allen*, 4 N. H. 385.

53. *Williams v. Williams*, 221 Ill. 541, 77 N. E. 928.

B. STYLE.—The statutes or constitution generally require all judicial process to run in the name of the state,⁵⁴ or the people of a state.⁵⁵ In many states the omission of the style from the process is merely a formal defect,⁵⁶ and amendable,⁵⁷ and a judgment thereon is not void.⁵⁸ Where, however, the entire omission of the style,⁵⁹ or a substantial departure from the statutory form,⁶⁰ is regarded as a fatal defect, in such writs as come within the terms of the statutory or constitutional requirements, it is not sufficient if the language used

As to service of copy of the pleading, see the title "Service of Process and Papers."

54. **Ia.**—*Nichols v. Burlington & L. Plank Road Co.*, 4 G. Gr. 42. **Kan.** *McKenna v. Cooper*, 79 Kan. 847, 101 Pac. 662; *Truitt v. Baird*, 12 Kan. 420. **La.**—*Bludworth v. Sompeyrac*, 3 Mart. (O. S.) 719. **Minn.**—*Hinkley v. St. Anthony Falls W. Power Co.*, 9 Minn. 55. **Neb.**—*Moore v. Fedawa*, 13 Neb. 379, 14 N. W. 170. **Ohio.**—*Collins v. Baltimore & O. R. R. Co.*, 7 Ohio Dec. 445. **S. D.**—*Kundert v. Madison*, 162 N. W. 898. **W. Va.**—*Ambler v. Leach*, 15 W. Va. 677. **Wis.**—*Ilseley v. Harris*, 10 Wis. 95.

[a] Where the code divides remedies into actions and special proceedings, and requires process in civil actions to run in the name of the state, under the familiar rule of exclusion, this requirement has no application to special proceedings. *Kundert v. Madison* (S. D.), 162 N. W. 898.

55. **U. S.**—*Manville v. Battle Mountain Smelt. Co.*, 17 Fed. 126, 5 McCrary 328, construing Colorado statute. **Ill.** *Knott v. Pepperdine*, 63 Ill. 219. **Mich.** *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385. **Nev.**—*Brooks v. Nevada Nickel Synd.*, 24 Nev. 311, 53 Pac. 597.

56. **Fla.**—*Gilmer v. Bird*, 15 Fla. 410. **Ga.**—*Baldwin, Starr & Co. v. McMichael*, 68 Ga. 828. **Kan.**—*Truitt v. Baird*, 12 Kan. 420. **Mo.**—*State v. Foster*, 61 Mo. 549; *Cape Girardeau v. Riley*, 52 Mo. 428; *Jump v. Batton's Creditors*, 35 Mo. 193, 86 Am. Dec. 146. **Neb.**—*Moore v. Fedawa*, 13 Neb. 379, 14 N. W. 170. **Wis.**—*Ilseley v. Harris*, 10 Wis. 95.

57. **Fla.**—*Gilmer v. Bird*, 15 Fla. 410. **Ill.**—*Harris v. Jenks*, 3 Ill. 475. Compare *Sidwell v. Schumacher*, 99 Ill. 426. **N. Y.**—*Sivaslian v. Akulian*, 166 N. Y. Supp. 535. **Tex.**—*Biesenbach v. Key*, 63 Tex. 79; *Portis v. Parker*, 8

Tex. 23, 28, 58 Am. Dec. 95. **Wis.** *Ilseley v. Harris*, 10 Wis. 95.

[a] "Under the first English statute of amendment (14 ed. 3-6), if not at common law, the title of process was amendable (8 Co., 158; 1 Com., 579), and the justices under subsequent statutes were authorized to amend process so long as such record was before them, as well after judgment as before." *Gilmer v. Bird*, 15 Fla. 410, 423.

58. *Gilmer v. Bird*, 15 Fla. 410; *Hanna v. Russell*, 12 Minn. 80.

59. **Ark.**—*Gilbreath v. Kuykendall*, 1 Ark. 50. **Ill.**—*Sidwell v. Schumacher*, 99 Ill. 426; *Leighton v. Hall*, 31 Ill. 108, 83 Am. Dec. 205; *McFadden v. Fortier*, 20 Ill. 509. **Ky.**—*Yeager v. Groves*, 78 Ky. 278. **N. H.**—See *Hutchins v. Edson*, 1 N. H. 139. **N. J.** *Brown v. Hoy*, 16 N. J. L. 157. **Ohio.** See *Collins v. Baltimore & O. R. R. Co.*, 7 Ohio Dec. 445. **Tenn.**—*McLendon v. State*, 92 Tenn. 520, 22 S. W. 200, 21 L. R. A. 738.

[a] "Whether appropriate or necessary or not, the constitution requires it, and what that instrument requires should be done without hesitation or inquiry into the question whether abstractly considered, the thing required is essential or not." *Yeager v. Groves*, 78 Ky. 278.

60. **U. S.**—*Manville v. Battle Mountain Smelt. Co.*, 17 Fed. 126, 5 McCrary 328. **Mich.**—*Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385. **W. Va.** *Gorman v. Steed*, 1 W. Va. 1.

[a] If the word "commonwealth" is substituted for "State" the writ should be quashed. *Gorman v. Steed*, 1 W. Va. 1.

[b] If a form is quoted in the constitution, it must be followed literally. *Johnson v. Provincial Ins. Co.*, 12 Mich. 216, 86 Am. Dec. 49. See also *Beach v. O'Riley*, 14 W. Va. 55, 62, and *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293.

merely indicates the venue;⁶¹ it must show also that the writ is issued by authority of such state.⁶² But as a substantial compliance with the provision is usually sufficient,⁶³ it is not of consequence in what part of the process the words are introduced, so that it appears that the command is given in its name.⁶⁴ The words "the state of"⁶⁵ or "state of"⁶⁶ preceding the name of the state, sufficiently designate the authority from which the process issues. Since only judicial writs are intended by a constitutional requirement that process run in the name of the state,⁶⁷ a summons issued by an attorney is not within the meaning of such a provision.⁶⁸

C. DIRECTION. — Process is generally directed to some officer⁶⁹ of

61. Mich.—Forbes v. Darling, 94 Mich. 621, 54 N. W. 385. Mo.—Little v. Little, 5 Mo. 227, 32 Am. Dec. 317. See also Hickman v. Griffin, 6 Mo. 37, 34 Am. Dec. 124. Compare State v. Foster, 61 Mo. 549. W. Va.—Beach v O'Riley, 14 W. Va. 55.

62. Beach v. O'Riley, 14 W. Va. 55. And see cases in preceding notes.

63. U. S.—Kimball v. Taylor, 2 Woods 37, 14 Fed. Cas. No. 7,775. Ill. Knott v. Pepperdine, 63 Ill. 219; Harris v. Jenks, 3 Ill. 475. Ia.—State v. Smouse, 49 Iowa 634. Minn.—Cleveland v. Tavernier, 11 Minn. 194. Neb. Moore v. Fedawa, 13 Neb. 379, 14 N. W. 170. Tex.—See Biesenbach v. Key, 63 Tex. 79.

64. Ill.—Harris v. Jenks, 3 Ill. 475. Minn.—Cleveland v. Tavernier, 11 Minn. 194. Miss.—See Greeson v. State, 5 How. 33. Pa.—White v. Com., 6 Binn. 179, 6 Am. Dec. 443. S. C.—State v. Hill, 19 S. C. 435.

65. Branch v. Branch, 6 Fla. 314.

66. Ia.—Harriman v. State, 2 G. Gr. 270. La.—Weber v. Frost, 22 La. Ann. 348. Wis.—Mabbett v. Vick, 53 Wis. 158, 10 N. W. 84.

[a] The omission of the article "the" before the word "state" is not fatal, and such an objection is hypercritical. Mabbett v. Vick, 53 Wis. 158, 10 N. W. 84.

67. U. S.—See Kimball v. Taylor, 2 Woods 37, 14 Fed. Cas. No. 7,775. Kan.—See McKenna v. Cooper, 79 Kan. 847, 161 Pac. 662. La.—Bludworth v. Sompeyrac, 3 Mart. (O. S.) 719. Mich. Attorney General v. Jochim, 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699. Minn.—Lowry v. Harris, 12 Minn. 255. Nev.—State ex rel. Curtis v. McCullough, 3 Nev. 202. Tex.—See Graves v. Rudd, 26 Tex. Civ. App. 554, 65 S. W. 63. Wis.

Sprague v. Birchard, 1 Wis. 457, 60 Am. Dec. 393.

[a] A citation is not such process as is contemplated by the constitutional provision. Kimball v. Taylor, 2 Woods 37, 14 Fed. Cas. No. 7,775; Bludworth v. Sompeyrac, 3 Mart. O. S. (La.) 719.

[b] An order for arrest of the defendant is a "writ or process" within the constitution, and should run in the name of the state. Ilsey v. Harris, 10 Wis. 95. But see Dusy v. Helm, 59 Cal. 188.

68. Colo.—Comet Consol. Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506. Fla.—Gilmer v. Bird, 15 Fla. 410. Ia. Tully v. Beaubien, 10 Iowa 187; Nichols v. Burlington & L. Plank Road Co., 4 G. Gr. 44. Minn.—Hanna v. Russell, 12 Minn. 80. Nev.—Brooks v. Nevada Nickel Synd., 24 Nev. 311, 53 Pac. 597. Ore.—Lane v. Ball, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975; Whitney v. Blackburn, 17 Ore. 564, 21 Pac. 874, 11 Am. St. Rep. 857; Bailey v. Williams, 6 Ore. 71. Wis.—Hammond-Chandler Lumb. Co. v. Industrial Com., 163 Wis. 596, 158 N. W. 292; Porter v. Vandercook, 11 Wis. 70.

69. Ga.—Peck v. La Roche, 86 Ga. 314, 12 S. E. 638. La.—Bludworth v. Sompeyrac, 3 Mart. (O. S.) 719. Mass. Wood v. Ross, 11 Mass. 271. Mich. Fletcher v. Morrell, 78 Mich. 176, 44 N. W. 133. Neb.—Hobson v. Cummins, 57 Neb. 611, 78 N. W. 295. N. Y. Utica City Bank v. Buel, 9 Abb. Pr. 385, 17 How. Pr. 498. Ohio.—State ex rel. Prosecuting Attorney v. Robinson, 9 Ohio Dec. (Reprint) 249. Tex. Moseby v. Burrow, 52 Tex. 396; Carroll v. Peck, 31 Tex. 649. Wyo. Clause v. Columbia Sav. & Loan Assn., 16 Wyo. 450, 95 Pac. 54.

[a] Process directed in the altern-

the county in which it is to be executed;⁷⁰ but under the code of many states the summons is directed to the defendant.⁷¹ In some jurisdictions certain process has been held to be vitiated by failure of proper direction,⁷² such as a direction to an officer of a wrong county,⁷³ or a direction to a wrong person,⁷⁴ and especially for a misdirection to the defendant, or an utter failure of direction, where by statute the name of the defendant must be shown by a direction of the summons to him;⁷⁵ while defects and omissions in the direction have some-

ative, to the sheriff or constable is proper. **Ill.**—*Gardner v. Witbord*, 59 Ill. 145. **Neb.**—*Hobson v. Cummins*, 57 Neb. 611, 78 N. W. 295. **Tex.** *Carroll v. Peck*, 31 Tex. 649.

[b] "There should be a particular direction to the officer, even in cases where his authority to serve is expressly recognized by statute." *Wood v. Ross*, 11 Mass. 271.

[c] **The Command to the Officer.**

(1) Omission of the command does not render the process void. *Smith v. Bradley*, 1 Root (Conn.) 148; *Mitchell v. Long*, 74 Ga. 94. (2) Nor does an erroneous command when process is properly executed. *Cicero v. Bates*, 1 Mich. N. P. 25. (3) But a writ which commands an unlawful act is bad. *Richardson v. Rich*, 66 Me. 249; *Thayer v. Comstock*, 39 Me. 140.

[d] **Returnable process** requires an officer to certify his doings. *Utica City Bank v. Buel*, 9 Abb. Pr. 385, 17 How. Pr. (N. Y.) 498.

70. **Ga.**—*Beasley v. Smith*, 144 Ga. 377, 87 S. E. 293. **Mich.**—*Antcliff v. June*, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621. **N. H.**—*Parker v. Barker*, 43 N. H. 35, 80 Am. Dec. 130. **Tex.**—*Pruitt v. State*, 92 Tex. 434, 49 S. W. 366; *Medlin v. Seidemann*, 39 Tex. Civ. App. 553, 88 S. W. 250.

To what county or district process runs, see *supra*, III, E.

71. **Cal.**—*Hancock v. Preuss*, 40 Cal. 572. **Ga.**—*Glenn v. Augusta Drug Co.*, 127 Ga. 5, 55 S. E. 1032. **La.**—*Jacobs v. Frere*, 28 La. Ann. 625; *Waddill v. Payne*, 23 La. Ann. 773. **Minn.**—*Plano Mfg. Co. v. Kaufert*, 86 Minn. 13, 89 N. W. 1124. **Mont.**—*Duluth Brew. & M. Co. v. Allen*, 51 Mont. 89, 149 Pac. 494.

72. **Ark.**—*Anthony v. Beebe*, 7 Ark. 447. **Conn.**—*Case v. Humphrey*, 6 Conn. 130, 138. **Ill.**—*Hickey v. Forristal*, 49 Ill. 255. **Tex.**—*Porter v. Hill County* (Tex. Civ. App.), 33 S. W. 383.

[a] **Writs Void if Without Direction.**—(1) "All writs and other process must be directed to some person authorized by law to execute the same, and without such direction they are wholly void." **Ark.**—*Vaughn v. Brown*, 9 Ark. 20, 47 Am. Dec. 730. **Tex.**—*Galveston, H. & S. A. R. R. Co. v. McTigue*, 1 White & W. Civ. Cas., §457. **Vt.** *Thomas v. Graves*, 90 Vt. 312, 98 Atl. 508; *St. Johnsbury v. Goodenough*, 44 Vt. 662. (2) "Between a writ not duly directed . . . and one that has no direction in fact, there is no legal difference." *Case v. Humphrey*, 6 Conn. 130, 139.

73. **Ga.**—*Strauss Bros. v. Owens*, 6 Ga. App. 415, 65 S. E. 161. *Compare Beasley v. Smith*, 144 Ga. 377, 87 S. E. 293. **Ohio.**—*Collins v. Baltimore & O. R. R. Co.*, 7 Ohio Dec. 445. **Tex.** *Witt v. Miller*, 25 Tex. Supp. 386; *Douthit v. Martin*, 15 Tex. Civ. App. 559, 39 S. W. 944; *Galveston, H. & S. A. R. R. Co. v. McTigue*, 1 White & W. Civ. Cas., §457.

See *supra*, III, E.

74. **Ark.**—*Rudd v. Thompson*, 22 Ark. 363. **Mich.**—*Fletcher v. Morrell*, 78 Mich. 176, 44 N. W. 133. **N. C.** *Fort v. Boone*, 114 N. C. 176, 19 S. E. 632.

[a] **Presumption From Service Alone.**—The fact that service was by a constable raises the presumption that the facts exist which render it proper for him to serve the process. *Gay v. State*, 20 Tex. 504.

75. **Ga.**—*Frank Adam Elect. Co. v. Witman*, 16 Ga. App. 574, 85 S. E. 819; *Holland Gold Pen Co. v. Williams & Co.*, 7 Ga. App. 173, 66 S. E. 540. **La.**—*Belard v. Gehelin*, 47 La. Ann. 162, 16 So. 739; *Bertoulin v. Bourgoins*, 19 La. Ann. 360. **Ore.**—*White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

[a] **If the name is shown in the body of the summons**, though merely directed "to the defendant" in the caption, the process is not invalid.

times been regarded as formal and amendable.⁷⁶

Where the direction is to an officer, the statutes usually provide that when the regular officer who serves process is an interested party, service shall be made by some other officer,⁷⁷ or an indifferent person⁷⁸ to whom the writ should be addressed.⁷⁹ In such case all the statutory prerequisites to the issuance of a writ to an indifferent person must be complied with,⁸⁰ and in some states all the facts necessary to give such person the power to serve the process should appear in the writ itself.⁸¹ Process directed to a sheriff who is a party

Glenn v. Augusta Drug Co., 127 Ga. 5, 55 S. E. 1032. See also Mitchell v. Long, 74 Ga. 94.

[b] **Direction need not be literally exact**, but only substantially correct. Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 89 N. W. 1124.

As to designation of parties, see *infra*, IV, D.

76. U. S.—Armstrong v. K. C. Southern Ry. Co., 192 Fed. 608. **Ala.**—Johnson v. Whitfield, 124 Ala. 508, 27 So. 406, 82 Am. St. Rep. 196; Herring v. Kelly, 96 Ala. 559, 11 So. 600; Peebles v. Weir, 60 Ala. 413; Yonge v. Broxson, 23 Ala. 684. **Ga.**—Telford v. Cogins, 76 Ga. 683; Warren v. Purtell, 63 Ga. 428. **Kan.**—First Nat. Bank v. Franklin, 20 Kan. 264. **Me.**—State v. Hall, 78 Me. 37, 2 Atl. 546. **Mass.**—Blanchard v. Waters, 10 Mete. 185; Wood v. Ross, 11 Mass. 271; Hearsey v. Bradbury, 9 Mass. 95. **Mo.**—Moss v. Thompson, 17 Mo. 405; McMenamy Inv. & Real Est. Co. v. Stillwell Catering Co., 175 Mo. App. 668, 158 S. W. 427. **N. H.**—Parker v. Barker, 43 N. H. 35, 80 Am. Dec. 130; Brown v. Dudley, 33 N. H. 511, 514. **Va.**—Andrews v. Fitzpatrick, 89 Va. 438, 16 S. E. 278.

[a] **When Amendable.**—If the process might lawfully have issued originally in the form of the proposed amendment, it is amendable. Parker v. Barker, 43 N. H. 35, 80 Am. Dec. 130; Andrews v. Fitzpatrick, 89 Va. 438, 16 S. E. 278.

[b] **A writ directed to a sheriff**, but served by a constable, may be amended by insertion of a direction to a constable. Blanchard v. Waters, 10 Mete. (Mass.) 185; Aldrich v. Aldrich, 8 Mete. (Mass.) 102, 106; Hearsey v. Bradbury, 9 Mass. 95.

[c] **Process is not void** (1) for want of proper direction (Nabors v. Thomason, 1 Ala. 590; Parker v. Barker, 43 N. H. 35, 80 Am. Dec. 130), nor (2)

if directed to wrong county (Armstrong v. K. C. Southern Ry. Co., 192 Fed. 608; Chadwick & Co. v. Dival, 12 Vt. 499), nor (3) if directed to sheriff in one state and served in another. McMenamy Inv. & Real Estate Co. v. Stillwell Catering Co., 175 Mo. App. 668, 158 S. W. 427.

77. Ky.—Brumleve v. Cronan, 176 Ky. 818, 197 S. W. 498. **Mass.**—Carlisle v. Weston, 21 Pick. 535. **N. C.**—Battle v. Baird, 118 N. C. 854, 24 S. E. 668. **Tex.**—Mansfield v. Ramsey (Tex. Civ. App.), 196 S. W. 330.

See the title "**Service of Process and Papers.**"

78. Augur v. Augur, 14 Conn. 82; Case v. Humphrey, 6 Conn. 130; Eno v. Frisbie, 5 Day (Conn.) 122; Culver v. Balch, 23 Vt. 618; Ingraham v. Leland, 19 Vt. 304.

79. Ky.—Brumleve v. Cronan, 176 Ky. 818, 197 S. W. 498. **Mass.**—Carlisle v. Weston, 21 Pick. 535. **Tex.**—Mansfield v. Ramsey (Tex. Civ. App.), 196 S. W. 330. **Vt.**—Thomas v. Graves, 90 Vt. 312, 98 Atl. 508.

[a] **If the direction is left blank** by the officer issuing the writ, and it is filled in by another person, the process is void. Thomas v. Graves, 90 Vt. 312, 98 Atl. 508; Ross v. Fuller, 12 Vt. 265, 36 Am. Dec. 342; Kelly v. Paris, 10 Vt. 261, 33 Am. Dec. 199. Issuance to attorney in blank, see *supra*, III, A.

80. Case v. Humphrey, 6 Conn. 130; Chord v. McCoy, Morris (Iowa) 311.

81. Ark.—McPherson v. Bank of State, 4 Ark. 558. **Conn.**—Case v. Humphrey, 6 Conn. 130. **Ia.**—See Minott v. Vineyard, 11 Iowa 90. **Mass.**—Carlisle v. Weston, 21 Pick. 535. **Vt.**—Washburn v. Hammond, 25 Vt. 648.

[a] **Unless the prerequisites appear** in the certificate, the direction is not legal. Case v. Humphrey, 6 Conn. 130.

[b] **Omission does not invalidate**

to the suit is defective, and will be quashed on timely application.⁸²

D. DESIGNATION OF PARTIES. — 1. **Necessity of Naming Parties.**⁸³ The statutes of the various states usually contain some provision that process show the names of the parties to a civil action,⁸⁴ and under such statutes the omission from the summons of the name of the plaintiff⁸⁵ or defendant⁸⁶ renders such process invalid. Each process is required by some statutes to show the names of all defendants, where there are several.⁸⁷ If, however, the statute does not specially

the process, though it is more regular to endorse the facts on the writ. *Sawyer v. Price*, 6 Ala. 285.

82. Ala.—*Nabors v. Thomason*, 1 Ala. 599. Miss.—*McLeod v. Harper*, 43 Miss. 42. N. C.—*Bowen v. Jones*, 35 N. C. 25, 55 Am. Dec. 426. Vt. *Shaw v. Baldwin*, 33 Vt. 447. W. Va. *Hansford v. Tate*, 61 W. Va. 207, 56 S. E. 372.

83. In actions by or against infants, see 12 STANDARD PROC. 737, and supplement.

Direction to party, see *supra*, IV, C.

84. Cal.—*Lyman v. Milton*, 44 Cal. 630. Colo.—*Smith v. Aurich*, 6 Colo. 388. Ill.—*Great Northern Hotel Co. v. Farrand, etc. Organ Co.*, 90 Ill. App. 419. Ky.—*Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477; *Bryant v. Mack*, 19 Ky. L. Rep. 744, 41 S. W. 774. Me. *Jones v. Sutherland*, 73 Me. 157. Mont. *Sharman v. Huot*, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645. Ore. *White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726. Tex.—*Pruitt v. State*, 92 Tex. 434, 49 S. W. 366; *Southern Pac. Co. v. Block*, 84 Tex. 21, 19 S. W. 300; *Putnam v. Wheeler*, 65 Tex. 522.

[a] In a published notice of partition of real estate, omission to insert the names of the adverse parties does not render the judgment void, though the statute makes the publication a substitute for the summons, and the summons should contain the names of the parties to be served. *Waltz v. Borroway*, 25 Ind. 380.

[b] Upon death of defendant before service new summons must issue in the name of the personal representative in order to bind him. *Matter of George's Estate*, 35 Misc. 685, 72 N. Y. Supp. 431; *White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726. As to procedure on revival, see the title "Revivor."

As to parties named only in the process, see *supra*, IV, B.

85. *Jones v. Sutherland*, 73 Me. 157; *Heath v. Fraley*, 50 Tex. 209.

[a] **Omission of Name of One Plaintiff Is Not Fatal.**—Where "the declaration is filed before the writ issues, and the declaration being the foundation of the writ and accompanying it, the party would look to it in order to ascertain the nature of the demand, and by whom the suit was instituted." *Jarbee v. Steamboat Daniel Hillman*, 19 Mo. 141.

86. Cal.—*Lyman v. Milton*, 44 Cal. 630. Ky.—*Casey v. Newport Rolling Mill Co.*, 156 Ky. 623, 161 S. W. 528; *Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477; *Butts v. Turner*, 5 Bush 435. Ore.—*White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726. Tex.—*Portwood v. Wilburn*, 33 Tex. 713; *McCauley v. Western Nat. Bank* (Tex. Civ. App.), 173 S. W. 1000; *Delaware Western Const. Co. v. Farmers' & M. Nat. Bank*, 33 Tex. Civ. App. 658, 77 S. W. 628.

[a] **Summons with name omitted from title and not directed to defendant**, does not inform defendant of the necessity of appearing, and is insufficient to support a default. *White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

[b] "Even though a copy of the petition be served, which petition named all the defendants." *Battle v. Eddy*, 31 Tex. 368.

[c] **The name of a party actually served** may be inserted. *Johnson v. Abbott*, 60 N. H. 150.

Direction to defendant, see *supra*, IV, C.

87. Ala.—*Boardman v. Parrish*, 56 Ala. 54. Ill.—*Reed v. Boyd*, 84 Ill. 66. Tex.—*Bendy v. James Boyce & Co.*, 37 Tex. 443; *Crosby v. Lum*, 35 Tex. 41; *Delaware Western Const. Co. v. Farmers' & M. Nat. Bank*, 33 Tex. Civ. App. 658, 77 S. W. 628.

[a] **Failure to name all defendants**, as required by statute, renders a citation insufficient. *Delaware Western*

require the parties to be named in the writ, the omission of one or more defendants under such circumstances as to preclude defendants being misled, is not a fatal defect;⁸⁸ and in some jurisdictions process to a different county need not,⁸⁹ and in others, should not,⁹⁰ contain names of other defendants than those to be served therewith.

2. Manner of Stating Names.⁹¹—Such names as are required to be stated must be set forth with sufficient accuracy to identify with certainty the persons intended,⁹² and as an aid to such identification, descriptive matter may be inserted in the process.⁹³ Technical ac-

Const. Co. v. Farmers' & M. Nat. Bank, 33 Tex. Civ. App. 658, 77 S. W. 628.

[b] **A branch summons issued to another county** should be a counterpart of the original, and contain names of all the defendants, but a variance is available only by a plea in abatement. Boardman v. Parrish, 56 Ala. 54.

[c] **Omission is not a discontinuance** as to the defendant whose name is left out of an additional summons served on other parties. Lewis v. Grace, 44 Ala. 307.

[d] **Other defendants referred to as "etc.,"** is an irregularity in an alias, but the process is not void. Reed v. Boyd, 84 Ill. 66.

88. Hobson v. Cummins, 57 Neb. 611, 78 N. W. 295; Burleson v. Henderson, 4 Tex. 49.

89. Lewis v. Grace, 44 Ala. 307; McCormick Harvesting Mach. Co. v. Cummins, 59 Neb. 330, 80 N. W. 1049; Hobson v. Cummins, 57 Neb. 611, 78 N. W. 295.

90. Hartley v. Tunstall, 3 Ark. 119.

91. **Direction to defendant,** see *supra*, IV.

In actions by or against infants, see 12 STANDARD PROC. 737.

92. **Ala.**—Betancourt v. Eberlin, 71 Ala. 461. **Cal.**—Lyman v. Milton, 44 Cal. 630. **Kan.**—King v. Wilson, 86 Kan. 227, 120 Pac. 342, Ann. Cas. 1913B, 1246. **Mass.**—Com. v. Crotty, 10 Allen 403, 87 Am. Dec. 669. **Minn.** See Blinn v. Chessman, 49 Minn. 140, 51 N. W. 666, 32 Am. St. Rep. 536. **Tex.**—El Paso & Southwestern Co. v. Hall (Tex. Civ. App.), 156 S. W. 356.

[a] **"It is important that a party shall be designated in process or notice so as to fairly indicate his identity and challenge his attention."** King v. Wilson, 86 Kan. 227, 120 Pac. 342, Ann. Cas. 1913B, 1246.

[b] **The following have been held insufficient terms to designate the parties:** (1) "Et uxor," in place of

wife's name (Higgins v. Shepard, 48 Tex. Civ. App. 365, 107 S. W. 79),

(2) "et al." for defendants not named Lyman v. Milton, 44 Cal. 630), (3) "unknown children" of certain persons. Kellar v. Stanley, 86 Ky. 240, 5 S. W. 477. (4) "Unknown heirs" does not include a surviving wife. Heidenheimer v. Loring, 6 Tex. Civ. App. 560, 26 S. W. 99.

[c] **"If any"** inserted in a summons to unknown owners, does not invalidate the summons. Abbott v. Curran, 98 N. Y. 665.

[d] **Where process ran against a board** but it was apparent that it was intended to sue the county, and summons was properly served, an amendment is proper, and no new process need be served on the county after such amendment. Fountain v. Board of Comrs., 171 N. C. 113, 87 S. E. 990.

93. **Ind.**—Waltz v. Borroway, 25 Ind. 380. **Ia.**—Schee v. La Grange, 78 Iowa 101, 106, 42 N. W. 616. See Fanning v. Krapfl, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293. **Kan.**—King v. Wilson, 86 Kan. 227, 120 Pac. 342, Ann. Cas. 1913B, 1246. **Mass.**—Com. v. Crotty, 10 Allen 403, 87 Am. Dec. 669; Smith v. Bowker, 1 Mass. 76. **Mich.**—Barber v. Smith, 41 Mich. 138, 1 N. W. 992. **Minn.**—D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 N. W. 357, 124 Am. St. Rep. 615, 17 L. R. A. (N. S.) 236. **N. Y.**—Lenehan v. College of St. Francis Xavier, 30 Misc. 378, 63 N. Y. Supp. 1033. **Ohio.** Buchanan v. Roy's Lessee, 2 Ohio St. 251. **Wash.**—Gravelle v. Canadian, etc. Mtg. & T. Co., 42 Wash. 457, 85 Pac. 36.

[a] **Where parties are thus relatively designated,** there is less reason for a technical adherence or exactness as to names than in other cases. Schee v. La Grange, 78 Iowa 101, 106, 42 N. W. 616.

[b] **Warrant, where name is left**

curacy, however, is not indispensable in indicating the name of either the plaintiff,⁹⁴ or the defendant.⁹⁵ A variance from the name shown by the record may render the process ineffectual,⁹⁶ unless amended.⁹⁷ The requirement for the names of the parties necessitates that the Christian name,⁹⁸ though generally not the middle name or initial,⁹⁹

blank must give best description possible. *Com. v. Crotty*, 10 Allen (Mass.) 403, 87 Am. Dec. 669.

[c] "Junior or younger is no part of a name." *Kincaid v. Howe*, 10 Mass. 203.

94. **Kan.**—*Patmor v. Rombauer*, 41 Kan. 295, 21 Pac. 284. **Mass.**—*Brewer v. Sibley*, 13 Mete. 175. **Mich.**—*Barber v. Smith*, 41 Mich. 138, 1 N. W. 992. **N. H.**—*Lebanon v. Griffin*, 45 N. H. 558. **Wis.**—*Wheeler v. Smith*, 18 Wis. 651.

[a] A writ which precedes the filing of the pleading, "must show for whose benefit suit is brought." *Hammond v. Lewiston, A. & W. St. R. Co.*, 106 Me. 209, 76 Atl. 672, 30 L. R. A. (N. S.) 78.

[b] The summons must issue against the principal, not the agent. *Vogel v. Brown*, 112 Ind. 299, 14 N. E. 77, 2 Am. St. Rep. 187.

95. *Patmor v. Rombauer*, 41 Kan. 295, 21 Pac. 284. See *infra*, this subdivision.

[a] A summons in the alternate is addressed to no one in particular and consequently void. *Alexander v. Leonard*, 1 Idaho 425.

[b] A partnership misdescribed as a corporation, in a summons served on one partner as a supposed officer, gives jurisdiction to amend. *Goldstein v. Peter Fox Sons Co.*, 22 N. D. 636, 135 N. W. 180, 40 L. R. A. (N. S.) 566.

[c] Failure to add name of officers of a joint stock association is a mere mistake and amendable. *Mack v. American Exp. Co.*, 20 Misc. 215, 45 N. Y. Supp. 362.

[d] Sufficient where enough appears to show who was intended, though name is indistinctly written. *Cooke v. Shoemaker*, 8 Kulp (Pa.) 212.

[e] An execution in which the full names of the defendants are not stated, is irregular but not void. *Goodgion v. Gilreath*, 32 S. C. 388, 11 S. E. 207.

96. **U. S.**—*Elliott v. Holmes*, 1 McLean 466, 8 Fed. Cas. No. 4,392. **Cal.** *Ford v. Doyle*, 37 Cal. 346. **Ia.**—*Newman v. Bowers*, 72 Iowa 465, 34 N. W.

212. **N. J.**—*Bowen v. Mulford*, 10 N. J. L. 230. **Tex.**—*Morris v. Balkham*, 75 Tex. 111, 12 S. W. 970, 16 Am. St. Rep. 874; *Battle v. Guedry*, 58 Tex. 111; *St. Louis & S. F. Ry. Co. v. English* (Tex. Civ. App.), 109 S. W. 424.

97. **U. S.**—*Elliott v. Holmes*, 1 McLean 466, 8 Fed. Cas. No. 4,392. **Ark.** *Martin v. Godwin & Co.*, 34 Ark. 682. **Ind.**—*Shackman v. Little*, 87 Ind. 181. **Minn.**—See *Bradley v. Sandilands*, 66 Minn. 40, 68 N. W. 321, 61 Am. St. Rep. 386.

As to amendment, see *infra*, IV, D, 4; VIII, B.

98. **Mass.**—*Root v. Fellowes*, 6 Cush. 29. **Mich.**—*Barber v. Smith*, 41 Mich. 138, 1 N. W. 992. **Pa.**—*Houser v. Jones*, 1 Phila. 394. **Tex.**—*Carlton v. Miller*, 2 Tex. Civ. App. 619, 21 S. W. 697. **Wash.**—*Gravelle v. Canadian, etc. Mtg. & T. Co.*, 42 Wash. 457, 85 Pac. 36.

[a] "By the common law, since the time of William the Norman, a full name consists of one Christian or given name, and one surname or patronymic. The two, using the Christian name first, and the surname last, constitute the legal name of the person." *Schofield v. Jennings*, 68 Ind. 233; *Enewold v. Olsen*, 39 Neb. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573.

[b] Given names of infant defendants must be stated in the citation. *Carlton v. Miller*, 2 Tex. Civ. App. 619, 21 S. W. 697.

[c] If Christian name is unknown, a description of the person may supply the deficiency. *Barber v. Smith*, 41 Mich. 138, 1 N. W. 992; *Gravelle v. Canadian, etc., Mtg. & T. Co.*, 42 Wash. 457, 85 Pac. 36.

[d] In proceedings establishing highways, failure of the notices to set forth Christian names, or full names of the parties, does not render the order subject to collateral attack. *Porter v. Stout*, 73 Ind. 3; *Miller v. Porter*, 71 Ind. 521.

99. **Ala.**—See *Betancourt v. Eberlin*, 71 Ala. 461. **Cal.**—*Allison v. Thomas*, 72 Cal. 562, 14 Pac. 309, 1 Am.

be indicated. The better practice is to use the full Christian name and surname in judicial process,¹ though initials,² or abbreviations,³

St. Rep. 89. **Colo.**—*Erdman v. Hardesty*, 14 Colo. App. 395, 60 Pac. 360. **Ga.**—*Denton v. McMillan*, 8 Ga. App. 84, 68 S. E. 615. **Ind.**—*Morgan v. Woods*, 33 Ind. 23. **Minn.**—*Ueland v. Lynch*, 77 Minn. 543, 80 N. W. 700, 77 Am. St. Rep. 698. **Mo.**—*Phillips v. Evans*, 64 Mo. 17. **N. H.**—*Hart v. Lindsey*, 17 N. H. 235, 43 Am. Dec. 597. **N. J.**—*Bowen v. Mulford*, 10 N. J. L. 230.

[a] **The law does not regard the middle name as material**, unless there are two persons of the same name. *Hicks v. Riley*, 83 Ga. 332, 9 S. E. 771; *Denton v. McMillan*, 8 Ga. App. 84, 68 S. E. 615.

[b] **Rule Is Not Without Exceptions.**—*D'Autremont v. Anderson Iron Co.*, 104 Minn. 165, 116 N. W. 357, 124 Am. St. Rep. 615, 17 L. R. A. (N. S.) 236.

[a] **In service by publication the erroneous insertion of a middle initial does not render the judgment invalid**, the other information given in the notice being sufficient to notify the defendant against whom the complaint was filed. *Harrison v. Harrison*, 19 Ala. 499.

[d] **"Omission of the initial of the defendant's middle name in the process, that is an omission which from the very infancy of the English law has always been regarded as a matter of no moment whatever."** *Paul v. Johnson*, 9 Phila. (Pa.) 32.

1. **Conn.**—*Tweedy v. Jarvis*, 27 Conn. 42. **Ind.**—*Porter v. Stout*, 73 Ind. 3. **Ia.**—*Fanning v. Krapfl*, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293. **Neb.**—See *Enewold v. Olsen*, 39 Neb. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573. **N. Y.**—*Grant v. Birdsall*, 16 Jones & S. 427, 2 Civ. Proc. 422. **Ohio.**—*Herf & Co. v. Shulze*, 19 Ohio 263. **S. D.**—*Newton v. McGee*, 31 S. D. 216, 140 N. W. 252. **W. Va.**—*Slingluff v. Gainer*, 49 W. Va. 7, 37 S. E. 771. **Wis.**—*Kellam v. Toms*, 38 Wis. 592.

[a] **A summons in a tax sale properly gives the Christian name**, though the property is assessed under initials. *Stoll v. Griffith*, 41 Wash. 37, 82 Pac. 1025.

[b] **To avail of the technical objection that only initials are stated, a**

showing must be made as to the true name of the party. **Conn.**—*Tweedy v. Jarvis*, 27 Conn. 42. **Neb.**—*Oakley v. Pegler*, 30 Neb. 628, 46 N. W. 920. **S. D.**—*Newton v. McGee*, 31 S. D. 216, 140 N. W. 252.

[c] **In Published Notice.**—"The practice of omitting the Christian name or names in a published notice is certainly subject to grave objections, and by no means to be commended. But, for the purpose of this opinion, it may be conceded that it is sufficient to publish merely the initial letter or letters of the Christian name or names." *Fanning v. Krapfl*, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293.

2. **La.**—*Lallande v. Terrill*, 12 La. 7. **Mo.**—*Martin v. Barron*, 37 Mo. 301. **Neb.**—*Oakley v. Pegler*, 30 Neb. 628, 46 N. W. 920; *Johnson v. Jones*, 2 Neb. 126. **Tex.**—*Milburn v. Smith*, 11 Tex. Civ. App. 678, 33 S. W. 910. **Wis.**—*Zwiecky v. Haney*, 63 Wis. 464, 23 N. W. 577.

[a] **The presumption is**, when initials of Christian names are used in the summons and complaint, and the full names are given in the judgment, that the persons are the same. *Zwiecky v. Haney*, 63 Wis. 464, 23 N. W. 577.

[b] **The universal practice of signing initials instead of one's given name has relaxed the common law rule.** *Cummings v. Rice*, 9 Tex. 527.

3. **Colo.**—*Rich v. Collins*, 12 Colo. App. 511, 56 Pac. 207. **Mo.**—*Fenton v. Perkins*, 3 Mo. 106. **Mont.**—*Kemp v. McCormick*, 1 Mont. 420. **Pa.**—*Paul v. Johnson*, 9 Phila. 32.

[a] **"Where two names have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken promiscuously and according to common use to be the same, though differing in sound, the use of one for the other is not a material misnomer."** *Paul v. Johnson*, 9 Phila. (Pa.) 32.

[b] **Familiar Abbreviations Permissible.**—"All such modes therefore of abbreviation as are warranted by custom, as 'Jno.' for 'John,' 'Bart.' for 'Bartholemew', or expressing one or more Christian names by initial letters, which have long been considered as sufficient and binding signatures to obligations, we think are suffi-

may be used where no uncertainty results.⁴ But initials alone cannot take the entire place of a proper name,⁵ and the identity of the person using the given initials may form an issue in the case.⁶ A summons giving only the firm name of the plaintiffs,⁷ or defendants,⁸ without naming them individually, is not invalid. An error or omission in stating the defendant's name in one part of the process is cured if the name correctly appear in another part,⁹ or elsewhere in papers served;¹⁰ and error in the plaintiff's name is inconsequential under like circumstances.¹¹

3. Misnomer.—a. *In General.*—Though mere clerical errors in the names of parties¹² do not, as a rule, render a process absolutely

cient." *Clark v. Paine*, 11 Pick. (Mass.) 66.

4. *Missouri, K. & T. Ry. Co. v. Bodie*, 32 Tex. Civ. App. 168, 74 S. W. 100.

5. *Patton v. Campbell's Trustee*, 25 Ky. L. Rep. 275, 74 S. W. 1092.

[a] Using simply initial letters in a business name consisting of several words is not sufficient in a summons. *Patton v. Campbell's Trustee*, 25 Ky. L. Rep. 275, 74 S. W. 1092.

[b] But where the name is given in full once in the process, the fact that it is referred to several times by initials is immaterial. *Missouri, K. & T. Ry. Co. v. Bodie*, 32 Tex. Civ. App. 168, 74 S. W. 100.

6. *Martin v. Barron*, 37 Mo. 301.

[a] "When a person is in the habit of using initials for his Christian name and is proceeded against by his initials, and the fact whether he was so known is put in issue, and the jury find in the affirmative, the court will not interfere on that ground." *Martin v. Barron*, 37 Mo. 301; *City Council v. King*, 4 McCord (S. C.) 487.

7. *Cady v. Smith*, 12 Neb. 628, 12 N. W. 95; *Blue Grass Canning Co. v. Wardman*, 103 Tenn. 179, 52 S. W. 137.

[a] Individual names ought to be set out, for greater regularity and certainty, but failure to do so does not render process void. *Bluegrass Canning Co. v. Wardman*, 103 Tenn. 179, 52 S. W. 137.

8. *Ark.*—*Martin v. Godwin & Co.*, 34 Ark. 682. *Ky.*—*Keathley v. Stump*, 147 Ky. 406, 144 S. W. 87; *Northern Bank v. Hunt's Heirs*, 93 Ky. 67, 19 S. W. 3; *Bryant v. Mack*, 19 Ky. L. Rep. 744, 41 S. W. 774. *Mass.*—*Johnson v. Somerville Dyeing & B. Co.*, 15 Gray 216. *N. D.*—*Gans v. Beasley*, 4 N. D. 140, 59 N. W. 714.

Tenn.—*Bolling v. Anderson*, 4 Baxt. 550. *Tex.*—*Putman v. Wheeler*, 65 Tex. 522; *Guimond v. Nast*, 44 Tex. 114; *Dewalt v. Zeigler*, 9 Tex. Civ. App. 82, 29 S. W. 60.

[a] An individual judgment is not justified against a member of the firm upon notice directed to and served upon the firm. *Bolling v. Anderson*, 4 Baxt. (Tenn.) 550. See the title "Partnership."

[b] In a suit brought against partners individually, if the name of one is miscalled in all the proceedings, service upon his co-partner will not give the court jurisdiction of the one misnamed, so as to divest his interest in property levied on under the judgment rendered in the cause. *Weaver v. Carpenter*, 42 Iowa 343.

9. *Ga.*—*Telford v. Coggins*, 76 Ga. 683. *Kan.*—*Case v. Bartholow*, 21 Kan. 300. *N. C.*—*Clawson v. Wolfe*, 77 N. C. 100. *Tex.*—*McCauley v. Western Nat. Bank* (Tex. Civ. App.), 173 S. W. 1000; *Guinan v. Waco*, 22 Tex. Civ. App. 445, 54 S. W. 611.

10. *Cal.*—*McGinn v. Rees*, 33 Cal. App. 291, 165 Pac. 52. *Ga.*—*Baldwin, Starr & Co. v. McMichael*, 68 Ga. 828; *Smith v. Morris*, 29 Ga. 339. *Ill.*—*Reed v. Boyd*, 84 Ill. 66; *Sidway v. Marshall*, 83 Ill. 438; *Dale v. Keefe*, 178 Ill. App. 262. *N. Y.*—*Van Wyck v. Hardy*, 4 Abb. Dec. 496, 39 How. Pr. 392.

11. *Jarbee v. Steamboat Daniel Hillman*, 19 Mo. 141; *Kirk v. Murphy*, 16 Tex. 654, 67 Am. Dec. 640; *McManus v. Southern Fruit Julep Co.* (Tex. Civ. App.), 171 S. W. 1033.

12. *Ala.*—*Ex parte Howard-Harrison Iron Works*, 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928. *Kan.*—*Patmor v. Rombauer*, 41 Kan. 295, 21 Pac. 284; *Case v. Bartholow*, 21 Kan. 300. *Neb.*—*Krotter & Co. v. Norton*, 84 Neb. 137, 120 N. W. 923. *N. Y.*—*Stuy-*

void, a misnomer is nevertheless held to be ground for abatement.¹³

b. *Of the Plaintiff*.—A misnomer of the plaintiff is generally reversible error on appeal,¹⁴ though it is not jurisdictional.¹⁵

c. *Of Defendant*.—The authorities differ as to the effect of an error in defendant's name.¹⁶ The broad rule has been laid down that

vesant *v.* Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562. Pa.—Dresher *v.* Williams, 4 Pa. Co. Ct. 4. Va. Arminius Chem. Co. *v.* White's Admx., 112 Va. 250, 71 S. E. 637.

See *supra*, IV, D, 2.

[a] Omission of "incorporated" in a corporate name, when there is but one company, is amendable, and brings defendant into court. Arminius Chem. Co. *v.* White's Admx., 112 Va. 250, 71 S. E. 637.

[b] Failure to amend clerical errors which would have been amendable on application, does not affect jurisdiction. Ala.—*Ex parte* Howard-Harrison Iron Wks., 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928. Ga.—Denton *v.* McMillan, 8 Ga. App. 84, 68 S. E. 615. Ind.—McGaughey *v.* Woods, 106 Ind. 380, 7 N. E. 7. Minn.—Bradley *v.* Sandilands, 66 Minn. 40, 68 N. W. 321, 61 Am. St. Rep. 386; Lane *v.* Innes, 43 Minn. 137, 45 N. W. 4.

13. Ill.—Pond *v.* Ennis, 69 Ill. 341. Mass.—Zuill *v.* Bradley, Quincy 6. Mo. Skelton *v.* Sacket, 91 Mo. 377, 3 S. W. 874. Tenn.—Brandon *v.* Diggs, 1 Heisk. 472.

See 1 STANDARD PROC. 33, 51.

[a] "At the common law (1) where the defendant was sued by the wrong name he might plead that fact in abatement, but to make his plea good he was bound to give the plaintiff a better writ in the future by disclosing his true name." Louisville & N. R. Co. *v.* Hall, 12 Bush (Ky.) 131, citing 1 Chit. Pl. 447. (2) "At common law misnomers in non-bailable process could only be taken advantage of by pleas in abatement, which were always disfavored, and were finally abolished in England by the 3 and 4, Wm. IV., c. 42, section 11." Paul *v.* Johnson, 9 Phila. (Pa.) 32. (3) "By the statute of 2d and 4th William IV, chap. 42, sec. 11, it was provided that the plaintiff, in case of a misnomer of the defendant, after the plea was sustained, might amend his declaration and then proceed against him by his true name, and such is the rule under our Code of Practice." Louisville & N. R. Co.

v. Hall, 12 Bush (Ky.) 131. (4) "When it is said in the elementary books that misnomer is only pleadable in abatement, it can only mean cases of personal service." Journey *v.* Dickerson, 21 Iowa 308, 312.

[b] A replication to the plea, that the party is known as well by one name as the other, is good. Ala.—See Harrison *v.* Harrison, 19 Ala. 499. Ga. Selman & Co. *v.* Shackelford, 17 Ga. 615. N. H.—Hart *v.* Lindsey, 17 N. H. 235, 43 Am. Dec. 597; Tibbets *v.* Kiah, 2 N. H. 557. Ohio.—Goodenow *v.* Tappan, 1 Ohio 60.

14. Ind.—Morgan *v.* Woods, 33 Ind. 23. Ia.—Newman *v.* Bowers, 72 Iowa 465, 34 N. W. 212. N. J.—Bowen *v.* Mulford, 10 N. J. L. 230. Tex.—McCaulley *v.* Western Nat. Bank (Tex. Civ. App.), 173 S. W. 1000.

[a] For variance in plaintiff's name between the process and pleading defendant ought not to be exposed to the hazards and burdens of having to show in a plea of former recovery, by which of the two persons named the recovery was had, "to save the plaintiff from the consequences of his carelessness and inattention." Bowen *v.* Mulford, 10 N. J. L. 230.

15. Ga.—Scudder *v.* Massengill, 88 Ga. 245, 14 S. E. 571. Idaho.—McKnight *v.* Grant, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287. Ind.—McGaughey *v.* Woods, 106 Ind. 380, 7 N. E. 7. Minn.—Martin *v.* Lindstrom, 73 Minn. 121, 75 N. W. 1038; Bradley *v.* Sandilands, 66 Minn. 40, 68 N. W. 321, 61 Am. St. Rep. 386. Tex.—Kirk *v.* Murphy, 16 Tex. 654, 67 Am. Dec. 640. Compare *Ex parte* Cheatham, 6 Ark. 531, 44 Am. Dec. 525.

16. Griswold *v.* Sedgwick, 6 Cow. (N. Y.) 456; Holman *v.* Goslin, 63 App. Div. 204, 71 N. Y. Supp. 197; Waldrop *v.* Leonard, 22 S. C. 118.

[a] A "wide difference of opinion seems to arise out of the view which is taken as to whether error in the summons as to the defendant's name should be considered as a mere misnomer, or as going deeper and touching the very jurisdiction of the court." Waldrop *v.* Leonard, 22 S. C. 118.

if process is personally served on the defendant intended to be sued, it is binding though the wrong name is given in the summons,¹⁷ in the absence of fraud;¹⁸ but the cases in support of this text are mostly those in which only the Christian name of the defendant was erroneously stated,¹⁹ and there is authority²⁰ that if an entirely different name is given in the process it will not support a judgment without

17. Cal.—See *Welsh v. Kirkpatrick*, 30 Cal. 202, 89 Am. Dec. 85. Ill.—*Pond v. Ennis*, 69 Ill. 341. Ind.—*Kingen v. Stroh*, 136 Ind. 610, 36 N. E. 519; *Vogel v. Brown*, 112 Ind. 299, 14 N. E. 77, 2 Am. St. Rep. 187. Kan.—*Hoffield v. Board of Education*, 33 Kan. 644, 7 Pac. 216. Ky.—*Louisville & N. R. Co. v. Hall*, 12 Bush 131. Md.—*First Nat. Bank v. Jagers*, 31 Md. 38, 100 Am. Dec. 53. Mass.—*Smith v. Bowker*, 1 Mass. 76. Mo.—*Ohlmann v. Clarkson Saw Mill Co.*, 222 Mo. 62, 120 S. W. 1155, 133 Am. St. Rep. 506, 28 L. R. A. (N. S.) 432; *Parry v. Woodson*, 33 Mo. 347, 84 Am. Dec. 51. Neb.—*Jones v. Union Pac. R. Co.*, 84 Neb. 121, 120 N. W. 946. Ore.—*Foshier v. Narver*, 24 Ore. 441, 34 Pac. 21, 41 Am. St. Rep. 874. But compare *White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726. Pa.—See *Paul v. Johnson*, 9 Phila. 32. Tenn.—*Robertson v. Winchester*, 85 Tenn. 171, 1 S. W. 781; *Brandon v. Diggs*, 1 Heisk. 472.

See 15 STANDARD PROC. 61, 62.

[a] "Process served on a man by a wrong name is as really served on him as if it had been served on him by his right name, and if in such case he fail to appear, or appearing fail to object that he is sued by the wrong name, and judgment be rendered against him by such name, he is as much bound by the judgment as if it had been rendered against him by his right name." *Parry v. Woodson*, 33 Mo. 347, 84 Am. Dec. 51.

[b] The rule applies to infants as well as adults. *Pond v. Ennis*, 69 Ill. 341; *McCormack v. Kimmel*, 4 Ill. App. 121.

[c] If the process is not personally served, it must set out the true name of the defendant. Ia.—*Journey v. Dickerson*, 21 Iowa 308. Mass.—*Fitzgerald v. Salentine*, 10 Metc. 436. Neb.—*Enewold v. Olsen*, 39 Neb. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573.

18. *McGaughey v. Woods*, 106 Ind. 380, 7 N. E. 7.

19. Ill.—*Pond v. Ennis*, 69 Ill. 341; *Guinard v. Heysinger*, 15 Ill. 288. Md.—*First Nat. Bank v. Jagers*, 31 Md. 38, 100 Am. Dec. 53. Mass.—*Smith v. Bowker*, 1 Mass. 76. N. Y.—*Stuyvesant v. Weil*, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562; *Morison v. Laing*, 132 App. Div. 689, 117 N. Y. Supp. 416. Ore.—*Foshier v. Narver*, 24 Ore. 441, 34 Pac. 21, 41 Am. St. Rep. 874. Pa.—*Althouse v. Hunsberger*, 6 Pa. Super. 163. S. C.—*Genobles v. West*, 23 S. C. 154, 167; *Waldrop v. Leonard*, 22 S. C. 118. Wis.—*Kellam v. Toms*, 38 Wis. 592. Eng.—*Smith v. Patten*, 6 Taunt. 115, 1 Marsh. 474, 1 Ch. 534, 128 Eng. Reprint 977; *Oakley v. Giles*, 3 East 167, 102 Eng. Reprint 561; *Crawford v. Satchwell*, 2 Str. 1218, 93 Eng. Reprint 1141.

[a] A summons against a married woman in the initials of her husband, with the prefix "Mrs." will support a judgment against her in her own Christian name, if there is no showing in an attack upon such judgment that she was not known by the one name as well as the other. *Peterson v. Little*, 74 Iowa 223, 37 N. W. 169.

[b] "The service is the important fact (1) and when it is shown that the proper person was served, that person cannot afterwards say that her Christian name was not stated, and thereby avoid the service." *Gravelle v. Canadian etc. Mtg. & Tr. Co.*, 42 Wash. 457, 85 Pac. 36. (2) By service of process, though by wrong Christian name, "the court obtained jurisdiction of her person, and she cannot now allege a misnomer. In such a case the Christian name is nothing." *Pond v. Ennis*, 69 Ill. 341.

[c] When properly given in the complaint, an error in the Christian name in the summons will not prevent default. *Sidway v. Marshall*, 83 Ill. 438.

20. Ark.—See *Bates v. State Bank*, 7 Ark. 394, 46 Am. Dec. 293. Ga.—*Neal-Millard Co. v. Owens*, 115 Ga. 959, 42 S. E. 266; *Adam Elect. Co. v.*

an amendment, where no statute lends assistance;²¹ and this has been applied to an erroneous statement of Christian as well as surnames.²² Of course if a party appears and defends without raising the question of misnomer he is bound by the judgment.²³

The general rule has also been stated to be, that if the defendant is fairly apprized that the action is brought against him as the party intended, it is sufficient to support a judgment if he fail to appear.²⁴

Witman, 16 Ga. App. 574, 85 S. E. 819. **Ia.**—*Sleeper v. Killion*, 166 Iowa 205, 147 N. W. 314. **Mass.**—*Crafts v. Sikes*, 4 Gray 194, 64 Am. Dec. 62; *Slasson v. Brown*, 20 Pick. 436. **Minn.**—*Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604; *Atwood v. Landis*, 22 Minn. 558. **N. Y.**—*People ex rel. Liatto v. Dunn*, 27 Misc. 71, 58 N. Y. Supp. 147; *McGill v. Weil*, 19 Civ. Proc. 43, 10 N. Y. Supp. 246. **Ohio** *Lyons v. Donges*, 12 Ohio Dec. (Reprint) 537. **Tex.**—*Southern Pac. Co. v. Block*, 84 Tex. 21, 19 S. W. 300; *Davenport v. Rutledge* (Tex. Civ. App.), 187 S. W. 988. **Eng.**—*Cole v. Hindson*, 6 T. R. 234, 101 Eng. Reprint 528.

[a] "A misnomer (1) often has a tendency to mislead the defendant, which no other defect in the process would be likely to have." *Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604. (2) "Men are known, and their identity fixed, by the name by which they are known. When addressed by name, they respond as segregated individual entities. When not so addressed, they, as a rule, are not expected or required to respond. In nearly every state in which courts acquire jurisdiction by writ, summons, or process, it is required that the paper, on the service of which the court assumes a right to act, must be addressed to the party summoned, by his true name, or by the name by which he is generally known. It has been uniformly held that a writ, summons, or process to one, but served on another, gives the court no jurisdiction of the person served, although he be the real party to the suit, and the one against whom relief is sought." *Sleeper v. Killion*, 166 Iowa 205, 147 N. W. 314; *Davies v. Thompson*, (Okla.), 160 Pac. 75, L. R. A. 1917B, 395.

21. See *Stuyvesant v. Weil*, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562; *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020.

22. **Ark.**—*Bates v. State Bank*, 7 Ark. 394, 46 Am. Dec. 293. **Ia.**—*Journey v. Dickerson*, 21 Iowa 308. **Mass.** *Slasson v. Brown*, 20 Pick. 436. **N. Y.** *McGill v. Weil*, 19 Civ. Proc. 43, 10 N. Y. Supp. 246. **Ohio.**—*Lyons v. Donges*, 12 Ohio Dec. (Reprint) 537. **Tex.**—*Shook v. Laufer* (Tex. Civ. App.), 84 S. W. 277.

[a] "The surname of a party is no more essential to his legal designation and identity than other parts of his name. A mistake in either is fatal to the validity of legal process, where no power of amendment exists." *Crafts v. Sikes*, 4 Gray (Mass.) 194, 64 Am. Dec. 62.

23. **U. S.**—*Stevellie v. Read*, 2 Wash. C. C. 274, 22 Fed. Cas. No. 13,389. **Ala.**—See *Mobile & M. Ry. Co. v. Yeates*, 67 Ala. 164. **Cal.**—*McCreery v. Everding*, 54 Cal. 168. **Kan.**—*Hoffield v. Board of Education*, 33 Kan. 644, 7 Pac. 216. **Mo.**—*Parry v. Woodson*, 33 Mo. 347, 84 Am. Dec. 51.

24. **Kan.**—*King v. Wilson*, 86 Kan. 227, 120 Pac. 342, Ann. Cas. 1913B, 1246. **N. Y.**—*Stuyvesant v. Weil*, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562; *Morison v. Laing*, 132 App. Div. 689, 117 N. Y. Supp. 416; *Holman v. Goslin*, 63 App. Div. 204, 71 N. Y. Supp. 197. **Tex.**—*Bell v. Vanzandt*, 54 Tex. 150.

See also the following: **Ala.**—*Betancourt v. Eberlin*, 71 Ala. 461. **Ia.** *Journey v. Dickerson*, 21 Iowa 308, 319. **Minn.**—*Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604.

[a] "If the person is fairly apprized (1) that the action is brought against him as the party intended to be affected, he is immediately in position to avail himself of every legal remedy which he might have invoked had he been in all respects correctly named." *Holman v. Goslin*, 63 App. Div. 204, 71 N. Y. Supp. 197. (2) "It may happen, as in this case, that the defendant's name is not correctly stated in the summons, and in such

The rule may differ also according as, under the practice in the particular jurisdiction, the summons issues before or after the filing of the complaint.²⁵ By statute in some states, if the plaintiff is ignorant of the real name of the defendant, a fictitious name may be given in the summons or other process, in the first instance,²⁶ and the party may be described therein as falling within a certain class of persons designated in the statute,²⁷ and on ascertaining the real name, it should be substituted by amendment.²⁸ In such cases the process should show on its face that the name is fictitious and is used to describe an unknown person.²⁹

A writ will not abate³⁰ merely on the ground that the defendant's

case it is the duty of the court, when properly moved, to determine whether, notwithstanding the error, the defendant was fairly apprized whether he was the party the action was intended to affect, and if the answer of the court be in the affirmative, its determination must be that the court acquired jurisdiction." *Stuyvesant v. Weil*, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562.

[b] "Railroad" for "railway" company (1) is an immaterial variance (*Alabama & V. R. Co. v. Bolding*, 69 Miss. 255, 13 So. 844, 30 Am. St. Rep. 541; *Central & M. R. Co. v. Morris*, 68 Tex. 49, 3 S. W. 457; *G. H. & S. A. Ry. Co. v. Donahoe*, 56 Tex. 162), and (2) is amendable. *Georgia Pac. Ry. Co. v. Propst*, 83 Ala. 518, 3 So. 764; *Chicago & I. A. L. Ry. Co. v. Johnston*, 89 Ind. 88.

25. *Lyons v. Donges*, 12 Ohio Dec. (Reprint) 537. See *supra*, IV, D, 2.

[a] "Before the code, when a defendant was sued by a wrong Christian name, he might be declared against by his true name; but as the petition, which is the substitute for the declaration, must be filed before the summons issues, the former rule does not apply." *Lyons v. Donges*, 12 Ohio Dec. (Reprint) 537.

26. Cal.—*Ford v. Doyle*, 37 Cal. 346. Neb.—*McNamara v. Gunderson*, 89 Neb. 112, 131 N. W. 183. N. Y.—*Snyder v. Parezo*, 151 App. Div. 110, 135 N. Y. Supp. 960; *McGill v. Weil*, 19 Civ. Proc. 43, 10 N. Y. Supp. 246.

See 6 STANDARD PROC. 649.

[a] When Fictitious Name Permissible.—"It is not allowable to a plaintiff to use a fictitious name at his discretion, but only where he is ignorant of the true name." *Crandall v. Beach*, 7 Hew. Pr. (N. Y.) 271; *McGill v. Weil*, 10 N. Y. Supp. 246.

[b] If either the Christian or surname is unknown, the case falls within the statute, since both are necessary to constitute the legal name of the person. *McNamara v. Gunderson*, 89 Neb. 112, 131 N. W. 183; *Enewold v. Olsen*, 39 Neb. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573.

[c] When plaintiff alleges surname of defendant, and states that only his Christian name is unknown, the plaintiff "must stand or fall by the correctness of his position in that respect." *People ex rel. Liatto v. Dunn*, 27 Misc. 71, 58 N. Y. Supp. 147; *Gannon v. Myers* 11 Civ. Proc. 187, 3 N. Y. St. 199.

27. *Snyder v. Parezo*, 151 App. Div. 110, 135 N. Y. Supp. 960.

28. *McGinn v. Rees*, 33 Cal. App. 291, 165 Pac. 52. See *infra*, IV, D, 4.

[a] If true name is not inserted, jurisdiction is not lost, but the judgment is erroneous and may be reversed on appeal. *McGinn v. Rees*, 33 Cal. App. 291, 165 Pac. 52.

29. Colo.—*Erdman v. Hardesty*, 14 Colo. App. 395, 60 Pac. 360. Neb.—*McNamara v. Gunderson*, 89 Neb. 112, 131 N. W. 183; *Enewold v. Olsen*, 39 Neb. 59, 57 N. W. 765, 42 Am. St. Rep. 557, 22 L. R. A. 573. N. Y.—*Waterbury v. Mather*, 16 Wend. 611; *Snyder v. Parezo*, 151 App. Div. 110, 135 N. Y. Supp. 960; *Italian Importing Co. v. Spodaro*, 63 Misc. 329, 117 N. Y. Supp. 135; *McGill v. Weil*, 19 Civ. Proc. 43, 10 N. Y. Supp. 246; *Aaron v. Lee*, 11 Wkly. Dig. 527.

[a] If substantially stated that the real parties are unknown, this is sufficient. *Snyder v. Parezo*, 151 App. Div. 110, 135 N. Y. Supp. 960.

30. Ia.—*Hubner v. Reickhoff*, 103 Iowa 368, 72 N. W. 540, 64 Am. St. Rep. 191. Minn.—*Lane v. Innes*, 43

name is misspelled, if the names are idem sonans.³¹ The misstating of a co-defendant's name is not available to other defendants as error.³²

In substituted service the name of the defendant becomes one of the essentials,³³ and more exactness is generally required,³⁴ but elsewhere the general rule seems to be applied.³⁵

4. Amendments.—Mistakes and omissions in names of parties,³⁶ such as merely clerical errors,³⁷ and errors in the Christian name

Minn. 137, 45 N. W. 4. **N. H.**—Tibbets v. Kiah, 2 N. H. 557. **N. Y.** Holman v. Goslin, 63 App. Div. 204, 71 N. Y. Supp. 197.

[a] "**Variance in orthography** in names has been held fatal or otherwise, as the facts of the case would warrant, having in view safety in the application of the rule, and just results." Hubner v. Reickhoff, 103 Iowa 368, 72 N. W. 540, 64 Am. St. Rep. 191.

[b] **The interpolation of one letter and change of another**, in order to convert one name into another, is not allowable. Entrekin v. Chambers, 11 Kan. 368.

31. Ia.—Mallory v. Riggs, 76 Iowa 748, 39 N. W. 886. **Kan.**—Rowe v. Palmer, 29 Kan. 337. **N. H.**—Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597; Tibbets v. Kiah, 2 N. H. 557. **Pa.** Paul v. Johnson, 9 Phila. 32. **Tenn.** Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781.

[a] **Names are idem sonans when** the attentive ear finds difficulty in distinguishing them when pronounced, or common and long continued usage has, by corruption and abbreviation, made them identical in pronunciation. Whelen v. Weaver, 93 Mo. 430, 6 S. W. 220.

[b] **For names not idem sonans**, see: **Kan.**—Entrekin v. Chambers, 11 Kan. 368. **La.**—New Orleans v. Cordevielle, 10 La. Ann. 727. **Mo.**—Chamberlain v. Blodgett, 96 Mo. 482, 10 S. W. 44; Whelen v. Weaver, 93 Mo. 430, 6 S. W. 220, and the title "**Names.**"

32. Neal-Millard Co. v. Owens, 115 Ga. 959, 42 S. E. 266; Gunter v. McEntire (Tex. Civ. App.), 24 S. W. 590. Compare Waterbury v. Mather, 16 Wend. (N. Y.) 611.

33. Ia.—Newman v. Bowers, 72 Iowa 465, 34 N. W. 212; Fanning v. Krapf, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293. **Kan.**—Entrekin v. Chambers, 11 Kan. 368. See King v. Wilson, 86 Kan. 227, 120 Pac. 342, Ann.

Cas. 1913B, 1246. **Mich.**—Colton v. Rupert, 60 Mich. 318, 27 N. W. 520. **Minn.**—See Lane v. Innes, 43 Minn. 137, 45 N. W. 4. **Mo.**—Ohlmann v. Clarkson Saw Mill Co., 222 Mo. 62, 120 S. W. 1155, 133 Am. St. Rep. 506, 28 L. R. A. (N. S.) 432; Whelen v. Weaver, 93 Mo. 430, 6 S. W. 220.

[a] **Use of initials in publication of notice**, (1) in place of Christian name, does not give the court jurisdiction. Burkham v. Manewal, 195 Mo. 500, 506, 94 S. W. 520; Evarts v. Missouri Lumb. Co. & Min. Co., 193 Mo. 433, 449, 92 S. W. 372; Gillingham v. Brown, 187 Mo. 181, 85 S. W. 1113; Skelton v. Sacket, 91 Mo. 377, 3 S. W. 874. (2) "If we were to adopt the rule contended for by the appellee, that not only can the Christian names be entirely omitted, but the initial letters of the Christian names *transposed*, this might become the favorite mode of giving notice by publication. It appears to us that we should open the door to mischief of which no one could see the end." Fanning v. Krapf, 61 Iowa 417, 14 N. W. 727, 16 N. W. 293.

34. Ind.—Schissel v. Dickson, 129 Ind. 139, 28 N. E. 540. Compare Waltz v. Borroway, 25 Ind. 380. **Ia.**—Hubner v. Reickhoff, 103 Iowa 368, 72 N. W. 540, 64 Am. St. Rep. 191. **Minn.**—D'Autremont v. Anderson Iron Co., 104 Minn. 165, 116 N. W. 357, 124 Am. St. Rep. 615, 17 L. R. A. (N. S.) 236. **Tex.** Freeman v. Hawkins, 77 Tex. 498, 14 S. W. 364, 19 Am. St. Rep. 769.

35. Seaver v. Fitzgerald, 23 Cal. 85, 92; Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781.

36. Ga.—Rome R. Co. v. Sullivan, Cabot & Co., 14 Ga. 277. **Mich.**—People v. Hildebrand, 71 Mich. 313, 38 N. W. 919. **N. Y.**—Van Wyck v. Hardy, 4 Abb. Dec. 496, 39 How. Pr. 392; Hirsch v. Camman, 106 N. Y. Supp. 814.

37. Ala.—Singer Mfg. Co. v. Greenleaf, 100 Ala. 272, 14 So. 109. **Ind.**

only,³⁸ are amendable, especially before judgment, while defendant has an opportunity to answer,³⁹ either in the name of the plaintiff,⁴⁰ or, if the process served was sufficient to confer jurisdiction over the person,⁴¹ in the name of the defendant.⁴² Provision is frequently made by statute for amendment of errors in names appearing in process.⁴³ The capacity in which one is designated in the process as a party may be changed by amendment,⁴⁴ and this applies generally to the plain-

Beck v. Williams, 5 Blackf. 374. **Mass.**—Crafts v. Sikes, 4 Gray 194, 64 Am. Dec. 62. **Mich.**—Final v. Backus, 18 Mich. 218. **N. Y.**—Thurber-Whyland Co. v. Klittner, 62 Hun 620, 16 N. Y. Supp. 828. **Pa.**—Mack v. American Exp. Co., 20 Misc. 215, 45 N. Y. Supp. 362.

38. **Mass.**—Cain v. Rockwell, 132 Mass. 193. **Minn.**—Morrison County Lumb. Co. v. Duclos, 131 Minn. 173, 154 N. W. 952. **Neb.**—Davis v. Jennings, 78 Neb. 462, 111 N. W. 128. **N. Y.**—Fassy v. Jacobs, 71 Misc. 145, 127 N. Y. Supp. 1062.

[a] Where only the partnership interest is bound, the Christian name of a partner not served may be corrected by amendment. Welch v. Hull, 73 Mich. 47, 40 N. W. 797.

39. Morrison County Lumb. Co. v. Duclos, 131 Minn. 173, 154 N. W. 952.

40. **U. S.**—Gulf, C. & S. F. Ry. Co. v. James, 48 Fed. 148, 1 C. C. A. 53. **Ga.**—Scudder v. Massengill, 88 Ga. 245, 14 S. E. 571. **Idaho.**—McKnight v. Grant, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287. **Ill.**—Sidway v. Marshall, 83 Ill. 438. **Ind.**—Nimmon v. Worthington, 1 Ind. 376; Beck v. Williams, 5 Blackf. 374. **Me.**—Griffin v. Pinkham, 60 Me. 123. **Mass.**—Drew v. Farnsworth, 186 Mass. 365, 71 N. E. 783; Cain v. Rockwell, 132 Mass. 193; Crafts v. Sikes, 4 Gray 194, 64 Am. Dec. 62; Wight v. Hale, 2 Cush. 486, 48 Am. Dec. 677. **Mich.**—McLaughlin v. Wilks, 42 Mich. 553, 4 N. W. 268; Final v. Backus, 18 Mich. 218. **N. Y.**—Brace v. Benson, 10 Wend. 213; Thurber-Whyland Co. v. Klittner, 62 Hun 620, 16 N. Y. Supp. 828; McGill v. Weil, 19 Civ. Proc. 43, 10 N. Y. Supp. 246.

[a] An amendment of plaintiff's name after default of defendant was allowed, on affidavits that the wrong name was inserted by mistake, and that the defendant had knowledge of that fact and was not misled. McLaughlin v. Wilks, 42 Mich. 553, 4 N. W. 268.

[b] It is a matter of discretion, whether the plaintiff's name may be amended. Final v. Backus, 18 Mich. 218.

[c] Name of minor may be inserted instead of that of next friend. Drew v. Farnsworth, 186 Mass. 365, 71 N. E. 783.

[d] Individual names of firm may be inserted by amendment. Martin v. Godwin & Co., 3 4Ark. 682; Haskins v. Citizens' Bank, 12 Neb. 39, 10 N. W. 466.

41. Chicago & I. A. L. Ry. Co. v. Johnston, 89 Ind. 88; Stuyvesant v. Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562; McGill v. Weil, 19 Civ. Proc. 43, 10 N. Y. Supp. 246.

42. **Ala.**—Singer Mfg. Co. v. Greenleaf, 100 Ala. 272, 14 So. 109. **Conn.**—Johnson v. Huntington, 13 Conn. 47. **N. C.**—Lane v. Seaboard & R. R. Co., 50 N. C. 25. **Pa.**—Dresher v. Williams, 4 Pa. Co. Ct. 4. **Tenn.**—Jones v. Miller, 1 Swan 319.

[a] Where the right person is brought into court by a wrong name, the process may be amended by striking that name and inserting the right one. **Cal.**—Broek v. Martinovich, 55 Cal. 516. **N. Y.**—Stuyvesant v. Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562. **N. C.**—Lane v. Seaboard & R. R. Co., 50 N. C. 25.

43. **Ga.**—Rome R. Co. v. Sullivan, Cabot & Co., 14 Ga. 277. **Ill.**—Sidway v. Marshall, 83 Ill. 438. **Mich.**—Welch v. Hull, 73 Mich. 47, 40 N. W. 797; Final v. Backus, 18 Mich. 218. **N. Y.**—Stuyvesant v. Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562. **N. C.**—Patterson v. Walton, 119 N. C. 500, 26 S. E. 43.

44. **Ga.**—Stokes v. Robertson, 143 Ga. 721, 85 S. E. 895. **Mass.**—Johnson v. Somerville Dyeing & B. Co., 15 Gray 216. **N. H.**—Boudreau v. Eastman, 59 N. H. 467. **N. Y.**—Martin v. Johnson, 8 Daly 541; Southack v. Gleason, 49 Misc. 445, 98 N. Y. Supp. 859. **N. C.**—Forte v. Boone, 114 N. C. 176, 19 S. E. 632.

tiff,⁴⁵ as well as to the defendant;⁴⁶ though some jurisdictions do not extend the privilege to the plaintiff.⁴⁷ An entirely different person may not, however, be substituted by an amendment to the process,⁴⁸ and though statutes may permit the striking out or addition of names in the process,⁴⁹ these are not generally considered as changing the rule.⁵⁰ Nor can there be an insertion of new names in a process where it would cause a misjoinder of parties.⁵¹ But a correction or change in the description of a person does not make a new party,⁵² and surplus matter which misdescribes parties may be

[a] **May Be Allowed After Verdict.**—*Boudrean v. Eastman*, 59 N. H. 467; *Forte v. Boone*, 114 N. C. 176, 19 S. E. 632.

[b] **Summons issued against a trustee** cannot be regarded as a writ against a township. *State v. Wilson*, 113 Ind. 501, 15 N. E. 596; *Vogel v. Brown*, 112 Ind. 299, 14 N. E. 77, 2 Am. St. Rep. 187. See *Wade on Notice*, §1146.

[c] **If the alteration would convert the action from a civil to a criminal one**, the amendment will not be allowed. *Walton v. Kirby*, 3 N. C. 174.

45. **Me.**—*Anderson v. Brock*, 3 Greenl. 243. **Mich.**—*Smith v. Pinney*, 86 Mich. 484, 49 N. W. 305. **Tenn.** *Flatley v. Memphis & C. R. Co.*, 9 Heisk. 230.

[a] **"The defendant being in court for particular cause of action**, it is not required that the expense and delay shall be incurred of new process" to allow the name of a new plaintiff to be substituted, where a mistake has been made. *Flatley v. Memphis & C. R. Co.*, 9 Heisk. (Tenn.) 230.

46. **Ga.**—*Stokes v. Robertson*, 143 Ga. 721, 85 S. E. 895. **Mass.**—*Lester v. Lester*, 8 Gray 437. **N. Y.**—*Boyd v. United States Mtg. & Trust Co.*, 187 (N. Y.) 39; *Vanderveer v. Cohen*, 139 Rep. 599, 9 L. R. A. (N. S.) 399.

47. *McMahan v. Allen*, 12 How. Pr. (N. Y.) 39; *Panderveer v. Cohen*, 139 App. Div. 296, 123 N. Y. Supp. 1033; *Bowen v. Phoenix Bridge Co.*, 134 App. Div. 22, 118 N. Y. Supp. 93.

48. **U. S.**—*Comegyss v. Robb*, 2 Cranch C. C. 141, 6 Fed. Cas. No. 3,049. **Colo.**—*Union Pacific D. & G. Ry. Co. v. Perkins*, 7 Colo. App. 184, 42 Pac. 1047. **Mich.**—*Final v. Backus*, 18 Mich. 218. **N. H.**—*Elliott v. Clark*, 18 N. H. 421. **N. J.**—*Maitland v. Worthington*, 59 N. J. L. 114, 35 Atl. 759. **N. Y.**—*Elias v. Hayes*, 24 Misc. 754, 53 N. Y. Supp. 858. **Pa.**—*Wilson v. Wallace*, 8 Serg. & R. 53.

See 1 STANDARD PROC. 907, et seq., and the titles "New Cause of Action or Defense," "Parties."

Compare Western Ry. Co. v. McCall, 89 Ala. 375, 7 So. 650.

49. **Me.**—*Clark v. Anderson*, 103 Me. 134, 68 Atl. 633. **Mass.**—*Cain v. Rockwell*, 132 Mass. 193. **N. Y.** *Steinhardt v. Baker*, 20 Misc. 470, 46 N. Y. Supp. 707.

50. *Clark v. Anderson*, 103 Me. 134, 68 Atl. 633; *Fleming v. Courtenay*, 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414. *Compare Winch v. Hosmer*, 122 Mass. 438; *Elder and Deacons of Baptist Church v. Bancroft*, 4 Cush. (Mass.) 281.

[a] **The statute applies only** when the party to be added is joined with the existing party, and the cause continues as to all, original as well as new ones. *Clark v. Anderson*, 103 Me. 134, 68 Atl. 633.

51. *Clark v. Anderson*, 103 Me. 134, 68 Atl. 633; *Holmes v. Daniels*, 86 N. Y. Supp. 19.

52. **N. Y.**—*Mack v. American Exp. Co.*, 20 Misc. 215, 45 N. Y. Supp. 362. **N. C.**—See *Lane v. Seaboard & R. R. Co.*, 50 N. C. 25. **Vt.**—*Hathaway v. Sabin*, 61 Vt. 608, 18 Atl. 188.

[a] **Adding the trade name of a party** does not make a new party. *Hathaway v. Sabin*, 60 Vt. 608, 18 Atl. 188.

[b] **"The power to amend** depends not upon the question whether the amendment changes the name, but whether or not it really changes the party." *Elliott v. Clark*, 18 N. H. 421.

[c] **"In cases of 'an undesigned misnomer**, and where the interests of substantial justice will allow it, without a real change in the identity of the opposing litigants,'" amendments as to names will be permitted. *Welch v. Hull*, 73 Mich. 47, 40 N. W. 797.

[d] **A change in the capacity** does not bring in a new party. *Boyd v.*

stricken out.⁵³

When process is sufficient to confer jurisdiction over the defendant, amendments correcting the name have been allowed without further notice, where there has been a default,⁵⁴ but this practice is not universally followed;⁵⁵ and an amendment without notice of course does not bind the defendant when no jurisdiction has been acquired.⁵⁶

E. DESIGNATION OF THE COURT.—It is essential that process requiring an appearance of the defendant should designate the court wherein the action is pending;⁵⁷ and the place of holding court, as

United States Mtg. & Trust Co., 187 N. Y. 262, 79 N. E. 999, 116 Am. St. Rep. 599, 9 L. R. A. (N. S.) 399.

53. **Me.**—Griffin v. Pinkham, 60 Me. 123. **Mass.**—Elder and Deacons of Baptist Church v. Bancroft, 4 Cush. 281. **N. Y.**—Boyd v. United States Mtg. & Trust Co., 187 N. Y. 262, 79 N. E. 999, 116 Am. St. Rep. 599, 9 L. R. A. (N. S.) 399.

[a] "Administrator of" such and such estate, following a name, is against the party personally, and the latter part may be treated as surplusage. *Roche v. Hampden Sav. Bank*, 128 Mass. 115; *Rich v. Sowles*, 64 Vt. 408, 23 Atl. 723, 15 L. R. A. 850.

54. **Cal.**—Brock v. Martinovich, 55 Cal. 516; *McGinn v. Rees*, 33 Cal. App. 291, 165 Pac. 52. **Ill.**—Sidway v. Marshall, 83 Ill. 438. **Mass.**—Terry v. Sisson, 125 Mass. 560; *Langmaid v. Puffer*, 7 Gray 378, 381. **N. Y.**—Stuyvesant v. Weil, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562.

[a] "All amendments of this character, not being against the right and justice of the matter of the suit, and not altering the issues between the parties, shall be made by the court in which judgment was given, and it is nowhere intimated any notice to the opposite party is necessary to enable the court to exercise this equitable power." *Sidway v. Marshall*, 83 Ill. 438.

[b] When a fictitious name is used, under statutory authority, after default no notice of an amendment inserting true name is necessary. *Brock v. Martinovich*, 55 Cal. 516.

55. *Frank v. Union Cent. Life Ins. Co.*, 130 Fed. 224; *Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604.

[a] When it appears that the defendant has been misled, "the court

might abuse its discretion by ordering an amendment, after default and entry of judgment, without giving the defendant leave to answer and defend." *Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604.

56. **Mo.**—Blodgett v. Schaffer, 94 Mo. 652, 671, 7 S. W. 436. **N. Y.**—McGill v. Weil, 19 Civ. Proc. 43, 10 N. Y. Supp. 246. **Tex.**—Southern Pac. Co. v. Block, 84 Tex. 21, 19 S. W. 300.

57. **Ala.**—Waddill v. John, 48 Ala. 232. **Ark.**—Womsley v. Cummins, 1 Ark. 125. **Cal.**—Nellis v. Justices' Court, 20 Cal. App. 394, 129 Pac. 472. **Ill.**—Orendorff v. Stanberry, 20 Ill. 89. **Ky.**—Beall v. Siverts, 1 A. K. Marsh. 154. **N. Y.**—Tallman v. Hinman, 10 How. Pr. 89; *Dix v. Palmer*, 5 How. Pr. 233, 3 Code Rep. 214. **R. I.**—Parker v. Superior Court (R. I.), 100 Atl. 305.

[a] "When a trial is to be had in a proceeding, process must have a time and place of return that such trial may be had then and there;" but where a process is not judicial and there can be no trial upon it, it need have no place of return. *Anderson v. Henry*, 45 W. Va. 319, 31 S. E. 998.

[b] "A summons should certainly inform a party in what court he is sued." *Dix v. Palmer*, 5 How. Pr. (N. Y.) 233, 3 Code Rep. 214.

[c] Though not expressly required by statute (1) a summons is irregular for failure to specify some particular court. (Anonymous, 2 Code Rep. [N. Y.] 75; *Tallman v. Hinman*, 10 How. Pr. [N. Y.] 89); or (2) if erroneous, the process is amendable. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642.

[d] "In the office of the clerk of the district court" of a given county, sufficiently describes the court. *Nichols v. Burlington etc. Plank Road Co.*, 4 G. Gr. (Iowa) 42.

[e] A notice containing a blank (1) where the court should have been

well,⁵⁸ though when there is a fixed place of holding court determined by law, it has been held that the location thereof need not be specially recited in the process.⁵⁹ A mere inaccuracy in designating the court,⁶⁰ or the place of holding court,⁶¹ is not fatal where it does not mislead or prejudice the defendant;⁶² but if it is left indefinite⁶³ where a

named is properly quashed. (*Beall v. Siverts*, 1 A. K. Marsh. [Ky.] 154); but not (2) if the omitted information appears elsewhere in the process. *Georgia Southern, etc., Ry. Co. v. Pritchard*, 123 Ga. 320, 51 S. E. 424.

[f] Under some statutes (1) in certain specified proceedings, writs are returnable before the clerk, in term or out. (*Tate v. Powe*, 64 N. C. 644; *Woodley v. Gilliam*, 64 N. C. 649. See also *Gas Co. v. Wheeling*, 7 W. Va. 22, 29); (2) and process commanding an appearance before the judge instead of the clerk is erroneous, but not void. *Piercey v. Watson*, 118 N. C. 976, 24 S. E. 659; *Johnson v. Judd*, 63 N. C. 498; *Swepson v. Harvey*, 63 N. C. 106; *Smith v. McIlwaine*, 63 N. C. 95.

58. Ala.—*State v. Allen*, 33 Ala. 422; *Wragg v. Branch Bank*, 8 Port. 195. Ark.—*Tucker v. Real Estate Bank*, 4 Ark. 429; *Womsley v. Cummins*, 1 Ark. 125. Ill.—*Northwestern Benev. & Mut. Aid Assn. v. Woods*, 21 Ill. App. 372. N. Y.—*Warner v. Kenney*, 1 Code Rep. 96, 3 How. Pr. 323. Tex.—*Hambel v. Davis*, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46; *DeWalt v. Zeigler*, 9 Tex. Civ. App. 82, 29 S. W. 60. Utah.—*Winters v. Hughes*, 3 Utah 443, 24 Pac. 759.

59. Ala.—*Yonge v. Broxon*, 23 Ala. 684; *Waddill v. John*, 48 Ala. 232. Pa.—*Stout v. Wertsner*, 15 Montg. Co. Rep. 48. W. Va.—*Cunningham v. Sayre*, 21 W. Va. 440.

[a] At the court house, in a named county, is sufficient. *Tucker v. Real Estate Bank*, 4 Ark. 429.

[b] District court of a specified judicial district is a sufficient description without adding the name of the state. *Lallande v. Terrill*, 12 La. 7.

60. Cal.—*Crane v. Brannan*, 3 Cal. 192. Ga.—*Blake v. Camp*, 45 Ga. 298; *Kelly v. Fudge*, 2 Ga. App. 759, 59 S. E. 19. N. Y.—*Morrell v. Waggoner*, 5 Johns. 233. N. C.—*Page v. McDonald*, 159 N. C. 38, 74 S. E. 642. Tex.—*Galveston H. & S. A. Ry. Co. v. Coker*, (Tex. Civ. App.), 135 S. W. 179. Wash.—*Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760.

[a] An amendment may be allowed to correct an erroneous designation. Ga.—*Kelly v. Fudge*, 2 Ga. App. 759, 59 S. E. 19. N. C.—*Page v. McDonald*, 159 N. C. 38, 74 S. E. 642. Tex.—*Galveston H. & S. A. Ry. Co. v. Coker*, (Tex. Civ. App.), 135 S. W. 179.

61. Ala.—*Waddill v. John*, 48 Ala. 232; *Relfe v. Valentine & Co.*, 45 Ala. 286. Ill.—*Carter v. Rodewald*, 108 Ill. 351; *Hall v. Davis*, 44 Ill. 494; *Northwestern Benev. & Mut. Aid Assn. v. Woods*, 21 Ill. App. 372. W. Va.—*Cunningham v. Sayre*, 21 W. Va. 440.

[a] Omission to name county, where the information appears elsewhere in the process, is not fatal. *Carter v. Rodewald*, 108 Ill. 351; *Hall v. Davis*, 44 Ill. 494.

62. Ala.—*Relfe v. Valentine & Co.*, 45 Ala. 286. Ga.—*Georgia Southern, etc. Ry. Co. v. Pritchard*, 123 Ga. 320, 51 S. E. 424. La.—*Driggs v. Morgan*, 10 Rob. 119. Minn.—*Hanna v. Russell*, 12 Minn. 80. Mo.—*Payne v. Collier*, 6 Mo. 321. N. Y.—*Van Wyck v. Hardy*, 39 How. Pr. 392, 4 Abb. Dec. 496; *Ward v. Sands*, 10 Abb. N. C. 60. Wash.—*Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760.

[a] "If taking the whole writ together, the defendant can see therefrom where he is required to appear, it would seem that he could not be misled to his prejudice, and in such case the object of process would be sufficiently accomplished." *Northwestern Benev. & Mut. Aid Assn. v. Woods*, 21 Ill. App. 372.

[b] A command to appear before the judge of a named court is equivalent to a command to appear at such court. *Payne v. Collier*, 6 Mo. 321; *Hambel v. Davis*, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46. Compare *Assignment of Davis*, 10 Daly (N. Y.) 31.

63. Cal.—*Nellis v. Justices' Court*, 20 Cal. App. 394, 129 Pac. 472. Ill.—*Gill v. Hoblit*, 23 Ill. 473; *Orendorff v. Stanberry*, 20 Ill. 89. S. C.—*Cator v. Cockfield*, 1 Brev. 91.

[a] Process is void where defendant is left in doubt as to the court

party is to appear, or a wrong place,⁶⁴ or county,⁶⁵ is named, the writ is invalid. In determining the sufficiency of the process, a copy of the complaint served therewith may be looked to,⁶⁶ and matter not required by statute to be stated, if erroneous, may be treated as surplusage.⁶⁷

F. TIME FOR APPEARANCE. — 1. In General.⁶⁸ — Process designed to require an appearance must indicate the day on which the defendant must appear and answer,⁶⁹ or defend.⁷⁰ The hour of appearance, before a justice of the peace, is even required to be shown under some statutes.⁷¹ The "return day" is the day appointed by law when writs are to be returned and filed,⁷² and is a different day

intended. *State v. Allen*, 33 Ala. 422; *Orendorff v. Stanberry*, 20 Ill. 89.

64. Ia.—*Eggleston v. Wattawa*, 117 Iowa 676, 91 N. W. 1044. **N. Y.**—See *Assignment of Davis*, 10 Daly 31. **S. C.** *Cator v. Cockfield*, 1 Brev. 91.

[a] If the statement of an erroneous place of holding court may be treated as surplusage, it does not affect the process. *Waddill v. John*, 48 Ala. 232; *Relfe v. Valentine & Co.*, 45 Ala. 286; *Lore v. McRae*, 12 Ala. 444.

[b] Designation of wrong court (1) is fatal under some statutes (*Eggleston v. Wattawa*, 117 Iowa 676, 91 N. W. 1044; *Rutta v. Laffera*, 1 White & W. Civ. Cas. [Tex.], §822), but (2) is amendable elsewhere. *Kelly v. Fudge*, 2 Ga. App. 759, 59 S. E. 19. See also *Hanna v. Russell*, 12 Minn. 80; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760.

65. Ill.—*Gill v. Hoblit*, 23 Ill. 473; *Orendorff v. Stanberry*, 20 Ill. 89. **Mont.**—*Duluth Brew. & Malting Co. v. Allen*, 51 Mont. 89, 149 Pac. 494. **Ore.** *Smith v. Ellendale Mill Co.*, 4 Ore. 70.

66. Ala.—*Relfe v. Valentine & Co.*, 45 Ala. 286. **La.**—*Driggs v. Morgan*, 10 Rob. 119. **N. Y.**—Anonymous, 2 Code Rep. 75. **Ore.**—*First Nat. Bank v. Rusk*, 64 Ore. 35, 127 Pac. 780, 129 Pac. 121, 44 L. R. A. (N. S.) 138.

[a] Failure to name county in the heading may be cured by a copy of the complaint. *Smith v. Ellendale Mill Co.*, 4 Ore. 70.

67. Ala.—*Relfe v. Valentine & Co.*, 45 Ala. 286. **Cal.**—*Crane v. Brannan*, 3 Cal. 192. **Minn.**—*Hanna v. Russell*, 12 Minn. 80.

[a] Where number of district is not required to be stated in a summons, the insertion of a wrong number is surplusage. *Hanna v. Russell*, 12 Minn. 80.

[b] A memorandum at top of sum-

mons, of the name "District Court" is no part of the writ when issued out of the county court. *Crane v. Brannan*, 3 Cal. 192.

[c] The state need not be named if the statute does not require it. *Lyon v. Byington*, 10 Iowa 124; *Hanna v. Russell*, 12 Minn. 80.

68. In justice court process, see 17 STANDARD PROC. 1015.

69. Ind.—*Dunkle v. Elston*, 71 Ind. 585. **La.**—*Kendrick's Heirs v. Kendrick*, 19 La. 36. **Miss.**—*Joiner v. Delta Bank*, 71 Miss. 382, 14 So. 464. **Neb.**—*State v. Republican Val. & W. R. Co.*, 27 Neb. 852, 44 N. W. 51. **Ohio.** *Williamson v. Nicklin*, 34 Ohio St. 123; *State ex rel. Prosecuting Attorney v. Robinson*, 9 Ohio Dec. (Reprint) 249. **Utah.**—*Winters v. Hughes*, 3 Utah 443, 24 Pac. 907.

[a] Summons which fails to name (1) a date for appearance is void. *Murdy v. McCutcheon*, 95 Pa. 435. (2) It will be quashed on motion before appearance. *Winters v. Hughes*, 3 Utah 443, 24 Pac. 907.

70. Lyman & Co. v. Bechtel, 55 Iowa 437, 7 N. W. 673.

[a] Notice requiring defendant to answer on a specified date is not misleading, though language of statute is "appear and defend." *Lyman & Co. v. Bechtel*, 55 Iowa 437, 7 N. W. 673.

As to time to plead see the title "Time To Plead."

71. Hodges v. Brett, 4 G. Gr. (Ia.) 345; *Titus v. Whitney*, 16 N. J. L. 85, 31 Am. Dec. 228. See 17 STANDARD PROC. 1015.

[a] If an hour is fixed without authority, the notice is not void, as the defendant still has the entire day. *Armstrong v. Middlestadt*, 22 Neb. 711, 36 N. W. 151.

72. Bouv. L. Dict.; Bankers' Iowa

under some statutes from that upon which the defendant is required to appear.⁷³ However, as appearance is usually required to be made on the same day the return is due,⁷⁴ the day for appearance is frequently referred to as the return day. The common law rule requiring fifteen days between the teste and return⁷⁵ is not applicable where statutes regulate the time allowed for appearance.⁷⁶ Where terms of court are held, the statutes usually require process commanding an appearance to be returnable to the term immediately succeeding its issuance,⁷⁷ and when so required, if a term intervenes, the process is void.⁷⁸ However, provision may also be made for return to a succeeding term when insufficient time remains to perfect service,⁷⁹ or to the next rule day in vacation;⁸⁰ and if not made returnable in compliance with such statute, it will be quashed on motion.⁸¹ Where

State Bank v. Jordan, 111 Iowa 324, 82 N. W. 779. See the title "**Returns.**"

73. Kan.—*Clough v. McDonald*, 18 Kan. 114. **Neb.**—*State v. Republican Valley & W. R. Co.*, 27 Neb. 852, 44 N. W. 51. **Okla.**—*State ex rel. Collins v. Parks*, 34 Okla. 335, 126 Pac. 242. **Utah.**—*Winters v. Hughes*, 3 Utah 443, 24 Pac. 907.

[a] Where statute fixes no time for return of writ, the "default day" must be regarded as the return day. *Bankers' Iowa State Bank v. Jordan*, 111 Iowa 324, 82 N. W. 779.

[b] **Curtailment of Time To Make Return.**—That an officer is required by the terms of a writ, to make service and return in a less time than is given by statute does not render a summons void, if he serves and returns it before the legal return day. "It might be voidable, however, if the officer should take the whole time (ten days) given him by law within which to serve it upon the defendant, for in that case the time given to the defendant within which to answer or demur would be shortened." *Clough v. McDonald*, 18 Kan. 114.

74. Hunsaker v. Coffin. 2 Ore. 107.

[a] **Where Statute Appoints No Appearance Day.**—"It may be inferred . . . in the absence of any express provision on the subject, that the appearance day is the return day of the writ, if according to law an appearance can then be entered; or if not, then the first day thereafter on which an appearance can be entered." *Branch v. Webb*, 7 Leigh (34 Va.) 371.

75. McNeal v. Gloucester City. 51 N. J. L. 444, 18 Atl. 112.

76. Logan v. Lawshe. 62 N. J. L. 567, 41 Atl. 751.

77. N. C.—*Folk v. Howard*, 72 N. C. 527. **Tex.**—*Hambel v. Davis*, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46; *DeWalt v. Zeigler*, 9 Tex. Civ. App. 82, 29 S. W. 60. **W. Va.** *Miller v. Whitescarver*, 23 W. Va. 10.

[a] By statute actions are classified so that part of them are returnable in term time, and part are returnable before the clerk at any time. *Woodley v. Gilliam*, 64 N. C. 649; *Tate v. Powe*, 64 N. C. 644.

78. Ill.—*Culver v. Phelps*, 130 Ill. 217, 22 N. E. 809; *Miller v. Handy*, 40 Ill. 448; *Elee v. Wait*, 28 Ill. 70; *Hildreth v. Hough* 20 Ill. 331. **Ind.**—*Briggs v. Sneghan*, 45 Ind. 14; *Carey v. Butler*, 11 Ind. 391; *Shirley v. Hagar*, 3 Blackf. 225. **Me.**—*Blake v. Wing*, 77 Me. 170. **N. J.**—*Van Ness v. Harrison*, 3 N. J. L. 632. **N. Y.**—*Burke v. Barnard*, 4 Johns. 309; *Bunn v. Thomas*, 2 Johns. 190.

[a] "It was the common law, that a writ to be executed on the person, could not run beyond a term." *Will v. Whitney*, 15 Ind. 194.

[b] **Process is amendable** where the return day is put beyond an intervening term. *Archibald v. Thompson*, 2 Colo. 388.

79. Ill.—*Culver v. Phelps*, 130 Ill. 217, 22 N. E. 809; *Matthews v. Hoff*, 113 Ill. 90; *Mechanics' Sav. Inst. v. Givens*, 82 Ill. 157. **Miss.**—*Hurst v. Strong*, 1 How. 123. **Neb.**—*Brauer v. Luntzer*, 12 Neb. 473, 11 N. W. 730. **Pa.**—*Dyott v. Pennock*, 2 Miles 213. **S. C.**—*Blacklock v. Gairdner*, 2 Bay 567, 1 Brev. 249.

80. Walker v. Joyner. 52 Miss. 789.

81. Ill.—*Matthews v. Hoff*, 113 Ill.

the defendant is summoned to court before the complaint is filed,⁸² a given number of days' notice prior to the beginning of the term may not be required.⁸³ The plaintiff, under some provisions, has the option to select one of two designated dates, as the return day for his particular writ,⁸⁴ or the amount in controversy may determine such date.⁸⁵ In some states the defendant is simply required to appear within a given number of days after service of summons, without reference to any term of court.⁸⁶

Process returnable on Sunday is voidable.⁸⁷

2. Necessity of Stating Correct Date. — a. *In General.* — The term of court to which appearance is commanded must be specifically named when the statute so provides.⁸⁸ The naming of a date for appearance other than that prescribed by statute is always ground for abatement of the process,⁸⁹ and in many jurisdictions it has been

90. Miss.—Walker v. Joyner, 52 Miss. 789. Pa.—Dyott v. Pennock, 2 Miles 213.

82. Oil & Gas Well Supply Co. v. Gartlan, 58 W. Va. 267, 52 S. E. 524. See *supra*, III, D.

[a] By statute, complaint need not be filed until three months after rule day. Oil & Gas Well Supply Co. v. Gartlan, 58 W. Va. 267, 52 S. E. 524.

83. Foley v. Ruley, 43 W. Va. 513, 27 S. E. 268; Spragins v. West Virginia C. & P. Ry. Co., 35 W. Va. 139, 13 S. E. 45.

[a] Issuance and return on same day is not improper under a statute providing that process may be executed on or before the return day thereof. Spragins v. West Virginia C. & P. Ry. Co., 35 W. Va. 139, 13 S. E. 45.

84. Ill.—Culver v. Phelps, 130 Ill. 217, 22 N. E. 809; Mechanics' Sav. Inst. v. Givens, 82 Ill. 157. Ind. Dunkle v. Elston, 71 Ind. 585. Neb. State v. Republican Val. & W. R. Co., 27 Neb. 852, 44 N. W. 51. Ohio.—Devol v. Culver & Co., 2 Ohio Dec. (Reprint) 154, 1 West. L. Month. 587. Pa.—Dyott v. Pennock, 2 Miles 213. S. C.—Blacklock v. Gairdner, 2 Bay 507, 1 Brev. 249.

[a] "It is optional with the party, in case the summons is issued to another county, to enlarge the time of its return; and this elongated time cannot go beyond the third or fourth Monday,"—as provided in the statute. State *ex rel.* Attorney General v. Republican Val. etc. R. Co., 27 Neb. 852, 44 N. W. 51; Devol v. Culver & Co., 2 Ohio Dec. (Reprint) 154, 1 West. L. Month. 587.

[b] Where there are two return days in a term, a summons made re-

turnable "to next term" is returnable to the first return day and not the second. Misho v. McClelland, 20 Pa. Co. Ct. 302.

[c] If insufficient time remains for complete service, the plaintiff may, at his option, under the statute, have the return to the first term, and thereby work a continuance, or have it returnable to the following term. Mechanics' Sav. Inst. v. Givens, 82 Ill. 157.

85. Brauer v. Luntzer, 12 Neb. 473, 11 N. W. 730.

86. Cal.—Dupuy v. Shear, 29 Cal. 238. Utah.—Winters v. Hughes, 3 Utah 443, 24 Pac. 907. Wash.—Stoll v. Griffith, 41 Wash. 37, 82 Pac. 1025; Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760.

87. U. S.—Norton v. Dover, 14 Fed. 106. Ala.—Goodlett v. Hansell, 56 Ala. 346. Ark.—Haines v. McCormick, 5 Ark. 663. N. J.—Lawrence Harbor Colony v. American Surety Co., 70 N. J. L. 589, 57 Atl. 390; McEvoy v. School Dist. No. Eight, 38 N. J. Eq. 420. N. Y.—Wright v. Jeffrey, 5 Cow. 15; Leetch v. Atlantic Mut. Ins. Co., 4 Daly 518.

See generally the title "Sunday and Holidays."

[a] Amendable to Next Monday. Lawrence Harbor Colony v. American Surety Co., 70 N. J. L. 589, 57 Atl. 390.

88. DeTar v. Boone, 34 Iowa 488; Knapp, Stout & Co. v. Haight, 23 Iowa 75; Decatur v. Clements, 18 Iowa 536; Des Moines Branch State Bank v. Van, 12 Iowa 523; Cave v. Houston, 65 Tex. 619; Kirk v. Hampton, 2 Wills. Civ. Cas. (Tex.) §719.

89. Ark.—Thompson v. McHenry, 18 Ark. 537; Jones v. Austin, 16 Ark.

held that process containing such a defect will not support a judgment in the absence of an appearance.⁹⁰ Thus if a wrong term is designated the process is usually considered void, in the absence of a remedial statute,⁹¹ and an error as to the specific day of the term may also render the process ineffectual,⁹² though amendments are quite commonly allowed to correct this defect.⁹³ A process which

336. **Me.**—Kehail v. Tarbox, 112 Me. 327, 92 Atl. 182. **Minn.**—Lockway v. Modern Woodmen of American, 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555. **N. J.**—Lawrence Harbor Colony v. American Surety Co., 70 N. J. L. 589, 57 Atl. 390. **Neb.**—Barker Co. v. Central West. Inv. Co., 75 Neb. 43, 105 N. W. 985; Crowell v. Galloway, 3 Neb. 215. **N. C.**—Simmons v. Norfolk & B. Steamboat Co., 113 N. C. 147, 18 S. E. 117, 37 Am. St. Rep. 614, 22 L. R. A. 677; Woodley v. Gilliam, 64 N. C. 649. **Pa.**—Dyott v. Pennock, 2 Miles 213. **Vt.**—University of Vermont v. Joslyn, 21 Vt. 52.

[a] **No discretion is vested in the clerk in respect to the return day.** Crowell v. Galloway, 3 Neb. 215.

[b] **Summons is irregular but not void,** for statement of an erroneous return day. **Ga.**—Richmond & D. R. Co. v. Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446. **Kan.**—Alford v. Hoag, 8 Kan. App. 141, 54 Pac. 1105. **Neb.**—Ley v. Pilger, 59 Neb. 561, 81 N. W. 507.

[c] **A writ returnable out of term is abatable on motion seasonably made.** **Ind.**—Ross v. Glass, 70 Ind. 391. **Me.**—Kehail v. Tarbox, 112 Me. 327, 92 Atl. 182; McAlpine v. Smith, 68 Me. 423. **N. H.**—Wood v. Hill, 5 N. H. 229.

90. **Me.**—Barker v. Norton, 17 Me. 416. **Mass.**—Bell v. Austin, 13 Pick. 90. **Miss.**—Walker v. Joyner, 52 Miss. 789. **Pa.**—Williamson v. McCormick, 126 Pa. 274, 17 Atl. 591. **Va.**—Kyles v. Ford, 2 Rand. (23 Va.) 1. **W. Va.**—Fisher, Sons & Co. v. Crowley, 57 W. Va. 312, 50 S. E. 422.

[a] **A summons returnable instant,** issued during a term, confers no jurisdiction. Joiner v. Delta Bank, 71 Miss. 382, 14 So. 464.

[b] **When the court fixes the return day of a writ to be issued out of chancery, and the clerk makes it returnable to a different day, it is a nullity.** Bolling v. Anderson, 4 Baxt. (Tenn.) 550.

91. **Ala.**—Brown v. Simpson, 3 Stew. 331. **Ind.**—Rigsbee v. Bowler,

17 Ind. 167. See Town of Knox v. Golding, 46 Ind. App. 634, 91 N. E. 857, 92 N. E. 986, for rule under present statutes. **N. Y.**—Ryan v. McCannell, 1 Sandf. 709, 1 Code Rep. 93.

Compare Archibald v. Thompson, 2 Colo. 388; Harrison v. Agricultural Bank, 2 Smed. & M. (Miss.) 307.

[a] **Reasons for Rule.**—"It was the common law, that a writ to be executed on the person could not run beyond a term. It was a rule in favor of the liberty of the subject. Suits, at common law, were commenced by capias; and, if they could have been made to run beyond a term, it is easy to see they might have been used as instruments to keep men unjustly confined in jail. This reason, as a general proposition, does not exist in this state at present. But there are reasons of public policy which render it proper that writs should not lie indefinitely in the hands of officers unexecuted." Will v. Whitney, 15 Ind. 194; Briggs v. Snegham, 45 Ind. 14.

92. **Ill.**—Rattan v. Stone, 4 Ill. 540. **Ia.**—Boals v. Shules, 29 Iowa 507. **Mich.**—People v. Circuit Judge, 38 Mich. 308. **N. H.**—Holt v. Moloney, 2 N. H. 322. But see Taylor v. Jones, 42 N. H. 25. **Pa.**—Thompson v. Patterson, 2 Miles 146. **Tex.**—Neill v. Brown, 11 Tex. 17.

93. **Ga.**—Richmond & D. R. Co. v. Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; Townsend v. Stoddard & Co., 26 Ga. 430. **Ind.**—Kaufman v. Sampson, 9 Ind. 520. **Ia.**—Graves v. Cole, 2 G. Gr. 467. **Me.**—Lawrence v. Chase, 54 Me. 196. **Mass.**—Hamilton v. Ingraham, 121 Mass. 562. **Neb.**—Barker Co. v. Central West Inv. Co., 75 Neb. 43, 105 N. W. 985. **N. J.**—Lawrence Harbor Colony v. American Surety Co., 70 N. J. L. 589, 57 Atl. 390. **N. C.**—Simmons v. Norfolk & B. Steamboat Co., 113 N. C. 147, 18 S. E. 117, 37 Am. St. Rep. 614, 22 L. R. A. 677; Thomas v. Womack, 64 N. C. 657; Merrill v. Barnard, 61 N. C. 569.

[a] **Naming wrong week of the term is an amendable error.** Lamb v. Tuck-

specifies an impossible date,⁹⁴ or term,⁹⁵ for appearance, is generally considered void.

b. *Less or Greater Than Statutory Period.*—Where a less time is stated in the process than is allowed by statute for defendant's appearance, the process is insufficient in many jurisdictions,⁹⁶ though in some it has been held amendable;⁹⁷ and in no case may default be taken before the full period has run.⁹⁸ When insufficient time intervenes, the effect is merely to work a continuance under some statutes,⁹⁹ or the return day named in the writ may be enlarged by the court by amendment when service cannot be had as required originally.¹

A "short summons" is sometimes provided for suits against non-residents, specifying a shorter period than ordinary for appear-

er, 146 Ga. 216, 91 S. E. 66; Barker v. Norton, 17 Me. 416.

[b] **As to error in stating date of appearance day**, under code provision barring technical objections where process substantially conforms to the code requisites and defendant has had notice of the pendency of the suit, it has been said: "When a man knows that he is sued, and is served with a copy of the declaration which tells him what he is sued for and in what court, it would be well for him to step to the clerk of that court and find out something about any little mistake in the process, and attend at the first term to take advantage of the mistake, if it would avail him, or have it corrected and put off a term, if the court so decided; especially would it be prudent not to delay action until after trial term, verdict, judgment and execution and then set up the mistake of the clerk, which must have been known to him the moment he read the copy (of the) declaration and process handed him by the sheriff." *Richmond & D. R. R. Co. v. Benson & Co.*, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446.

94. *Mo.*—*Holliday v. Cooper*, 3 Mo. 286. *N. H.*—*Dame v. Fales*, 3 N. H. 70. *N. M.*—*Holzman v. Martinez*, 2 N. M. 271. *Tex.*—*Violand v. Saxel*, 31 Tex. 283; *Smith v. Buckholtz State Bank* (Tex. Civ. App.), 193 S. W. 730; *Taylor v. Taylor* (Tex. Civ. App.), 157 S. W. 1184; *Llano Imp. Co. v. Watkins*, 4 Tex. Civ. App. 428, 23 S. W. 612.

Contra, *Kelly v. Harrison*, 69 Miss. 856, 12 So. 261.

[a] **When the date has already passed** the process gives no jurisdiction. *Violand v. Saxel*, 31 Tex. 283.

95. *Lowry v. Richmond & D. R. Co.*,

83 Ga. 504, 10 S. E. 123; *Holzman v. Martinez*, 2 N. M. 271.

96. *U. S.*—*Manville v. Battle Mountain Smelting Co.*, 17 Fed. 126, 5 McCrary 328. *Ill.*—*Matthews v. Hoff*, 113 Ill. 90. *Kan.*—*Foster v. Markland*, 37 Kan. 32, 14 Pac. 452. *Mo.*—*Sanders v. Rains*, 10 Mo. 770. *S. C.*—*Adkins v. Moore*, 43 S. C. 173, 20 S. E. 985.

[a] **Process Will Be Set Aside on Motion.**—*Del.*—*Warrington v. Tull*, 5 Harr. 107. *Okla.*—*State ex rel. Collins v. Parks*, 34 Okla. 335, 126 Pac. 242; *Aggers v. Bridges*, 31 Okla. 617, 122 Pac. 170. *Pa.*—*Misho v. McClelland*, 20 Pa. Co. Ct. 302.

97. *U. S.*—*Stone v. Speare*, 175 Fed. 584, under New Hampshire statute. *Minn.*—*Oxmon v. Modern Woodmen of America*, 124 Minn. 390, 145 N. W. 171; *Lockway v. Modern Woodmen of America*, 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555. *N. Y.*—*Gibbon v. Freel*, 93 N. Y. 93, 65 How. Pr. 273, 2 McCarty Civ. Proc. 482; *Deimel v. Scheveland*, 16 Daly 34, 9 N. Y. Supp. 482; *Spruhan v. Brown*, 63 Misc. 46, 116 N. Y. Supp. 568. *N. C.*—*McDowell v. Justice*, 167 N. C. 493, 83 S. E. 803. *Pa.*—*Fisher v. Potter*, 2 Miles 147.

98. See *Worster v. Oliver*, 4 Iowa 345; *Guion v. Melvin*, 69 N. C. 242; *Jones' Exrs. v. Stokes*, 3 N. C. 25.

99. *Mechanics' Sav. Inst. v. Givens*, 82 Ill. 157; *Town of Knox v. Golding*, 46 Ind. App. 634, 91 N. E. 857, 92 N. E. 986; *Chicago, etc. R. Co. v. Harris*, 19 Ind. App. 137, 46 N. E. 1010; *Axtell v. Workman*, 17 Ind. App. 152, 46 N. E. 472.

1. *Walnut v. Newton*, 82 N. J. L. 290, 82 Atl. 317; *McCracken v. Richardson*, 46 N. J. L. 50, 52; *Kloopping v. Stellmacher*, 36 N. J. L. 176, 178. See *infra*, VI.

ance,² and in such instances as this form is appropriate, the use of a longer period in the summons is improper in some jurisdictions,³ but is permissible in others.⁴ Ordinarily, the mere giving of a longer time than the statute specifies does not of itself deprive the court of jurisdiction,⁵ provided no term intervenes,⁶ but it may furnish ground for dismissal.⁷ If the statute allows additional time to defendants living beyond a specified distance, the scale for calculating this time must be expressed in the citation.⁸

3. Form and Sufficiency of Statement.—The time for appearance should be clearly and distinctly stated,⁹ though the form is not important if the date is shown with reasonable certainty.¹⁰ Typographical

2. Mich.—*Everts v. Fisk*, 44 Mich. 515, 7 N. W. 81. **N. Y.**—*Allison v. Snider Preserve Co.*, 20 Misc. 367, 45 N. Y. Supp. 923; *Perry v. Round Lake, etc. Assn.*, 22 Hun 293; *Johnson v. Cayuga, etc. R. R. Co.*, 11 Barb. 621. **Pa.**—*Benighouse v. Felt*, 1 Pa. Co. Ct. 496.

[a] "The purpose of the statute requiring a short summons or attachment against nonresidents is that the defendant may not be delayed in returning to his home, and that his property may not be empounded an unreasonable time before the appointed hearing." *Allison v. Snider Preserve Co.*, 20 Misc. 367, 45 N. Y. Supp. 923.

3. Willins v. Wheeler, 8 Abb. Pr. (N. Y.) 116, 28 Barb. 669, 17 How. Pr. 93; *Newcombe v. Cohn*, 33 Misc. 602, 67 N. Y. Supp. 930.

4. Stoll v. Padley, 98 Mich. 13, 56 N. W. 1042; *Segar v. Muskegon S. & Lumb. Co.*, 81 Mich. 344, 45 N. W. 982; *Moore v. Vrooman*, 32 Mich. 526; *Benighouse v. Felt*, 1 Pa. Co. Ct. 496.

5. Wolff v. Marietta Paper Mfg. Co., 61 Ga. 463; *Worster v. Oliver*, 4 Iowa 345. *Contra*, *Simmons v. Cochran*, 29 S. C. 31, 6 S. E. 859.

[a] **A Statute Fixing a Minimum.** "In requiring the summons to bear date fifteen days before the time of trial, the statute merely fixes a minimum. It does not mean that the interval may not be greater. Certainly, it cannot be less." *Wolff v. Marietta Paper Mfg. Co.*, 61 Ga. 463.

6. See supra, IV, F.

7. Starbird v. Brown, 84 Me. 238, 24 Atl. 824.

[a] "When a statute limits the time within which process shall be made returnable, it must be observed, and when objection is made to process which violates the rule, it is commonly fatal to the writ if, as here, no power

of amendment exists in the court. *Rattoon v. Walls*, 2 Penn. 608; *Martin v. Steele*, 2 Penn. 718." *Condon v. Barr*, 47 N. J. L. 113, 54 Am. Rep. 121.

8. Kendrick's Heirs v. Kendrick, 19 La. 36; *West v. Wilson*, 4 La. 219.

[a] The provision should only be inserted when it applies to the facts of the particular case. *Sullivan v. Maynor*, 132 La. 598, 61 So. 682.

9. Ia.—*Des Moines Branch State Bank v. Van*, 12 Iowa 523. **La.**—*Kendrick's Heirs v. Kendrick*, 19 La. 36. **Me.**—*Barker v. Norton*, 17 Me. 416. **Pa.**—*Elwood Paper Co. v. Radziewicz*, 16 Pa. Co. Ct. 81. **Utah.**—*Winters v. Hughes*, 3 Utah 443, 24 Pac. 759.

[a] "'Ten days after the return' is too vague and indefinite, and is really equivalent to leaving the time blank, for how is the defendant to know when the officer makes his return?" *Winters v. Hughes*, 3 Utah 443, 24 Pac. 759.

10. Colo.—*Comet Consol. M. Co. v. Frost*, 15 Colo. 310, 25 Pac. 506. **Idaho.**—*McKnight v. Grant*, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287. **Ill.**—*Williams v. Williams*, 221 Ill. 541, 77 N. E. 928. **Ia.**—*See Lemonds v. French*, 4 G. Gr. 123. **N. J.**—*Maires v. Smith*, 16 N. J. L. 360. **Wash.**—*Stoll v. Griffith*, 41 Wash. 37, 82 Pac. 1025; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760.

[a] **Statutory Language.**—It is not absolutely necessary to follow statutory language. *McKnight v. Grant*, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287.

[b] **Figures may be used to express the return day.** *Maires v. Smith*, 16 N. J. L. 360.

[c] **Designation of date sufficient (1) where it is shown by copy of pleading attached** (*Williams v. Williams*, 221 Ill. 541, 77 N. E. 928), or (2) is

errors which do not obscure or render the date uncertain,¹¹ and errors or irregularities which do not prejudice or mislead,¹² are not important. Though the term may be improperly designated, the next term after service will be presumed.¹³ Where the day and the month are specified without the year, and the month is the same as that in which the process is issued, the word "next" following the month is sometimes construed literally to mean the same month in the following year;¹⁴ but generally under such circumstances, in construing such expression the courts consider the circumstances, and where it is apparent that a subsequent day of the same current month is intended, it will be given that meaning.¹⁵ Some courts have taken the view that where the term of court is indicated in the summons, and the time of sitting is fixed by law, it is not essential that the date be mentioned in the summons,¹⁶ although it is the better practice to

stated as "third Monday of July" next, without stating the day of the month (*McDowell v. Nicholson*, 2 Wils. Civ. Cas. [Tex.], §268), or (3) as "3rd Monday in Jan." without adding "next." *Arminius Chem. Co. v. White's Admx.*, 112 Va. 250, 71 S. E. 637.

11. *Ketchum v. Bourland* (Tex. Civ. App.), 145 S. W. 276.

12. *Idaho*.—*McKnight v. Grant*, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287. *Me.*—*Barker v. Norton*, 17 Me. 416. *Miss.*—*Kelly v. Harrison*, 69 Miss. 856, 12 So. 261. *Neb.*—*Hurford v. Baker*, 17 Neb. 443, 23 N. W. 339. *N. C.*—*Merrill v. Barnard*, 61 N. C. 569. *Wash.*—*Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760. *W. Va.*—*Town of Point Pleasant v. Greenlee*, 63 W. Va. 207, 60 S. E. 601, 129 Am. St. Rep. 971.

[a] Use of "before" instead of "at" in specifying appearance day is a harmless irregularity which does not go to the jurisdiction of the court. *Wilson v. Wilson*, 255 Mo. 528, 164 S. W. 561.

13. *Ala.*—See *Davis v. McCary*, 100 Ala. 545, 13 So. 665. *Ia.*—*Butcher v. Brand*, 6 Iowa 235. *Va.*—*Arminius Chem. Co. v. White's Admx.*, 112 Va. 250, 71 S. E. 637.

14. *Ill.*—*Miller v. Handy*, 40 Ill. 448; *Elee v. Wait*, 28 Ill. 70; *Hildreth v. Hough*, 20 Ill. 331. *N. J.*—See *Condon v. Barr*, 47 N. J. L. 113, 54 Am. Rep. 121. *N. Y.*—*Bunn v. Thomas*, 2 Johns. 190. *Ohio*.—See *Fosdick v. Perrysburg*, 14 Ohio St. 472, 480.

[a] Such Process Insufficient.—A process dated in March and commanding an appearance on the "3rd Mon-

day of March next," requires an appearance the following year and is void. *Elee v. Wait*, 28 Ill. 70.

15. *Ala.*—*Gibson v. Laughlin*, Minor 182. *N. H.*—See *Osgood v. Hutchins*, 6 N. H. 374, 384. *N. J.*—*Condon v. Barr*, 47 N. J. L. 113, 54 Am. Rep. 121. *Ohio*.—See *Fosdick v. Perrysburg*, 14 Ohio St. 472, 480. *S. C.*—*State v. Washington*, 82 S. C. 341, 64 S. E. 386; *Posey v. Branch*, 2 McMull. 338.

[a] The error is self-correcting, as it is apparent that the following month was intended. *Town of Point Pleasant v. Greenlee*, 63 W. Va. 207, 60 S. E. 601, 129 Am. St. Rep. 971.

16. *Ala.*—*Davis v. McCary*, 100 Ala. 545, 13 So. 665; *Yonge v. Broxon*, 23 Ala. 684. *Ark.*—*Anderson v. Pearce*, 36 Ark. 293, 38 Am. St. Rep. 39; *Phillips v. Lemoyne*, 4 Ark. 144. *Ill.*—*Rogers v. Miller*, 5 Ill. 333. *Ind.*—*Dunkle v. Elston*, 71 Ind. 585; *Morgan v. Woods*, 33 Ind. 23. *Ia.*—*Butcher v. Brand*, 6 Iowa 235; *Worster v. Oliver*, 4 Iowa 345. *Me.*—*Ames v. Weston*, 16 Me. 266. *N. C.*—*Merrill v. Barnard*, 61 N. C. 569. *Va.*—*Hare v. Niblo*, 4 Leigh (31 Va.) 359. *W. Va.*—*Cunningham v. Sayre*, 21 W. Va. 440.

[a] "The defendant was bound to know when the 'next term' of the superior court of his county would be held; and the fact that the notice incorrectly named the date of the term did not render it invalid." *American Bond & Surety Co. v. Adams*, 124 Ga. 510, 52 S. E. 622; *McNatt v. Citizens' & Southern Bank*, 20 Ga. App. 755, 93 S. E. 271.

[b] "Next term" is a sufficient designation of date. *Ala.*—*Davis v. McCary*, 100 Ala. 545, 13 So. 665. *Ill.*

give it,¹⁷ and that a misstatement thereof does not render the process void;¹⁸ but if the statute expressly requires it, the date of sitting must be shown.¹⁹

G. NATURE OF CAUSE OF ACTION. — Under the common law practice where the declaration was not filed until after the defendant had been brought before the court by process, the plaintiff's cause of action was indicated in the summons or *capias*.²⁰ The statutes of some states require the summons to contain some statement of the nature of plaintiff's cause of action,²¹ while the statutes of other states do not provide for it,²² or require it only in a summons issued from an inferior court;²³ unless so required by statute, no such statement²⁴ need be

Rogers v. Miller, 5 Ill. 333. N. C. Merrill v. Barnard, 61 N. C. 569.

17. Ia.—Butcher v. Brand, 6 Iowa 235. N. C.—Merrill v. Barnard, 61 N. C. 569. Wis.—Porter v. Vandercook, 11 Wis. 70.

18. Ga.—American Bond. & Surety Co. v. Adams, 124 Ga. 510, 52 S. E. 622. Ind.—Morgan v. Woods, 33 Ind. 23. Ia.—Wooster v. Oliver, 4 Iowa 345. N. C.—Merrill v. Barnard, 61 N. C. 569. Wis.—Porter v. Vandercook, 11 Wis. 70.

19. De Tar v. Boone, 34 Iowa 488; Des Moines Branch Bank v. Van, 12 Iowa 523; Merrill v. Barnard, 61 N. C. 569.

20. Parsons v. Hill, 15 App. Cas. (D. C.) 532, 541; Brigham v. Este, 2 Pick. (Mass.) 420.

[a] Such process as attaches the goods or body of defendant should give notice of the demand made upon him. Brigham v. Este, 2 Pick. (Mass.) 420.

21. Ark.—Renner v. Reed, 3 Ark. 339. Mont.—Sawyer v. Robertson, 11 Mont. 416, 28 Pac. 456. N. H.—Stoddard v. Cockran, 6 N. H. 160. Tex. Hinz v. Kempner, 82 Tex. 617, 18 S. W. 659; Loungeway v. Hale, 73 Tex. 495, 11 S. W. 537. Wash.—De Corvet v. Dolan, 7 Wash. 365, 35 Pac. 72.

See *infra*, IV, M.

[a] The *ad damnum* (1) should be shown in the process (Fla.—Campbell v. Chaffee, 6 Fla. 724. Mass.—Cragin v. Warfield, 13 Mete. 215. Miss.—Foster v. Collins, 5 Smed. & M. 259. N. H. Putney v. Cram, 5 N. H. 174. Ohio. Stone v. Cordell, 1 Ohio Dec. [Reprint] 166), but (2) omission or error may be cured by an amendment (Conn. Sanford v. Bacon, 75 Conn. 541, 54 Atl. 204. Fla.—Campbell v. Chaffee, 6 Fla. 724. Ill.—Thompson v. Turner, 22 Ill. 389. Me.—Hare v. Dean, 90 Me. 308, 38 Atl. 227. Mass.—Newzery v.

Beard, 226 Mass. 332, 115 N. E. 420; Laxton v. Hay, 211 Mass. 463, 98 N. E. 29, Ann. Cas. 1913B, 709; Cragin v. Warfield, 13 Mete. 215. Miss.—Foster v. Collins, 5 Smed. & M. 259. Ohio. Stone v. Cordell, 1 Ohio Dec. [Reprint] 166), (3) which may increase the amount claimed (Me.—Merrill v. Curtis, 57 Me. 152. Mass.—Graves v. New York & N. E. R. Co., 160 Mass. 402, 35 N. E. 851. N. Y.—Deane v. O'Brien, 13 Abb. Pr. 11. N. C.—Clayton v. Liverman, 29 N. C. 92. R. I.—Quaglieri v. Venditti, 102 Atl. 177), or (4) reduce it. Converse v. Damariscotta Bank, 15 Me. 431; Hart v. Waitt, 3 Allen (Mass.) 532.

[b] In case of service by publication, the cause and general nature of the action must be stated. De Corvet v. Dolan, 7 Wash. 365, 35 Pac. 72.

22. Gulf, C. & S. F. R. Co. v. James, 48 Fed. 148, 1 C. C. A. 53; Stanquist v. Hebbard, 122 Cal. 268, 54 Pac. 841.

23. Ga.—Powell v. Alford, 113 Ga. 979, 39 S. E. 449. Neb.—Farmers' Banking & Loan Co. v. Mauck, 70 Neb. 586, 97 N. W. 835; German Ins. Co. v. Frederick, 57 Neb. 538, 77 N. W. 1106. N. C.—See Leathers v. Morris, 101 N. C. 184, 7 S. E. 783.

See 17 STANDARD PROC. 1013.

[a] Variance between cause stated and cause proved, see Powell v. Alford, 113 Ga. 979, 39 S. E. 449; and 17 STANDARD PROC. 75.

24. U. S.—Eddy v. Lafayette, 163 U. S. 456, 16 Sup. Ct. 1082, 41 L. ed. 225; Gulf, C. & S. F. Ry. Co. v. James, 48 Fed. 148, 1 C. C. A. 53. Cal.—Stanquist v. Hebbard, 122 Cal. 268, 54 Pac. 841. N. C.—Battle v. Baird, 118 N. C. 854, 21 S. E. 668.

[a] A statute necessarily implies that the nature or subject of the action should be given, by requiring that

made. Such statutes are usually mandatory,²⁵ and failure to observe them furnishes ground for abatement of the process,²⁶ or may even be considered insufficient to confer jurisdiction;²⁷ but they are sometimes merely directory.²⁸ A brief statement identifying the matter to be litigated is all that is usually required,²⁹ and this statement may be general.³⁰ The defendant may be referred to an accompanying

the summons briefly state the substance of the remedy sought. *Moody v. Taylor*, 12 Iowa 71.

[b] "While it might be a convenience to a defendant to be able to ascertain from the face of the summons the nature of the action brought against him, yet, being a convenience merely, the legislature has the right to deprive him of it." *Stanquist v. Hebard*, 122 Cal. 268, 54 Pac. 841.

25. **Colo.**—*Smith v. Aurich*, 6 Colo. 388; *Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231. **N. H.**—*Colby v. Dow*, 18 N. H. 557. **N. Y.**—*Silkman v. Boiger*, 4 E. D. Smith 236; *Cooper v. Chamberlain*, 2 Code Rep. 142. **N. C.** *Leathers v. Morris*, 101 N. C. 184, 7 S. E. 783. **Tex.**—*Pruitt v. State*, 92 Tex. 434, 49 S. W. 366; *Carlton v. Mayner*, 47 Tex. Civ. App. 47, 103 S. W. 411. **Can.**—*Boyle v. Victoria Yukon Trading Co.*, 8 Brit. Col. 352.

26. **Ala.**—*Johnson v. Perry*, 4 Stew. & P. 45. **Ark.**—*Renner v. Reed*, 3 Ark. 339. **Mass.**—*Rathbone v. Rathbone*, 5 Pick. 221; *Brigham v. Este*, 2 Pick. 420. **N. H.**—*Colby v. Dow*, 18 N. H. 557.

[a] Summons should be quashed, on motion, for failure to advise defendant of the nature of the claim against him. *Moody v. Taylor*, 12 Iowa 71.

27. **Cal.**—*People v. Greene*, 52 Cal. 577. **Colo.**—*Atchison, T. & S. F. Ry. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512. **N. Y.**—*Silkman v. Boiger*, 4 E. D. Smith 236. **N. C.**—*Leathers v. Morris*, 101 N. C. 184, 7 S. E. 783.

[a] An inadequate statement is not fatal. *Rich v. Collins*, 12 Colo. App. 511, 56 Pac. 207.

[b] In inferior court where pleadings are oral, service of summons which does not contain such statement, confers jurisdiction. *Johnstone v. Weibel*, 131 App. Div. 166, 115 N. Y. Supp. 255. See 17 STANDARD PROC. 1013, 1014, note 13 [b].

28. *Love v. Southern R. Co.*, 108 Tenn. 104, 121, 65 S. W. 475, 55 L. R. A. 471.

29. **Cal.**—*Bewick v. Muir*, 83 Cal.

368, 23 Pac. 389. **Colo.**—*Tabor v. Goss & Phillips Mfg. Co.*, 11 Colo. 419, 424, 18 Pac. 537; *Smith v. Aurich*, 6 Colo. 388; *Barndollar v. Patton*, 5 Colo. 46; *Rich v. Collins*, 12 Colo. App. 511, 56 Pac. 207. **Ia.**—*Moody v. Taylor*, 12 Iowa 71. **Ohio.**—*Walke v. Bank of Circleville*, 15 Ohio 288. **Tex.** *Blake v. Vesey* (Tex. Civ. App.), 143 S. W. 221.

[a] It should show origin of claim, whether it arose out of a tort or contract. *Moody v. Taylor*, 12 Iowa 71.

[b] The statement need not be specific as a bill of particulars. *Walke v. Bank of Circleville*, 15 Ohio 288.

[c] Where there are several defendants, each must be notified of the character of the demand against himself. *Miles v. Kinney* (Tex.), 8 S. W. 542.

[d] For material variance (1) between the writ and declaration, the process must abate on objection, where the statute requires it to give the information. *Stoddard v. Cockran*, 6 N. H. 160. (2) But a slight variance will not furnish ground to quash. *Hickman v. Chambers*, 10 Iowa 301.

30. **Ark.**—*Neeley v. Robinson*, 19 Ark. 253. **Cal.**—*People v. Greene*, 52 Cal. 577. **Ia.**—*Davis v. Burt*, 7 Iowa 56; *Harkins v. Edwards*, 1 Iowa 296. **Md.**—*Ritter v. Offutt*, 40 Md. 207. **Neb.**—*McPherson v. First Nat. Bank*, 12 Neb. 202, 10 N. W. 707. **N. J.** *Brown v. Hoy*, 16 N. J. L. 157. **N. C.** See *Leathers v. Morris*, 101 N. C. 184, 7 S. E. 783. **R. I.**—*Slocumb v. Powers*, 10 R. I. 255. **Tex.**—*Miles v. Kinney*, 8 S. W. 542; *Pipkin v. Kaufman*, 62 Tex. 545. **Wash.**—*De Corvet v. Dolan*, 7 Wash. 365, 35 Pac. 72.

[a] Details Are Not Necessary. *Harkins v. Edwards*, 1 Iowa 296; *McAnally v. Vickry* (Tex. Civ. App.), 79 S. W. 857.

[b] The general nature of the claim must be correctly given. *Carlton v. Magner*, 47 Tex. Civ. App. 47, 103 S. W. 411.

[c] In Justice Court.—A "suit by summons is rather by way of hint or

copy of the complaint for an amplification of the statements,³¹ or even to supply the lack of such a statement.³² A defective statement is amendable, if jurisdiction has been acquired.³³

H. CONSEQUENCES OF DEFAULT.—Many states have statutes requiring the summons to state the relief demanded by the plaintiff,³⁴ and the amount for which judgment will be taken,³⁵ or whatever other consequence will result from a default on the part of the defendant.³⁶ Though the omission of these recitals is not generally fatal to jurisdiction,³⁷ yet these statutes being mandatory,³⁸ failure to comply with

suggestion, than by way of full and explicit declaration." *Kleckley v. Leyden*, 63 Ga. 215. But see 17 *STANDARD PROC.* 1014.

31. **U. S.**—*Swift v. Meyers*, 37 Fed. 37, 40, 13 Sawy. 583. **Cal.**—*King v. Blood*, 41 Cal. 314. **Colo.**—*Sage Inv. Co. v. Haley*, 59 Colo. 504, 149 Pac. 437; *Burkhardt v. Haycox*, 19 Colo. 339, 35 Pac. 730; *Griffing v. Smith*, 26 Colo. App. 220, 142 Pac. 202. **Ore.**—*First Nat. Bank v. Rusk*, 64 Ore. 35, 127 Pac. 780, 129 Pac. 121, 44 L. R. A. (N. S.) 138. **Tex.**—*Old Alcalde Oil Co. v. Ludgate* (Tex. Civ. App.), 85 S. W. 453.

[a] **Reference to the complaint** (1) does not cure an expression wholly devoid of advice, where a copy of complaint is not required to be served with the writ. *Atchison, T. & S. F. Ry. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512; *Smith v. Aurich*, 6 Colo. 388. Though (2) if the recitals in the summons do not fully inform the defendant of the nature of the action, it is his duty to appear and ascertain these facts. *Freeman v. Paul*, 105 Ind. 451, 5 N. E. 754. See also *Bewick v. Muir*, 83 Cal. 368, 23 Pac. 389.

32. **Colo.**—*Swem v. Newell*, 19 Colo. 397, 35 Pac. 734. **Ore.**—*First Nat. Bank v. Rusk*, 64 Ore. 35, 127 Pac. 780, 129 Pac. 121, 44 L. R. A. (N. S.) 138. **Tex.**—*El Paso & Southwestern Co. v. Hall* (Tex. Civ. App.), 156 S. W. 356.

33. **Cal.**—*Polock v. Hunt*, 2 Cal. 193. **Fla.**—*Campbell v. Chaffee*, 6 Fla. 724. **Ill.**—*Kagay v. School Trustees*, 68 Ill. 75. **Ind.**—*State v. Hood*, 6 Blackf. 260. **N. C.**—*Leathers v. Morris*, 101 N. C. 184, 7 S. E. 783.

34. **U. S.**—*United States v. Turner*, 50 Fed. 734. **Colo.**—*Burkhardt v. Haycox*, 19 Colo. 339, 35 Pac. 730; *Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231. **Ia.**—*Moody v. Taylor*, 12 Iowa 71. **Minn.**—*Hotchkiss v. Cutting*, 14 Minn. 537.

35. **Cal.**—*Behlow v. Shorb*, 91 Cal. 141, 27 Pac. 546. **Colo.**—*Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231. **Ia.**—*Moody v. Taylor*, 12 Iowa 71. **Kan.**—*Dusenberry v. Bennett*, 7 Kan. App. 123, 53 Pac. 82. **Miss.**—*Foster v. Collins*, 5 Smed. & M. 259. **Neb.**—*Crowell v. Galloway*, 3 Neb. 215. **Wis.**—*Gundry v. Whittlesey*, 19 Wis. 211.

36. **U. S.**—*Ammons v. Brunswick-Balke-Collender Co.*, 141 Fed. 570, 72 C. C. A. 614. **Ia.**—*McKee v. Harris*, 1 Iowa 364. **Minn.**—*White v. Iltis*, 24 Minn. 43. **Nev.**—*Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. **Utah.**—*Miller v. Zeigler*, 3 Utah 17, 5 Pac. 518.

[a] **Published notice to delinquent taxpayers** which fails to give the warning specified by statute, will not support a judgment for sale of the land. *Charles v. Waugh*, 35 Ill. 315. But see *Hobson v. Ewan*, 62 Ill. 146, 152; *Gundry v. Whittlesey*, 19 Wis. 211.

37. **U. S.**—*Ammons v. Brunswick-Balke-Collender Co.*, 141 Fed. 570, 72 C. C. A. 614; *Chamberlain v. Bittersohn*, 48 Fed. 42. **Cal.**—*People v. Dodge*, 104 Cal. 487, 491, 38 Pac. 203; *Clark v. Palmer*, 90 Cal. 504, 27 Pac. 375; *Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838. **Idaho.**—*Snake River Val. Irr. Dist. v. Stevens*, 18 Idaho 541, 110 Pac. 1033; *Harpold v. Doyle*, 16 Idaho 671, 102 Pac. 158. **Ind.**—*Freeman v. Paul*, 105 Ind. 451, 5 N. E. 754. **Kan.**—*Tootle v. Ellis*, 63 Kan. 422, 65 Pac. 675, 88 Am. St. Rep. 246; *Simpson v. Rice*, 43 Kan. 22, 22 Pac. 1019; *Dusenberry v. Bennett*, 7 Kan. App. 123, 53 Pac. 82. **Minn.**—*Hotchkiss v. Cutting*, 14 Minn. 537. **S. D.**—*Bradey v. Mueller*, 22 S. D. 534, 118 N. W. 1035; *Berry v. Bingaman*, 1 S. D. 525, 47 N. W. 825. **Utah.**—*Miller v. Zeigler*, 3 Utah 17, 5 Pac. 518.

38. **Cal.**—*Lyman v. Milton*, 44 Cal. 630. **Colo.**—*Atchison, T. & S. F. Ry. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512. **Mont.**—*Sawyer v. Robertson*, 11

them,³⁹ at least substantially,⁴⁰ renders the process subject to abatement; it is error also to adjudge, on default, relief different from that claimed in the process.⁴¹ Where there are two statutory modes of procedure upon default, depending upon the nature of the case,⁴² it has been held error to give notice of the use of the mode inapplicable in the particular case;⁴³ but the summons may recite both alternatives literally as prescribed by the statute,⁴⁴ or simply give the appropriate one.⁴⁵ If a copy of the complaint is delivered with the summons this may supply deficiencies in the process.⁴⁶

Mont. 416, 28 Pac. 456; *Dyas v. Keaton*, 3 Mont. 495. Nev.—*Sweeney v. Schultes*, 19 Nev. 53, 6 Pac. 44, 8 Pac. 768. Ore.—*Odell v. Campbell*, 9 Ore. 298.

39. U. S.—*Chamberlain v. Mensing*, 47 Fed. 202. Colo.—*Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231. Ia. *McKee v. Harris*, 1 Iowa 364. Kan. *Tootle v. Ellis*, 63 Kan. 422, 65 Pac. 675, 88 Am. St. Rep. 246. Mont.—*Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456. Nev.—*Sweeney v. Schultes*, 19 Nev. 53, 6 Pac. 44, 8 Pac. 768. N. Y. *Cobb v. Dunkin*, 19 How. Pr. 97; *Tuttle v. Smith*, 6 Abb. Pr. 329, 14 How. Pr. 395.

[a] Where Statute Is Imperative. "The insertion of this notice having been imperatively required, its omission necessarily is fatal." *Chamberlain v. Mensing*, 47 Fed. 202.

40. Cal.—*Behlow v. Shorb*, 91 Cal. 141, 27 Pac. 546; *Clark v. Palmer*, 90 Cal. 504, 2 Pac. 375. Colo.—*Burkhardt v. Haycox*, 19 Colo. 339, 35 Pac. 730; *Kimball v. Castogim*, 8 Colo. 525, 9 Pac. 488. Ga.—*Kleckley v. Leyden*, 63 Ga. 215. Minn.—*White v. Iltis*, 24 Minn. 43; *Hotehkiss v. Cutting*, 14 Minn. 537. Mont.—*Schuttler v. King*, 12 Mont. 149, 30 Pac. 25. Nev.—*Prezeau v. Spooner*, 22 Nev. 88, 35 Pac. 514; *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. N. Y.—*Brown v. Eaton*, 37 How. Pr. 325. Utah.—*Miller v. Zeigler*, 3 Utah 17, 5 Pac. 518. Wis. *Gundry v. Whittlesey*, 19 Wis. 211.

41. Ia.—*Blair v. Wolf*, 72 Iowa 246, 33 N. W. 669. Neb.—*Crowell v. Gallo-way*, 3 Neb. 215. Tex.—*Blackman v. Harry* (Tex. Civ. App.), 35 S. W. 290.

See 14 STANDARD PROC. 904, 905, and *infra*, IV, M.

[a] Where relief other than that mentioned in citation is obtained, judgment by default will be set aside on appeal. *Miles v. Kinney* (Tex.), 8 S. W. 542.

42. U. S.—*United States v. Turner*, 50 Fed. 734. Mont.—See *Schuttler v. King*, 12 Mont. 149, 30 Pac. 25. Nev.—*Sweeney v. Schultes*, 19 Nev. 53, 6 Pac. 44, 8 Pac. 768. N. Y.—*Maccoun v. New York Cent. & H. R. R. Co.*, 50 N. Y. 176.

[a] Actions for Recovery of Money and Other Actions.—"There were two modes of obtaining advantage of a defendant's default in not answering. In one class of cases, actions on contract for the recovery of money only, the plaintiff could take judgment; that is to say, no application to the court was necessary. . . . In all other cases he was required to ask of the court the relief he sought, and the court gave it or refused it at discretion." *Chamberlain v. Mensing*, 47 Fed. 202.

43. U. S.—*Chamberlain v. Mensing*, 47 Fed. 202. Nev.—*Sweeney v. Schultes*, 19 Nev. 53, 6 Pac. 44, 8 Pac. 768. Ore.—*Odell v. Campbell*, 9 Ore. 298.

Contra, *Clark v. Palmer*, 90 Cal. 504, 27 Pac. 375; *Maccoun v. New York Cent. & H. R. R. Co.*, 50 N. Y. 176. Compare *Schuttler v. King*, 12 Mont. 149, 30 Pac. 25.

44. *Standquist v. Hebbard*, 122 Cal. 268, 54 Pac. 841. See *Schuttler v. King*, 12 Mont. 149, 30 Pac. 25.

45. *United States v. Turner*, 50 Fed. 734; *Granger v. Sheriff*, 133 Cal. 416, 65 Pac. 873; *Standquist v. Hebbard*, 122 Cal. 268, 54 Pac. 841.

46. Colo.—See *Burkhardt v. Haycox*, 19 Colo. 339, 35 Pac. 730. Ia. *Blair v. Wolf*, 72 Iowa 246, 33 N. W. 669; *York v. Boardman*, 40 Iowa 57. Nev.—*Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. N. Y.—*Maccoun v. New York Cent. & H. R. R. Co.*, 50 N. Y. 176; *Hemson v. Decker*, 29 How. Pr. 385. S. D.—See *Berry v. Bingaman*, 1 S. D. 525, 47 N. W. 825. Tex. *Scaifi & Co. v. State*, 96 Tex. 559, 31 Tex. Civ. App. 671, 73 S. W. 441; *Old Alcalde Oil Co. v. Ludgate* (Tex.

I. TESTE. -- Though the statute⁴⁷ or constitution⁴⁸ require process to be attested in the name of the judge⁴⁹ or clerk⁵⁰ of the court, a defect in the teste is generally regarded as a mere irregularity⁵¹ and

Civ. App.), 85 S. W. 453. **Utah.**—Miller v. Zeigler, 3 Utah 17, 5 Pac. 518. **Wis.**—Gundry v. Whittlesey, 19 Wis. 211.

47. **Ark.**—Woolford v. Dugan, 2 Ark. 131, 35 Am. Dec. 52. **Ill.**—Hernandez v. Drake, 81 Ill. 34. **Tex.**—Caufield v. Jones, 18 Tex. Civ. App. 721, 45 S. W. 741.

48. **Ark.**—Powers v. Swigart, 8 Ark. 363. **Mass.**—Ripley v. Warren, 2 Pick. 592. **N. H.**—Reynolds v. Damrell, 19 N. H. 394. **N. C.**—Buchanan, Dunlap & Co. v. Kennon, 1 N. C. 530. **Tenn.**—Lyle v. Longley, 6 Baxt. 286. **Va.**—Hickam v. Larkey, 6 Gratt. (47 Va.) 210. **W. Va.**—Pendleton v. Smith, 1 W. Va. 16, 24, referring to the constitution of Virginia.

[a] "The attestation of writs required by the constitution, means the subscribing the name of the clerk to the process. Such has been the usage of clerks from the foundation of the government." Pendleton v. Smith, 1 W. Va. 16, 24.

49. **U. S.**—United States v. Turner, 50 Fed. 734. **Ga.**—Peck v. La Roche, 86 Ga. 314, 12 S. E. 638; Chappell v. Boyd, 56 Ga. 578; Brown v. Roberts, 19 Ga. 424. **Mich.**—Howerter v. Kelly, 23 Mich. 337. **Wis.**—Johnston v. Hamburger, 13 Wis. 175.

Must be signed by clerk, see *infra*, IV, J.

[a] If "there is any design to give authenticity and credit to legal process, by requiring an actual attestation of the chief, first, or senior justice of the court, the practical construction which has uniformly been put on this provision of the constitution has wholly defeated that object; for the ordinary process of the court never in fact bears the actual signature of the chief justice, but his name is printed into the blank writs before they are delivered out of the clerk's office. The teste of the writ is therefore in practice a mere matter of form." Parsons v. Swett, 32 N. H. 87, 64 Am. Dec. 352.

[b] Process issuing out of an inferior court bearing teste in the name of one of the justices is sufficient. Brown v. Roberts, 19 Ga. 424. See 17 STANDARD PROC. 1016.

50. **Ark.**—Woolford v. Dugan, 2 Ark. 131, 35 Am. Dec. 52. **Ia.**—East v. Parks, 4 G. Gr. 80. **Mo.**—Smith, Heddings & Co. v. Hackley, 44 Mo. App. 614. **N. C.**—Buchanan, Dunlap & Co. v. Kennon, 1 N. C. 530. **Ohio.**—Chapin v. Allison, 15 Ohio 566; Collins v. Baltimore & O. R. R. Co., 7 Ohio N. P. 270, 7 Ohio Dec. 445. **Tenn.**—Lyle v. Longley, 6 Baxt. 286. **Tex.**—Haley v. Greenwood & Co., 28 Tex. 680; Marshall v. Marshall (Tex. Civ. App.), 30 S. W. 578. **Va.**—Noell v. Noell, 93 Va. 433, 25 S. E. 242. **W. Va.**—Ambler v. Leach, 15 W. Va. 677.

51. **Ga.**—Jordan-Porterfield, 19 Ga. 139, 63 Am. Dec. 301. **Ill.**—Norton v. Dow, 10 Ill. 459. **Me.**—Converse v. Damariscotta Bank, 15 Me. 431. **Mass.**—Ripley v. Warren, 2 Pick. 592; Hawkes v. Inhab. of Kennebeck, 7 Mass. 461. **N. H.**—Reynolds v. Damrell, 19 N. H. 394. **S. C.**—City Council of Charleston v. Schmidt, 11 Rich. L. 343.

[a] **A Mere Matter of Form.**—"Now nothing can be more precisely mere matter of form than the teste of a writ, although by some unaccountable means it was thought important enough to be provided for in the constitution of the state." Ripley v. Warren, 2 Pick. (Mass.) 592.

[b] **Tested in Wrong Name.**—(1) If tested in name of clerk instead of judge writ may be quashed on motion seasonably made. Norton v. Dow, 10 Ill. 459. See also Buchanan, Dunlap & Co. v. Kennon, 1 N. C. 530. (2) Naming the wrong judge is an amendable defect. United States v. Turner, 50 Fed. 734. (3) A teste in the deputy's name, omitting the name of the clerk, is void under wording of some statutes (Wimbish v. Wofford, 33 Tex. 109), (4) but permissible under others. Farmers' Bank v. McGavock, 119 Va. 510, 89 S. E. 949.

[c] **Sufficiency of Attestation.**—(1) The words "witness my hand" preceding the signature of the clerk is a sufficient teste, without repeating the name in the body of the teste, where the statute requires the teste to be in the name of the clerk. East v. Parks, 4 G. Gr. (Iowa) 80; Chapin v. Allison, 15 Ohio 566. See also Lyle v. Longley, 6 Baxt. (Tenn.) 286, 292.

errors therein,⁵² or the omission of the teste or some part thereof,⁵³ are amendable defects. In a few states, however, it has been regarded as a matter of substance.⁵⁴ Statutes relating to the attestation of process issuing out of a court of record do not apply to such process as parties or attorneys are expressly authorized to issue.⁵⁵ Under the common law practice, the teste need not be of the date of the issuance of the writ.⁵⁶

(2) The attestation should refer to the seal and attest the seal over the clerk's signature. *Riggs v. Bagley*, 2 G. Gr. (Iowa) 383. (3) The precise word "tested" need not be used. *St. Louis, B. & M. Ry. Co. v. Hamilton* (Tex. Civ. App.), 163 S. W. 666.

52. *Ga.*—*Sapp v. Parrish*, 3 Ga. App. 234, 59 S. E. 821. *Tenn.*—*Perkins v. Woodfolk*, 8 Baxt. 480. *Tex.*—*Brack v. McMahan*, 61 Tex. 1.

53. *U. S.*—*United States v. Turner*, 50 Fed. 734. *Ga.*—*Atlantic Coast Line R. Co. v. Whitney*, 13 Ga. App. 345, 79 S. E. 181; *Sapp v. Parrish*, 3 Ga. App. 234, 59 S. E. 821. *Me.*—*Converse v. Damariscotta Bank*, 15 Me. 431. *Mass.*—*Ripley v. Warren*, 2 Pick. 592. *N. H.*—*Parsons v. Swett*, 32 N. H. 87, 64 Am. Dec. 352; *Reynolds v. Damrell*, 19 N. H. 394. *N. Y.*—*Douglas v. Haberstro*, 88 N. Y. 611; *People ex rel. Brown v. Van Hoesen*, 62 How. Pr. 76; *Brink v. Fulton*, 1 Cow. 41. *Tex.*—*Seawell v. Lowery*, 16 Tex. 47.

[a] The only use of the teste "seems to be to give character and dignity to the process; but in that respect it is not matter of substance, but of the purest form, deficiencies in which are not only open to be supplied and amended, but are of the class of which courts will take no notice unless they are objected to, and promptly, by the other party." *Reynolds v. Damrell*, 19 N. H. 394.

54. *Ia.*—See *Riggs v. Bagley*, 2 G. Gr. 383. *N. C.*—*Buchanan, Dunlap & Co. v. Kennon*, 1 N. C. 530. *Tex.*—*Wimbish v. Wofford*, 33 Tex. 109.

[a] "This is one of the essential requirements to a valid citation." *Caulfield v. Jones*, 18 Tex. Civ. App. 721, 45 S. W. 741.

[b] "This attestation is so substantiated and material a part of each and every writ, as to render all those abatable which do not contain such attestation." *Buchanan, Dunlap & Co. v. Kennon*, 1 N. C. 530.

55. *Gilmer v. Bird*, 15 Fla. 410;

Johnston v. Hamburger, 13 Wis. 175; *Porter v. Vandercook*, 11 Wis. 70.

56. *Del.*—*Potter v. White*, 3 Harr. 329. *Ill.*—*Brown v. Parker*, 15 Ill. 307. *Miss.*—*Hurst v. Strong*, 1 How. 123. *N. J.*—*Allen v. Smith*, 12 N. J. L. 159. *S. C.*—*City Council of Charleston v. Schmidt*, 11 Rich. L. 343. *Tenn.*—*Lyle v. Longley*, 6 Baxt. 286, 292. *Eng.*—*Hanway v. Merrey*, 1 Vent. 28, 86 Eng. Reprint 20.

[a] "The day mentioned in the teste-clause (1) is the date of the writ, and not the day expressed in the memorandum of the prothonotary at the foot of the writ, showing the actual time of his issuing and signing it." *Potter v. White*, 3 Harr. (Del.) 329. (2) "The teste of our process of capias or summons, on some day of a term, sometimes the last, but perhaps more usually the first day, is a mere fiction or form of law, and I think I might venture to add, without having now very satisfactory reasons to sustain it. Nothing, however, is more wide of reality than that it shows the day on which the writ was in truth sued out or the suit actually commenced." *Allen v. Smith*, 12 N. J. L. 159. (3) Process may bear test before the accrual of the cause of action. *City Council of Charleston v. Schmidt*, 11 Rich. L. (S. C.) 343. See *Comyn's Digest*, "Action," 222.

[b] Original process to bring in a party to answer to an action, when required by statute to be made returnable to the term next succeeding that of which it bears test, could not be tested of a term after it issues, but should bear teste of the preceding term. *Hurst v. Strong*, 1 How. (Miss.) 123.

[c] The Writ Must Bear Teste in Term Time.—(1) "A writ may be sued out in term time or vacation, but must bear teste on some day in term, not being Sunday. If tested in vacation, it seems the writ is void, although the sheriff is justifiable in serving it," *Potter v. White*, 3 Harr.

J. SIGNATURE.—Statutes usually require process to be signed by the clerk of the court.⁵⁷ As the act is ministerial,⁵⁸ it may usually be done by a deputy,⁵⁹ who must sign the principal clerk's name, as a general rule,⁶⁰ though where the language of the statute is sufficiently broad, the signature of the deputy only has been held good.⁶¹

(Del.) 329. (2) "If sued out in vacation, it must be tested as the previous term." **Del.**—Potter v. White, 3 Harr. 329. **N. J.**—Allen v. Smith, 12 N. J. L. 159. **Tenn.**—Lyle v. Longley, 6 Baxt. 286. **Wis.**—Quarles v. Robinson, 2 Pin. 97, 1 Chand. 29.

[d] By "statute, all process must bear teste of the day on which it is issued." Brown v. Parker, 15 Ill 307.

57. **U. S.**—Dwight v. Merritt, 4 Fed. 614, 18 Blatchf. 305, 59 How. Pr. 320; Peaslee v. Haberstro, 15 Blatchf. 472, 19 Fed. Cas. No. 10,884. **Cal.**—Ligare v. California So. R. Co., 76 Cal. 610, 18 Pac. 777. **Ill.**—Hernandez v. Drake, 81 Ill. 34. **La.**—Anderson v. Joilett, 14 La. Ann. 614. **Mass.**—Austin v. Lamar Fire Ins. Co., 108 Mass. 338. **Mont.**—Sharman v. Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645. **N. H.**—Reynolds v. Damrell, 19 N. H. 394. **Ohio.**—Collins v. Baltimore & O. R. R. Co., 7 Ohio Dec. 445, 7 Ohio N. P. 270. **S. C.**—Smith v. Affanasieffe, 2 Rich. 334. **Tex.**—Caufield v. Jones, 18 Tex. Civ. App. 721, 45 S. W. 741.

[a] The statutory provision (1) that process shall be attested by the clerk means that the clerk shall officially sign process issued by him. **Caufield v. Jones**, 18 Tex. Civ. App. 721, 45 S. W. 741. (2) "A citation must be signed by the clerk who delivers it, and express his quality." **Anderson v. Joilett**, 14 La. Ann. 614.

[b] Though tested in the name of the judge (1) process should be signed by the clerk. **Ind.**—Wibright v. Wise, 4 Blackf. 137. **Mass.**—Austin v. Lamar Ins. Co., 108 Mass. 338. **N. H.**—Parsons v. Swett, 32 N. H. 87, 64 Am. Dec. 352. **Ohio.**—Walke v. Bank of Circleville, 15 Ohio 288. (2) At common law the "writ would have to be tested in the name of the President Judge, and then be sealed with the seal of the court, and officially signed by the clerk. The clerk is the keeper of the seal of the court at common law; and when he seals process, he must officially sign it to show that it

was sealed at the proper mint of justice." **Wibright v. Wise**, 4 Blackf. (Ind.) 137. See *infra*, this section.

58. **Windham v. Hampton**, 1 Root (Conn.) 175. See *supra*, III, A.

59. **Ark.**—Powers v. Swigart, 8 Ark. 363. **Ga.**—Dever v. Akin, 40 Ga. 423, 429; **Goodwyn v. Goodwyn**, 11 Ga. 178. **Mich.**—Calender v. Olcott, 1 Mich. 344. **Pa.**—Harden v. Roberts, 9 Pa. Co. Ct. 160.

[a] **Who May Sign Process.**—It may be signed by the clerk "in person, or by a lawfully appointed deputy, or by any other person who shall sign the writ, with his name, in his presence, and under his direction." **Powers v. Swigart**, 8 Ark. 363.

[b] **Summons issued by justice of the peace** must be signed by such justice. **Colborn v. Booth**, 41 W. Va. 289, 23 S. E. 556. See 17 STANDARD PROC. 1016.

60. **Miss.**—Felder v. Meredith, Walk. 447. **Tex.**—Wimbish v. Wofford, 33 Tex. 109. **W. Va.**—Pendleton v. Smith, 1 W. Va. 16, considering the Virginia constitution.

[a] **Deputy Must Act in Name of Principal.**—"Whatever duties the deputy may discharge for his principal, must be in the name of the principal." Process "must be attested by the clerk in his own proper name; or it may be done by his deputy placing the name of his principal to the process;" that is the attestation of writs required by the constitution (of Virginia). **Pendleton v. Smith**, 1 W. Va. 16.

61. **Mich.**—Calender v. Olcott, 1 Mich. 344. **Ohio.**—Chapin v. Allison, 15 Ohio 566. **Pa.**—Harden v. Roberts, 9 Pa. Co. Ct. 160. **Vt.**—Johnson v. Nash, 20 Vt. 40.

[a] **Under a statute reading:** "the deputy may in all things, and with the like effect, perform all the duties of such clerk" in the latter's absence, the deputy's signature as "deputy clerk, and in the absence of the clerk," was held sufficient on a summons. **Calender v. Olcott**, 1 Mich. 344.

The entire failure of a clerk to sign a process, when required by statute, has been held to render the process void,⁶² while elsewhere the defect is regarded as simply rendering the writ voidable⁶³ upon proper objection,⁶⁴ and is curable by amendment.⁶⁵ Formerly, if a writ bore the impress of the proper seal, the signature was not important,⁶⁶

[b] **Deputy's signature sufficient** (1) where the writ bears the proper test, though more technically correct for the deputy to sign for his principal. *Walke v. Bank of Circleville*, 15 Ohio 288. (2) "Whether he sign the name of his principal, or his own as deputy for his principal, is mere matter of form. His act in signing, in either form, is the act of his principal." *Harden v. Roberts*, 9 Pa. Co. Ct. 160.

62. U. S.—*Dwight v. Merritt*, 4 Fed. 614, 18 Blatchf. 305, 59 How. Pr. 320; *Peaslee v. Haberstro*, 15 Blatchf. 472, 19 Fed. Cas. No. 10,884. **Ala.**—*Sheppard v. Powers & Bros.*, 50 Ala. 377. **Ark.**—*Powers v. Swigart*, 8 Ark. 363. **Cal.**—*Merguire v. O'Donnell*, 139 Cal. 6, 72 Pac. 337, 96 Am. St. Rep. 91; *O'Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389. **Ga.**—*Rawles v. Jackson*, 104 Ga. 593, 30 S. E. 820, 69 Am. St. Rep. 185; *Brown v. Way*, 33 Ga. 190. **Ill.** *Wooters v. Joseph*, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355; *Sidwell v. Schumacher*, 99 Ill. 426; *Hernandez v. Drake*, 81 Ill. 34. **Mont.**—*Sharman v. Huot*, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645. **Ore.**—*Willamette R. E. Co. v. Hendrix*, 28 Ore. 485, 42 Pac. 514, 52 Am. St. Rep. 800. **S. C.** *Smith v. Affanassieffe*, 2 Rich. 334. **Tenn.**—*Wiley v. Bennett*, 9 Baxt. 581. **Tex.**—*Caufield v. Jones*, 18 Tex. Civ. App. 721, 45 S. W. 741.

[a] **A writ without the clerk's signature** is no more than a blank piece of paper. *Harper v. Turner*, 101 Tenn. 686, 50 S. W. 755; *Wiley v. Bennett*, 9 Baxt. (Tenn.) 581.

[b] **Necessity for Signature.**—(1) "Process is a mandatory precept, issuing from a court. . . . The mandate, without the authenticating signature, is no more 'process' than would be the signature without the preceding mandate." *Brown v. Way*, 33 Ga. 190. (2) "This is a serious omission, and has been held to render the writ absolutely void. . . . At all events the omission of the clerk's signature was such an irregularity or de-

fect as to furnish ground for a motion to quash." *Smith, Heddins & Co. v. Hackley*, 44 Mo. App. 614.

[c] **Where defendants had notice of the suit by ancillary proceedings** therein, and the case remained on the docket two years before default judgment was taken, they waived the objection that the summons was not properly signed by the clerk. *Baker v. Swift*, 87 Ala. 530, 6 So. 153.

63. Ark.—*Jett v. Shinn*, 47 Ark. 373, 1 S. W. 693. **Kan.**—*Taylor v. Buck*, 61 Kan. 694, 60 Pac. 736, 78 Am. St. Rep. 346. **Mass.**—*Austin v. Lamar Fire Ins. Co.*, 108 Mass. 338. **Minn.**—*Herriek v. Morrill*, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841. **Mo.**—See also *Smith, Heddins & Co. v. Hackley*, 44 Mo. App. 614. **N. H.** *Reynolds v. Damrell*, 19 N. H. 394. **N. Y.**—*Hill v. Haynes*, 54 N. Y. 153. **Vt.**—*Huntley v. Henry*, 37 Vt. 165. **W. Va.**—*Ambler v. Leach*, 15 W. Va. 677.

[a] **A writ not signed by the clerk** is very defective but it is not a nullity. *Ambler v. Leach*, 15 W. Va. 677, 696.

64. Conn.—*Windham v. Hampton*, 1 Root 175. **Kan.**—*Lindsay v. Board of Comrs.*, 56 Kan. 630, 44 Pac. 603. **Minn.** *Herriek v. Morrill*, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841. **N. H.** *Nichols v. Smith*, 26 N. H. 298. **Vt.** *Andrus v. Carroll*, 35 Vt. 102. **W. Va.** *Ambler v. Leach*, 15 W. Va. 677.

See *infra*, VIII, A, 3.

[a] **After acceptance of service**, and the giving of security, the objection that process was unsigned comes too late. *Benson v. Carrier*, 28 S. C. 119, 5 S. E. 272; *Wicker v. Pope*, 6 Rich. (S. C.) 366.

65. Mass.—*Austin v. Lamar Fire Ins. Co.*, 108 Mass. 338. **N. H.**—*Reynolds v. Damrell*, 19 N. H. 394. **N. Y.** *Hill v. Haynes*, 54 N. Y. 153. **N. C.** *Henderson v. Graham*, 84 N. C. 496.

66. Cal.—*O'Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389. **N. C.**—*Henderson v. Graham*, 84 N. C. 496. **Pa.**—*Benjamin v. Armstrong*, 2 Serg. & R. 392; *McCormick*

but it must now generally appear to complete the authentication,⁶⁷ at least somewhere on the writ.⁶⁸ Even a signed endorsement on the back of the process has been held a sufficient authentication in some instances.⁶⁹ A process signed and attested by a person not authorized by law is void;⁷⁰ the proper officer, however, may authorize his

v. Meason, 1 Serg. & R. 92; *Harden v. Roberts*, 9 Pa. Co. Ct. 160.

As to seal, see *infra*, IV, K.

[a] "Under the ancient practice, where the seal of the court was in the custody of a particular officer and sedulously guarded, and when seals were habitually used for the purpose of authenticating instruments, a seal alone may have been sufficient to authenticate an execution. . . . But in modern times the seal has lost its significance, and cannot be regarded as a sufficient authentication without the signature of the officer affixing it." *O'Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389.

67. U. S.—*Dwight v. Merritt*, 4 Fed. 614, 18 Blatchf. 305, 59 How. Pr. 320. Cal.—*O'Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389. Ind.—*Wibright v. Wise*, 4 Blackf. 137. Ia.—*Riggs v. Bagley*, 2 G. Gr. 383. Mont.—*Sharman v. Huot*, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

[a] Without signature or seal, "this paper is no process" and is not amendable. *Dwight v. Merritt*, 4 Fed. 614, 18 Blatchf. 305, 59 How. Pr. 320.

[b] A warrant of attachment "not signed by the clerk nor sealed with the seal of the court, or otherwise," is void. *O'Farrell v. Heard*, 22 Minn. 189, 193.

[c] Though the seal proves itself, "it does not of itself prove that it was affixed by the proper officer, or by authority. The clerk is the keeper of the seal; he alone is authorized to use it; and upon affixing the seal officially to any process, he should attest the fact over his own signature." *Riggs v. Bagley*, 2 G. Gr. (Iowa) 383, quoted in *Sharman v. Huot*, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

68. *Botts v. Williams*, 5 J. J. Marsh. (Ky.) 62.

[a] Where the teste is in the clerk's handwriting (1), and contains his name and official character, that is a sufficient signing and a sufficient

teste. *Wibright v. Wise*, 4 Blackf. (Ind.) 137. (2) "Witness T. H. clerk of our said court" if written by the clerk himself, or by a deputy, is sufficient, without an actual subscription of the clerk's name thereunder. *Botts v. Williams*, 5 J. J. Marsh. (Ky.) 62.

69. *Baker v. Swift*, 87 Ala. 530, 6 So. 153; *Nichols v. Taylor*, 6 Mon. (Ky.) 325.

[a] A signed endorsement, which the statute requires to be placed upon a summons, "in the absence of any objection raised in the court below, furnishes sufficient evidence that the summons was issued by the clerk." *Baker v. Swift & Son*, 87 Ala. 530, 6 So. 153.

[b] When the statute does not require the clerk's signature to the endorsement, "the mere fact that his name is appended thereto does not supply the omission nor give force to the unsigned summons." *Lindsay v. Board of Comrs.*, 56 Kan. 630, 44 Pac. 603.

[c] Where the statute imports distinct and separate acts in the signing of two certificates, separated by a space, on the same writ, the signing of one alone is not a sufficient authentication of both. *Andrus v. Carroll*, 35 Vt. 102.

70. U. S.—*Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. 252. Cal.—*O'Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389. Colo.—*McNevins v. McNevins*, 28 Colo. 245, 64 Pac. 199. Ind.—*Cox v. Matthews*, 17 Ind. 367, 373. La.—*Anderson v. Joilet*, 14 La. Ann. 614. Minn.—*Wheaton v. Thompson*, 20 Minn. 196, 199. N. Y.—*Hill v. Haynes*, 54 N. Y. 153.

[a] A printed form, in name of former clerk, when used by a deputy, is not subject to amendment. *O'Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389.

[b] It is ground for abatement, if the writ is attested by one not the clerk. *Buchanan, Dunlap & Co. v. Kennon*, 1 N. C. 530.

[c] Officer Disqualified Because of

name to be signed to a process by one not a regular deputy.⁷¹ The signature should show the official character of the officer,⁷² but mere technical objections to the form and manner of signing are generally disregarded.⁷³ Thus the typewritten or printed signature of the clerk is generally regarded as sufficient.⁷⁴

By the statutes of some states, the summons and other forms of

Interest.—(1) A magistrate authorized to sign and issue writs cannot sign such process in his own case. *Doolittle v. Clark*, 47 Conn. 316. (2) A magistrate is not disqualified to sign a writ because he is an inhabitant of a town and one of the plaintiffs in a suit by said town. *Windham v. Hampton*, 1 Root (Conn.) 175. (3) "It is apparent that the legislature considered the subject of signing and issuing process in civil actions as one of consequence to the citizen. It is one of the processes of law by which a man may be deprived of his liberty and his property, and hence it is carefully guarded. It is not to be issued by citizens indiscriminately nor by any one except an officer of the state." *Doolittle v. Clark*, 47 Conn. 316.

71. **Ark.**—*Powers v. Swigart*, 8 Ark. 363. **Ky.**—*Louisville & N. R. Co. v. Banks*, 17 Ky. L. Rep. 1065, 33 S. W. 627. **Me.**—*Richardson v. Bachelder*, 19 Me. 82. **Mass.**—*Stevens v. Ewer*, 2 Mete. 74. **Miss.**—*Gamble v. Trahen*, 3 How. 32. **S. C.**—*Miller v. Hall*, 1 Spear 1.

[a] **Must Be in Presence of the Officer.**—"A justice cannot confer upon any one authority to sign writs or other process with his name, in his absence, so as to make the process valid." *Powers v. Swigart*, 8 Ark. 363; *Nichols v. Smith*, 26 N. H. 298.

[b] "That the clerk's name was annexed by his order before service is to be presumed, and cannot be contested except by plea denying the fact." *Stevens v. Ewer*, 2 Mete. (Mass.) 74.

[c] **A signature affixed by an attorney, (1) under authority of the proper officer, being recognized and adopted by the latter, must be taken as having been duly signed by such officer.** *Richardson v. Bachelder*, 19 Me. 82. (2) But a practice adopted by a clerk of verbally authorizing practicing attorneys to fill up and sign writs in his name, thereafterwards recognizing them as valid, is illegal and not suf-

ficient to give validity to the writs. *Gardner v. Lane*, 14 N. C. 53.

[d] **The clerk may adopt the act of one not a deputy in signing his name, so as to make the act his own and valid.** *Louisville & N. R. Co. v. Banks*, 17 Ky. L. Rep. 1065, 33 S. W. 627.

72. **La.**—*Anderson v. Joilet*, 14 La. Ann. 614. **Mass.**—*Nash v. Coffey*, 105 Mass. 341. **Tex.**—*Caufield v. Jones*, 18 Tex. Civ. App. 721, 45 S. W. 741.

[a] **Failure to designate the official character of a magistrate signing a notice to a creditor in a proceeding for the relief of a poor debtor, rendered the discharge void.** *Nash v. Coffey*, 105 Mass. 341; *Carter v. Clohecy*, 100 Mass. 299.

73. See *infra*, this note.

[a] **Initials Instead of Christian Name.**—"The signature of the clerk to the summons, by using the initial for his first name, was sufficient." *Bishop Hill Colony v. Edgerton*, 26 Ill. 54.

[b] **Where a clerk misdescribed himself as a deputy, in signing a writ, an amendment correcting the description of the capacity in which he signed, is proper.** *Johnson v. Nash*, 20 Vt. 40.

74. **Cal.**—*Ligare v. California So. Ry. Co.*, 76 Cal. 610, 18 Pac. 777; *Williams v. McDonald*, 58 Cal. 527. **N. C.**—See *Henderson v. Graham*, 84 N. C. 496. **Ohio.**—*Littleton v. Marshall*, 8 Ohio Dec. 672. **Tex.**—See also *McCauley v. Western Nat. Bank* (Tex. Civ. App.), 173 S. W. 1000. **Wash.**—*Degginger v. Martin*, 48 Wash. 1, 92 Pac. 674.

But see *Smith, Heddins & Co. v. Hackley*, 44 Mo. App. 614.

[a] **Affixing the seal is a sufficient adoption of the printed signature.** *Ligare v. California So. Ry. Co.*, 76 Cal. 610, 18 Pac. 777.

[b] **The signature of the deputy with a "per" after the printed clerk's signature proves the adoption.** *Littleton v. Marshall*, 8 Ohio Dec. 672.

notice may be signed by the parties or their attorneys,⁷⁵ and such notices and process are not considered as embraced in constitutional or statutory provisions for the signature of the clerk upon process.⁷⁶ On such notice the form of the signature is not important if it notifies the defendant of the name and address of the party issuing it.⁷⁷ The same general rules obtain with regard to signing by agent as apply to the clerk:⁷⁸ likewise the names of attorneys may be printed instead of written.⁷⁹ Defects in the subscription of such notices are

75. N. Y.—*Jones v. Conlon*, 48 Misc. 172, 95 N. Y. Supp. 255. **Ore.**—*White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726. **S. C.**—*Genobles v. West*, 23 S. C. 154, 168. **Wis.**—*Mezchen v. More*, 54 Wis. 214, 11 N. W. 534.

[a] **In the Federal Court.**—Though the state law permits the summons to be issued by the plaintiff or his attorney, this cannot be done in suits in the federal court, where the summons and all writs and process are issued by the clerk under the seal of the court. *Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. 252.

[b] **Where several plaintiffs unite in one action**, but one attorney should sign a summons for all, under a statute which requires that "the summons must be subscribed by the plaintiff's attorney who must add to his signature his office address," so that a copy of the answer may be served upon him. *Jones v. Conlon*, 48 Misc. 172, 95 N. Y. Supp. 255.

[c] **The statute contemplates an attorney at law not a mere agent.** *Dixey v. Pollock*, 8 Cal. 570; *Weir v. Slocum*, 3 How. Pr. (N. Y.) 397, 1 Code Rep. 105.

[d] **Summons subscribed by plaintiff alone** is not valid under a statute requiring the signature of plaintiff's attorney. *Jaworower v. Rovere*, 162 N. Y. Supp. 1075.

76. Comet Consol. Min. Co. v. Frost, 15 Colo. 310, 25 Pac. 506; *Rand v. Pantagraph Co.*, 1 Colo. App. 270, 28 Pac. 661; *Johnston v. Hamburger*, 13 Wis. 175.

[a] **Notice for published service** is not "process" within the constitution, and need not be signed by the clerk. *McKenna v. Cooper*, 79 Kan. 847, 101 Pac. 662.

77. People's Nat. Bank v. Ring, 95 Neb. 376, 145 N. W. 833; *Bank of Geneva v. Rice*, 12 Wend. (N. Y.) 424; *Sluyter v. Smith*, 2 Bosw. (N. Y.) 673.

[a] **A summons signed by the firm name** of plaintiffs' attorneys, instead of by an attorney in his own proper name is properly signed. *People's Nat. Bank v. Ring*, 95 Neb. 376, 145 N. W. 833; *Bank of Geneva v. Rice*, 12 Wend. (N. Y.) 424.

[b] **"New York City"** as an address is at most an irregularity, though no street number is given, *Sullivan v. Harney*, 53 Misc. 249, 103 N. Y. Supp. 177.

78. See *infra*, this note.

[a] **Attorneys' signatures** may be affixed by their clerks under general permission. *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62.

[b] **Plaintiff's name subscribed by his agent**, in his presence, at his express direction, is a sufficient subscription. *Hotchkiss v. Cutting*, 14 Minn. 537.

79. Cal.—*Hancock v. Bowman*, 49 Cal. 413. **Ind.**—*Hamilton v. State*, 103 Ind. 96, 2 N. E. 299, 53 Am. Rep. 491. **Ia.**—*Cummings v. Landes*, 140 Iowa 80, 117 N. W. 22. **Minn.**—*Herrick v. Morrill*, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841. **N. Y.**—*Barnard v. Heydrick*, 49 Barb. 62, 2 Abb. Pr. (N. S.) 47, 32 How. Pr. 97; *Mutual Life Ins. Co. v. Ross*, 10 Abb. Pr. 260, note; *New York v. Eisler*, 2 Civ. Proc. 125, 10 Daly 396. **N. D.**—*Hagen v. Gresby*, 34 N. D. 349, 159 N. W. 3, L. R. A. 1917B, 281. **Wis.**—*Dreutzer v. Smith*, 56 Wis. 292, 14 N. W. 465; *Mezchen v. More*, 54 Wis. 214, 11 N. W. 534.

[a] **"No more is exacted than that the name of plaintiff or that of his attorney be attached to the notice by any of the known methods of impressing the name on paper, whether this be in writing, printing or lithographing, provided it is done with the intention of signing or be adopted in issuing the original notice for service."** *Cummings v. Landes*, 140 Iowa 80, 117 N. W. 22.

amendable,⁸⁰ and even the omission to sign a summons is treated as a mere irregularity in some jurisdictions,⁸¹ though elsewhere it has also been held to render the summons invalid.⁸²

K. SEAL.⁸³—At common law a seal is necessary,⁸⁴ and it is quite generally required, upon process issuing from a court of record, by a statutory or constitutional provision therefor.⁸⁵ No seal is ordinarily

80. Ga.—*Tatum v. Allison*, 31 Ga. 337. N. Y.—*Wiggins v. Richmond*, 58 How. Pr. 376; *Sluyter v. Smith*, 2 Bosw. 673; *Hull v. Canandaigua E. L. & R. Co.*, 55 App. Div. 419, 66 N. Y. Supp. 865. Wis.—*Prentice v. Stefan*, 72 Wis. 151, 39 N. W. 364.

[a] If summons is signed by a non-resident attorney not authorized to practice, it may be amended by substituting the name of a resident attorney. *Prentice v. Stefan*, 72 Wis. 151, 39 N. W. 364.

81. *Lee v. Clark*, 53 Minn. 315, 55 N. W. 127; *Harvey v. Chicago & N. W. R. Co.*, 148 Wis. 391, 134 N. W. 839.

[a] The purpose of the requirement being (1) "that the defendant may know upon whom and at what place he may serve his answer and other papers in the action" (*Mezchen v. More*, 54 Wis. 214, 11 N. W. 534), (2) if the papers annexed to the summons and served with it show the attorney's name and address, the omission thereof from the process is supplied. *Harvey v. Chicago & N. W. R. Co.*, 148 Wis. 391, 134 N. W. 839.

[b] Failure to give address is not jurisdictional. *Wiggins v. Richmond*, 58 How. Pr. (N. Y.) 376; *Hull v. Canandaigua Elect. Light & R. Co.*, 55 App. Div. 419, 66 N. Y. Supp. 865; *Sullivan v. Harney*, 53 Misc. 249, 103 N. Y. Supp. 177.

82. *Hoitt v. Skinner*, 99 Iowa 360, 68 N. W. 788.

83. Seal on copy of process served, see the title "Service of Process and Papers."

84. U. S.—*Wolf v. Cook*, 40 Fed. 432. Ind.—*State v. Davis*, 73 Ind. 359. Mont.—*Choate v. Spencer*, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424. Neb.—*Taylor v. Courtney*, 15 Neb. 190, 16 N. W. 842. N. Y.—*Millett v. Baker*, 42 Barb. 215. N. C.—*Finley v. Smith*, 15 N. C. 95; *Shackelford v. McRea's Admrs.*, 10 N. C. 226. Tenn.—*Tackett v. State*, 3 Yerg. 392, 24 Am. Dec. 582.

[a] "At common law, a writ issuing from a court having a seal, in

order to be considered authentic or of any value, must be attested by the seal of the court from which it is issued." *Choate v. Spencer*, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424.

[b] A summary process must be sealed as a writ. It is a judicial process, and not a mere rule or order of the court. *Hughes v. Phelps*, 1 Brev. (S. C.) 81.

[c] Want of seal not amendable at common law. Ia.—*Foss v. Isett*, 4 G. Gr. 76, 61 Am. Dec. 117. Me.—*State v. Smith*, 99 Me. 164, 58 Atl. 779. Mass.—*Hall v. Jones*, 9 Pick. 446. N. Y.—*Churchill v. Marsh*, 2 Abb. Pr. 219, 4 E. D. Smith 369. Pa.—*In re Bryson's Road*, 2 Pen. & W. 207.

[d] Reason for Common Law Rule Refusing Amendments.—The statute (8 Hen. VI, ch. 12,) authorizing the common law courts to amend writs and process for clerical error and misprision clearly "did not apply to original writs, which theoretically were issued by the King himself, not out of courts of law, and were sealed with the great seal,—never in the custody of the courts to whom power of amendment was granted by the act. I think, also, the statute had no reference to the seal to judicial writs, since its omission could not arise from misprision of the clerk, who was not its custodian." *Wolf v. Cook*, 40 Fed. 432.

85. U. S.—*Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. 252; *Peaslee v. Haberstro*, 15 Blatchf. 472, 19 Fed. Cas. No. 10,884. Ind.—*Hinton v. Brown*, 1 Blatchf. 429. Kan.—*McKenna v. Cooper*, 79 Kan. 847, 101 Pac. 662. Mont.—*Choate v. Spencer*, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424. N. Y.—*People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020. Ohio.—*Collins v. Baltimore & O. R. R. Co.*, 7 Ohio N. P. 270, 7 Ohio Dec. 445. Ore.—*Starkey v. Lunz*, 57 Ore. 147, 110 Pac. 702, Ann. Cas. 1912D, 783. Tex.—*Chambers v. Chapman*, 32 Tex. 569;

required on process issued by a party or his attorney.⁸⁶

The primary purpose of a seal is the authentication of the process,⁸⁷ taken in connection with the clerk's certificate thereto;⁸⁸ though the

Newman v. Mackey, 37 Tex. Civ. App. 85, 83 S. W. 31.

[a] **Process of a justice of the peace** need not be under seal at common law, and a seal is unnecessary unless required by statute. Millett v. Baker, 42 Barb. (N. Y.) 215. See 17 STANDARD PROC. 1017; and also Feld v. Loftis, 140 Ill. App. 530.

[b] **Presumption Raised by Statutory Language.**—Dispensing with a seal within the district is a strong legislative declaration that a seal is essential where a writ issues out of a district. Shackelford v. McRea's Admr., 10 N. C. 226.

[c] **A code provision as to writs of execution** does not necessarily apply to an order of sale in a foreclosure proceeding. Hager v. Astorg, 145 Cal. 548, 79 Pac. 68, 104 Am. St. Rep. 68.

[d] **Notice in citation by publication** is not process within the constitution, and need not be under seal. McKenna v. Cooper, 79 Kan. 847, 101 Pac. 662.

86. Rand v. Pantograph Stationery Co., 1 Colo. App. 270, 28 Pac. 661.

[a] **Inferior courts** may not come within the statute dispensing with the seal to process. Talcott v. Rosenberg, 8 Abb. Pr. (N. S.) 287, 3 Daly (N. Y.) 203.

87. **U. S.**—Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167, 175; Wolf v. Cook, 40 Fed. 432. **Ill.**—Sietman v. Goeckner, 127 Ill. App. 67. **Ind.**—State v. Davis, 73 Ind. 359. **Kan.**—Compare Gordon v. Bodwell, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341. **Me.**—Bailey v. Smith, 12 Me. 196. **Mo.**—Jump v. McClurg, 35 Mo. 193, 86 Am. Dec. 146. **N. H.**—Reynolds v. Damrell, 19 N. H. 394. **N. M.**—Holzman v. Martinez, 2 N. M. 271. **N. C.**—Shackelford v. McRea's Admr., 10 N. C. 226. **Ohio.**—Boal v. King, 6 Ohio 11. **Pa.**—In re Bryson's Road, 2 Pen. & W. 207; Harden v. Roberts, 9 Pa. Co. Ct. 160.

[a] **Seal Most Satisfactory Proof.** "The law has always considered that the writs issuing from a court are most satisfactorily proved by the seal provided by public authority, which every man is presumed to know."

Shackelford v. McRea's Admr., 10 N. C. 226.

[b] "It gives additional solemnity (1) to the papers to which it is affixed, and renders it more difficult to forge or counterfeit them." Bailey v. Smith, 12 Me. 196. (2) "A process by which a man's person or property is liable to be affected, ought to bear on its face the highest evidence of authenticity." Shackelford v. McRea's Admr., 10 N. C. 226.

88. **Cal.**—O'Donnell v. Merguire, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389. **Ga.**—Lowe v. Morris, 13 Ga. 147. **N. C.**—Shackelford v. McRea's Admr., 10 N. C. 226. **S. C.**—Smith v. Alston, 1 Mill Const. 104.

[a] "In modern times the seal has lost its significance, and cannot be regarded as a sufficient authentication without the signature of the officer affixing it." O'Donnell v. Merguire, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389.

[b] "Its genuineness is more usually determined by the manner of its authentication, than by the characteristic and distinguishing emblems left upon its face. . . . We can only judge of it by the faith and credit due to the attestation of the keeper." Smith v. Alston, 1 Mill Const. (S. C.) 104.

[c] **Necessity of Certifying to the Seal.**—(1) "A clerk is not required to state on the face of the process that it is issued under the seal of the court. It is enough that he actually affixes the seal to the writ." Morrison v. Silverburgh, 13 Ill. 551. See also Harden v. Roberts, 9 Pa. Co. Ct. 160. (2) "The seal of the court, without being in any way named or referred to, is impressed upon a corner of the writ. . . . It is true, as is urged, that the seal of the district court proves itself, but it does not of itself prove that it was affixed by the proper officer, or by authority. The clerk is the keeper of the seal; he alone is authorized to use it; and upon affixing the seal officially to any process, he should attest the fact over his own signature." Riggs v. Bagley, 2 G. Gr. (Iowa) 383. (3) The omission of the clerk's certificate is amendable.

use of the seal as a source of revenue to the clerks and officers has not been lost sight of by the courts.⁸⁹

There has been much conflict among decisions as to the effect of the omission of a seal from the court's process.⁹⁰ In many cases process has been held void for want of seal,⁹¹ either on the ground that at common law the seal must be affixed where one is provided for,⁹² or that the statutory provision therefor is itself mandatory.⁹³ On the other hand the defect has been considered as merely formal⁹⁴

Hallett v. Chicago & N. W. R. Co., 22 Iowa 259, 92 Am. Dec. 393.

89. U. S.—Wolf v. Cook, 40 Fed. 432. N. H.—Eastman v. Morrison, 46 N. H. 136; Dearborn v. Twist, 6 N. H. 44. N. Y.—Sullivan v. Alexander, 18 Johns. 3.

[a] Alterations of writs to avoid clerk's fees, see Dearborn v. Twist, 6 N. H. 44; Sullivan v. Alexander, 18 Johns. (N. Y.) 3.

90. See Warmoth v. Dryden, 125 Ind. 355, 25 N. E. 433.

91. Ill.—Sidwell v. Schumacher, 99 Ill. 426; Hernandez v. Drake, 81 Ill. 34; Durham v. Heaton, 28 Ill. 264, 81 Am. Dec. 275; Williams v. Vanmeter, 19 Ill. 293. Kan.—Kelso v. Norton, 74 Kan. 442, 87 Pac. 184; Stouffer v. Harlan, 68 Kan. 155, 74 Pac. 610, 104 Am. St. Rep. 396, 64 L. R. A. 320; Gordon v. Bodwell, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341; Lindsay v. Board of Comrs., 56 Kan. 630, 44 Pac. 603; Dexter v. Cochran, 17 Kan. 447. La.—King v. Baker, 7 La. Ann. 570; Bonin v. Durand, 2 La. Ann. 776. Me. State v. Smith, 99 Me. 164, 58 Atl. 779; Witherel v. Randall, 30 Me. 168; Converse v. Damariscotta Bank, 15 Me. 451. Mont.—Choate v. Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424. N. H.—Reynolds v. Damrell, 19 N. H. 394; Hutchins v. Edson, 1 N. H. 139. N. C. Taylor v. Taylor, 83 N. C. 116. Ohio. Boal v. King, 6 Ohio 11. Pa.—Lower Towamensing Twp. Road, 10 Pa. Dist. Ct. 581; *In re Bryson's Road*, 2 Pen. & W. 207. R. I.—Lough v. Millard, 2 R. I. 436.

[a] "A warrant commanding an arrest on behalf of the state, not having the magistrate's seal, is void." Tackett v. State, 3 Yerg. (Tenn.) 392, 24 Am. Dec. 582. See the title "Warrants."

92. U. S.—Aetna Insurance Co. v. Hallock, 6 Wall. 556, 18 L. ed. 948. See also Wehrman v. Conklin, 155 U.

S. 314, 15 Sup. Ct. 129, 39 L. ed. 167, 174. Compare Wolf v. Cook, 40 Fed. 432. Ind.—Reid v. Houston, 49 Ind. 181; Jones v. Frost, 42 Ind. 543; Sanford v. Sinton, 34 Ind. 539; Hinton v. Brown, 1 Blackf. 429. Ia.—Foss v. Isett, 4 G. Gr. 76, 61 Am. Dec. 117. Mass.—Hall v. Jones, 9 Pick. 446. Miss.—See Hurst v. Strong, 1 How. 123. S. C.—Smith v. Affanassieffe, 2 Rich. 334. Tenn.—Tackett v. State, 3 Yerg. 392, 24 Am. Dec. 582.

[a] "Without this seal (1) it is no more for the purpose of a writ than blank paper." Foss v. Isett, 4 G. Gr. (Iowa) 76, 61 Am. Dec. 117. (2) "One court cannot speak officially to any other court, otherwise than by its seal." Jones v. Frost, 42 Ind. 543.

93. Ill.—Weaver v. Peasley, 163 Ill. 251, 45 N. E. 119, 54 Am. St. Rep. 469. Kan.—Gordon v. Bodwell, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341. Mont.—Choate v. Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424. N. M.—Holzman v. Martinez, 2 N. M. 271. N. Y. Churchill v. Marsh, 2 Abb. Pr. 219, 4 E. D. Smith 369. Ore.—Starkey v. Lunz, 57 Ore. 147, 110 Pac. 702, Ann. Cas. 1912D, 783. Tex.—Frosch v. Schlumpf, 2 Tex. 422, 47 Am. Dec. 655; Carson Bros. v. McCord-Collins Co., 37 Tex. Civ. App. 540, 84 S. W. 391; Line v. Cranfill (Tex. Civ. App.), 37 S. W. 184.

[a] The Statute Is Imperative.—(1) Garland v. Britton, 12 Ill. 232, 52 Am. Dec. 487. (2) The omission "impeaches the very act by which jurisdiction is to be acquired over the defendants, and rests on the non-compliance with a statute requisite." Churchill v. Marsh, 4 E. D. Smith (N. Y.) 369.

94. Ind.—Warmoth v. Dryden, 125 Ind. 355, 25 N. E. 433. Mass.—Brewer v. Sibley, 13 Mete. 175; Foot v. Knowles, 4 Mete. 386. Mo.—Jump v. McClurg, 35 Mo. 197. Neb.—Taylor v. Courtney, 15 Neb. 190, 16 N. W.

and amendable⁹⁵ or the process has been declared sufficient unless appropriately objected to by direct attack.⁹⁶ Not only have the statutory requirements for a seal been regarded by some courts as directory only,⁹⁷ but in many states the effect of such statutes has been set at rest, and the rigor of the common law rule ameliorated by general statutory provisions for amendment of process.⁹⁸ In holding the want of seal amendable or not amendable, the distinction between jurisdictional and non-jurisdictional process has been pointed out as influencing the decision,⁹⁹ but the soundness of this distinction

842. **N. C.**—Vick *v.* Flournoy, 147 N. C. 209, 60 S. E. 978.

95. **U. S.**—See Wolf *v.* Cook, 40 Fed. 432, applying the Wisconsin law to sustain process previously issued in a case subsequently removed to the federal court. **Ark.**—Rudd *v.* Thompson, 22 Ark. 363. **Cal.**—Hager *v.* Astorg, 145 Cal. 548, 79 Pac. 68, 104 Am. St. Rep. 68. **Fla.**—Benedict *v.* W. T. Hadlow Co., 52 Fla. 188, 42 So. 239. **Ga.**—Dever *v.* Akin, 40 Ga. 423, 429; Lowe *v.* Morris, 13 Ga. 147. **Idaho.**—Harpold *v.* Doyle, 16 Idaho 671, 102 Pac. 153. **Ind.**—State *v.* Davis, 73 Ind. 359. **Mich.**—Arnold *v.* Nye, 23 Mich. 286, 293. **Mo.**—Jump *v.* McClurg, 35 Mo. 193, 86 Am. Dec. 146. **Neb.**—Passumpsic Sav. Bank *v.* Maulick, 60 Neb. 469, 83 N. W. 672, 83 Am. St. Rep. 539. **N. Y.**—Hill *v.* Haynes, 54 N. Y. 153; People *v.* Dunning, 1 Wend. 16. **N. C.**—Calmes *v.* Lambert, 153 N. C. 248, 69 S. E. 138; Clark *v.* Hellen, 23 N. C. 421; Den. *ex dem.* Seawalt *v.* Bank of Cape Fear, 14 N. C. 279, 22 Am. Dec. 722. **R. I.**—Potter *v.* Smith, 7 R. I. 55. **Tex.**—Whittenberg *v.* Lloyd, 49 Tex. 633, 640. **Wis.**—Keehn *v.* Stein, 72 Wis. 196, 39 N. W. 372; Sabin *v.* Austin, 19 Wis. 421; Strong *v.* Catlin, 3 Chand. 130, 3 Pin. 121.

96. State *v.* Flemming, 66 Me. 142, 22 Am. Rep. 552; State *v.* Lightbody, 38 Me. 200; Sawyer *v.* Baker, 3 Me. 29; Pharis *v.* Conner, 3 Smed. & M. (Miss.) 87.

97. Jump *v.* McClurg, 35 Mo. 193, 86 Am. Dec. 146.

98. **Ark.**—Bridewell *v.* Mooney, 25 Ark. 524; Rudd *v.* Thompson, 22 Ark. 363; Mitchell *v.* Conley, 13 Ark. 414. **Ind.**—State *v.* Davis, 73 Ind. 359; Boyd *v.* Fitch, 71 Ind. 306; Hunter *v.* Burnsville Tpk. Co., 56 Ind. 213. **Ia.**—Murdough *v.* McPherrin, 49 Iowa 479. **Miss.**—Spratley *v.* Kitchens, 55 Miss. 578. **Mont.**—Kipp *v.* Burton, 29

Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325. See Choate *v.* Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424. **N. Y.**—Talcott *v.* Rosenberg, 8 Abb. Pr. (N. S.) 287, 3 Daly 203; People *ex rel.* Jenkins *v.* Kuhne, 57 Misc. 30, 107 N. Y. Supp. 1020. **Wis.**—Davelaar *v.* Blue Mound Inv. Co., 110 Wis. 470, 86 N. W. 185; Corwith *v.* State Bank, 18 Wis. 560, 36 Am. Dec. 793; Strong *v.* Catlin, 3 Chand. 130, 3 Pin. 121.

[a] The provisions of the statutes of amendments are of as commanding authority and as imperative in their directions as those prescribing the formalities of the process. Kipp *v.* Burton, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325.

[b] Under the federal statute authorizing amendment of process, enacted since the decision in Aetna Ins. Co. *v.* Hallock, 6 Wall. (U. S.) 556, 18 L. ed. 948, a writ may be amended in appropriate cases, by adding the seal. Tilton *v.* Cofield, 93 U. S. 163, 23 L. ed. 858; Wolf *v.* Cook, 40 Fed. 432.

[c] On Removal to Federal Court. "It is not now practicable to cause the proper seal to be affixed to the writ, since the state court is divested of all jurisdiction of the cause. It would seem just, in the peculiar conditions, to enforce the equitable doctrine that the court will deem that done which ought to have been done. It will therefore be ordered that the writ stand amended, and be held valid and effectual, to all intents and purposes, as though the proper seal had been originally affixed thereto." Wolf *v.* Cook, 40 Fed. 432.

99. **Me.**—Bailey *v.* Smith, 12 Me. 196. **Mont.**—Kipp *v.* Burton, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325. **N. Y.**—Talcott *v.* Rosenberg, 8 Abb. Pr. (N. S.) 287, 3 Daly 203.

[a] Summons and Execution Dis-

has also been denied,¹ and upon looking to the nature of the process involved in the adjudicated cases, it will be seen that both jurisdictional² and non-jurisdictional³ process has been indiscriminately held void for lack of seal,—or only voidable,⁴ according to the rule in the particular jurisdiction.

Process has been regarded as sufficiently valid to amend by where either the seal or the teste is present,—the other being supplyable by amendment.⁵

In case the statute requires a seal, without prescribing the form, the particular form of seal used,⁶ or whether it is intended by the court to be temporary or permanent,⁷ is immaterial; and even if a public seal has been adopted, if it appears from the process that none has actually been provided, the absence thereof is excused,⁸ and the

tinguished.—"There is a distinction between a summons and a writ of execution," with respect to the necessity of appeal. *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325.

[b] **A distinction between judicial and original writs** (1) has been made, allowing amendments in the former case, but not in the latter. *Bailey v. Smith*, 12 Me. 196. (2) But in referring to the above case the federal circuit court said: "I wholly fail to appreciate the distinction drawn, since all writs, with us, emanate from the court." *Wolf v. Cook*, 40 Fed. 432.

1. **U. S.**—*Wolf v. Cook*, 40 Fed. 432. **Ark.**—*Mitchell v. Conley*, 13 Ark. 414, 420. **Kan.**—*Gordon v. Bodwell*, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341.

[a] **No distinction between original, mesne and final process**, can be drawn, where the constitution requires the use of a seal in the authentication of all process. *Gordon v. Bodwell*, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341.

2. **Ark.**—*Stayton v. Newcomer*, 6 Ark. 451, 44 Am. Dec. 524. **Kan.** *Kelso v. Norton*, 74 Kan. 422, 87 Pac. 184. **N. H.**—*Dearborn v. Twist*, 6 N. H. 44. **Ohio.**—*In re Gorey*, 2 Ohio N. P. (N. S.) 389. **Tex.**—*Frosch v. Schlumpf*, 2 Tex. 422, 47 Am. Dec. 655.

3. **U. S.**—*Aetna Ins. Co. v. Hallock*, 6 Wall. 556, 18 L. ed. 948; *Overton v. Cheek*, 22 How. 46, 16 L. ed. 285. **Ill.** *Roseman v. Miller*, 84 Ill. 297. **Kan.** *Gordon v. Bodwell*, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341. **Minn.** *Wheaton v. Thompson*, 20 Minn. 196. **Ohio.**—*Boal v. King*, 6 Ohio 11.

4. *Bridewell v. Mooney*, 25 Ark.

524; *Warmoth v. Dryden*, 125 Ind. 355, 25 N. E. 433; *Rose v. Ingram*, 98 Ind. 276.

5. **U. S.**—*Dwight v. Merritt*, 4 Fed. 614, 18 Blatchf. 305, 59 How. Pr. 320; *Peaslee v. Haberstro*, 15 Blatchf. 472, 19 Fed. Cas. No. 10,884. **Cal.**—*Hager v. Astorg*, 145 Cal. 548, 79 Pac. 68, 104 Am. St. Rep. 68. **Ga.**—*Lowe v. Morris*, 13 Ga. 147.

6. *Hinton v. Brown*, 1 Blackf. (Ind.) 429; *Stevens v. Ewer*, 2 Mete. (Mass.) 74.

[a] **Any Seal Sufficient.**—(1) "The court has not required that the authenticity of its seal should be tested by any device or inscription; any seal, therefore, affixed by the clerk to the writ, as the seal of the court, is to be so considered." *Stevens v. Ewer*, 2 Mete. (Mass.) 74. (2) A scrawl as a seal is sufficient, if adapted by the court as its seal. *Dixon v. Doe ex dem. Lasselle*, 5 Blackf. (Ind.) 106. (3) Where no engraved seal has been furnished, "a scroll as a seal, the writ on its face showing the reason thereof" is sufficient. *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167, 175. (4) A stamp with ink may be adopted by a magistrate as an official seal. *Reg. v. Inhab. of St. Paul's Convent Garden*, 9 Jur. (Eng.) 422.

[b] **For general discussion of the form of seals on process**, see *Lowe v. Morris*, 13 Ga. 147, 150.

[c] **If a seal has been adopted with appropriate devices**, the use of a different seal is without effect. *Bailey v. Smith*, 12 Me. 196.

7. *Hinton v. Brown*, 1 Blackf. (Ind.) 429.

8. **U. S.**—*Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed.

private seal of the clerk has been regarded as a sufficient authentication under such circumstances.⁹ But process cannot be authenticated by the seal of a different court,¹⁰ though the same person is clerk of both.¹¹

A seal once used becomes *functus officio* and cannot be detached and used on a different process.¹²

The presence of a seal may be presumed.¹³

167, 175. **Ill.**—*Beaubien v. Sabine*, 3 Ill. 457; **Kan.**—*Goff v. Russell*, 3 Kan. 206. **Miss.**—*Pharis v. Conner*, 3 Smed. & M. 87. **N. C.**—*Shackelford v. McRea's Admr.*, 10 N. C. 226.

[a] **Absence of Seal Does Not Prevent Issuance of Process.**—"Suppose that today the engraved seal of O'Brien county should be destroyed or stolen, must all the judicial proceedings therein be brought to a standstill, awaiting the procurement of another engraved seal? Would this not be subverting substance to mere form? Would it not be permissible for the court to continue the issuance of writs of attachment and execution, having attached thereto a scroll as a seal, the writ on its face showing the reason thereof?" (quoting with approval from the opinion of the circuit court). "The fact that no engraved seal had been procured is a sufficient excuse for the purpose of the case." *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167, 175.

9. *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167, 175.

[a] **Contra.**—Where the clerk used his private seal, certifying that no public seal had been devised by the court, a transcript was rejected as insufficiently sealed, under a statute requiring the court to have a seal. *Hinton v. Brown*, 1 Blackf. (Ind.) 429.

[b] **By statute** (1), the clerk may certify that no public seal has been provided, and use his private seal (**Ill.** *Beaubien v. Sabine*, 3 Ill. 457. **Kan.** *Goff v. Russell*, 3 Kan. 206. **Mo.** *Swink v. Thompson*, 31 Mo. 336), (2) but the use of a private scroll would afford no authentication of a writ. *Goff v. Russell*, 3 Kan. 206. (3) The scrawl of the clerk is a sufficient sealing where the statute provides that if no official seal is provided, the clerk may affix his private seal. *Swink v. Thompson*, 31 Mo. 336.

10. **Ia.**—*Shaffer v. Sundwall*, 33 Iowa 579. **Me.**—*Bailey v. Smith*, 12 Me. 196. **Mass.**—*Hall v. Jones*, 9 Pick.

446. **Mont.**—*Choate v. Spencer*, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424. **N. H.**—*Dearborn v. Twist*, 6 N. H. 44. **N. Y.**—*Dominick v. Eacker*, 3 Barb. 17. **Pa.**—*Road in Lower Towamensing Twp.*, 10 Pa. Dist. 581. **Tex.**—*Brewster v. Norfleet*, 3 Tex. Civ. App. 103, 22 S. W. 226. **Wis.** *Davelaar v. Blue Mound Inv. Co.*, 110 Wis. 470, 86 N. W. 185.

[a] "The process of each court is by law to be under its own seal. *Bailey v. Smith*, 12 Me. 196.

[b] **A Wrong Seal Is Equivalent to No Seal.**—"The order had the seal of the wrong court attached. In our opinion, this amounted to the same thing as if no seal at all had been attached." *Road in Lower Towamensing Twp.*, 10 Pa. Dist. 581. See **Mont.**—*Choate v. Spencer*, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424. **N. Y.**—*Dominick v. Eacker*, 3 Barb. (N. Y.) 17. **Wis.**—*Davelaar v. Blue Mound Inv. Co.*, 110 Wis. 470, 86 N. W. 185.

[c] **Amendable by Statutory Aid.** *Murdough v. McPherrin*, 49 Iowa 479.

11. *Dearborn v. Twist*, 6 N. H. 44.

12. *Filkins v. Brockway*, 19 Johns. (N. Y.) 170; *People v. Singer*, 1 Cow. (N. Y.) 41. Compare *Stevens v. Ewer*, 2 Mete. (Mass.) 74.

13. See *infra*, this note.

[d] **A slight impression upon the process**, will be presumed, after many years, to be the impress of the seal. *Heighway v. Pendleton*, 15 Ohio 735.

[b] **Absence of a visible impression is not fatal**, since from the clerk's attestation the court may conclude that the seal has been effaced. *Smith v. Alston*, 1 Mill Const. (S. C.) 104.

[c] **Last writs of attachment** are presumed to have been sealed, when questioned in an action of replevin. *McNorton v. Akers*, 24 Iowa 369.

[d] **The issue as to the presence of a seal** cannot be retried in the supreme court as a question of fact. *Crane v. Blum*, 56 Tex. 325.

L. DATE.¹⁴—While it is proper for process to bear date,¹⁵ neither the failure to do so,¹⁶ nor the insertion of an incorrect date,¹⁷ is necessarily fatal. Such a defect is amendable.¹⁸ And though the statute may direct that the date of issuance appear on the writ,¹⁹ the provision still may be regarded as merely directory.²⁰ Even though the date of issuance may become of importance where the taking out of the writ is the commencement of an action,²¹ yet the date which

14. **As to teste**, see *supra*, IV, I.

15. **U. S.**—*Emmons v. Marbelite Plaster Co.*, 193 Fed. 181. **N. Y.**—*Merrill v. Townsend*, 5 Paige 80. **Tenn.** *Swan v. Roberts*, 2 Coldw. 153. **W. Va.** *State v. Citizens' Trust & G. Co.*, 72 W. Va. 181, 77 S. E. 902.

16. **U. S.**—*Emmons v. Marbelite Plaster Co.*, 193 Fed. 181. **Mass.** *Nash v. Brophy*, 13 Mete. 476; *Hawkes v. Kennebeck*, 7 Mass. 461. **Mich.** *Lyon v. Baldwin*, 194 Mich. 118, 160 N. W. 428, L. R. A. 1917C, 148. **N. H.** *Rogers v. Farnham*, 25 N. H. 511. **Tenn.** *Lyle v. Longley*, 6 Baxt. 286, 292. **W. Va.**—*Ambler v. Leach*, 16 W. Va. 677.

[a] **The date is not a material part of the writ.** **U. S.**—*Emmons v. Marbelite Plaster Co.*, 193 Fed. 181. **Cal.** *Hibernia Sav. & Loan Soc. v. Churchill*, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73. **Ind.**—*Kelley v. Mason*, 4 Ind. 618.

[b] **Where no special question arises upon the date of the issuance**, a process should not be declared void because there is nothing to show when it issued. *Lyle v. Longley*, 6 Baxt. (Tenn.) 286, 292.

[c] **For want of a date, a writ is defective**, and may be quashed, but it is not a nullity. *Ambler v. Leach*, 15 W. Va. 677, 696.

17. **U. S.**—*Emmons v. Marbelite Plaster Co.*, 193 Fed. 181. **Ark.**—*Jackson v. Bowling*, 10 Ark. 578. **Cal.**—*Hibernia Sav. & Loan Soc. v. Churchill*, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73; *Bank of Venice v. Hutchinson*, 19 Cal. App. 219, 125 Pac. 252. **Conn.** *Roberts v. Church*, 17 Conn. 142. **Ky.** *Bridges v. Ridgley*, 2 Litt. 395. **Me.** *Gardiner v. Gardiner*, 71 Me. 266; *Woodman v. Smith*, 37 Me. 21.

[a] **Where a clerical error is apparent**, it should be amended and the writ should not be quashed. *Jackson v. Bowling*, 10 Ark. 578.

[b] **A citation dated a year before** the institution of the suit will not support a default judgment. Interna-

tional & G. N. R. R. Co. v. Pape, 1 White & W. Civ. Cas. (Tex.) §§241, 244. See also *Gould v. Tryon*, Walk. Ch. (Mich.) 339.

[c] **The Record Should Determine the Date.**—The actual time when a process is issued is determined by the record; "and if it has no date, or a mistaken or impossible one, we do not see how its effect as a compulsory writ is thereby destroyed." *Roberts v. Church*, 17 Conn. 142.

18. **Ark.**—*Jackson v. Bowling*, 10 Ark. 578; *McLarren v. Thurman*, 8 Ark. 313; *Haines v. McCormick*, 5 Ark. 663. **Ky.**—*Bridges v. Ridgley*, 2 Litt. 395. **Me.**—*Gardiner v. Gardiner*, 71 Me. 266; *Bragg v. Greenleaf*, 14 Me. 395. **N. Y.**—*Merrill v. Townsend*, 5 Paige 80.

19. **Ill.**—*Hernandez v. Drake*, 81 Ill. 34. **Kan.**—*Lindsay v. Board of Comrs.*, 56 Kan. 630, 44 Pac. 603. **Tex.** *Haley v. M. Greenwood & Co.*, 28 Tex. 680; *Marshall v. Marshall* (Tex. Civ. App.), 30 S. W. 578.

20. *Morris Canal & Bank. Co. v. Mitchell*, 31 N. J. L. 99.

[a] **"The better practice unquestionably is to follow the directions of the act and date the process truly**, but a departure from that practice is not fatal to the writ." *Morris Canal & Bank. Co. v. Mitchell*, 31 N. J. L. 99.

[b] **The Statute Is in Terms Directory.**—*Swan v. Roberts*, 2 Coldw. (Tenn.) 153.

21. **N. H.**—*Robinson v. Burleigh*, 5 N. H. 225. **N. C.**—*Currie v. Hawkins*, 118 N. C. 593, 600, 24 S. E. 476. **Vt.** *Chapman v. Goodrich*, 55 Vt. 354. **W. Va.**—*Oil & Gas Well Supply Co. v. Gartlan*, 58 W. Va. 267, 52 S. E. 524.

See the title "Suits and Actions."

[a] **"The antedating of a writ may work great damage**, as in the case of an attempt to avoid the statute of limitations." *Morris Canal & Bank. Co. v. Mitchell*, 31 N. J. L. 99.

[b] **Common Law Changed by Statute.**—The common law doctrine that a

a process bears simply raises the presumption that the writ was issued on such date,²² and this may be disputed like any other fact.²³

M. ENDORSEMENTS. — Though endorsements have been said, in certain instances, to be no part of a process,²⁴ they are usually so regarded.²⁵ Frequently, by express direction of statute, process has been required to show certain matter by means of an endorsement thereon,²⁶ such as the amount of the plaintiff's claim,²⁷ the nature of

writ became effective from the date of the teste was done away with by act of parliament, 29 Car. II, Ch. 3, §16; and this statute, in substance, has been generally followed in this country. *Burton v. Deleplain*, 25 Mo. App. 376.

22. Ala.—*Huss v. Central R. & B. Co.*, 66 Ala. 472. Haw.—*Gear v. Henry* 21 Hawaii 101. Ill.—*Rural Press Co. v. Chicago Elect. & S. Co.*, 107 Ill. App. 501. Mich.—*Howell v. Shepard*, 48 Mich. 472, 12 N. W. 661. N. H.—*Robinson v. Burleigh*, 5 N. H. 225. N. Y.—*Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 341. N. C.—*Currie v. Hawkins*, 118 N. C. 593, 24 S. E. 476. Vt.—*Chapman v. Goodrich*, 55 Vt. 354. W. Va.—*Geiser Mfg. Co. v. Chewing*, 52 W. Va. 523, 44 S. E. 193.

23. Ark.—*Jackson v. Bowling*, 10 Ark. 578. Cal.—*Hibernia Sav. & Loan Soc. v. Churchill*, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73. Me.—*Bragg v. Greenleaf*, 14 Me. 395; *Trafton v. Rogers*, 13 Me. 315. Mass.—*Federhen v. Smith*, 3 Allen 119. N. H.—*Society etc. v. Whitcomb*, 2 N. H. 227. N. Y.—*Porter v. Kimball*, 3 Lans. 330. N. C.—*Currie v. Hawkins*, 118 N. C. 593, 600, 24 S. E. 476.

[a] The presumption is not rebutted by the date of the sheriff's endorsement of its receipt by him. *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699; *Currie v. Hawkins*, 118 N. C. 593, 24 S. E. 476.

[b] "Whenever the true time is material it may be shown notwithstanding the teste of the writ." *Robinson v. Burleigh*, 5 N. H. 225.

24. Cooper v. Jacobs, 82 Ala. 411, 2 So. 832; *White v. Taylor*, 48 N. H. 281.

25. U. S.—*United States v. Rose*, 14 Fed. 681. Ky.—*Northern Bank v. Hunt's Heirs*, 93 Ky. 67, 19 S. W. 3; *Nichols v. Taylor*, 6 Mon. 325; *Jones v. Overstreet*, 4 Mon. 547. Mich.—*McGuire v. Galligan*, 53 Mich. 453, 19 N. W. 112. Ohio.—*Goodrich v. Hamer*, 8

Ohio Dec. (Reprint) 441, 8 W. L. Bull. 11. Tenn.—*Warder v. Millard*, 8 Lea 581.

[a] The endorsements may be considered in aid of the matter stated in the body of the process. *Hull v. Candaugua Elect. L. & H. Co.*, 55 App. Div. 419, 66 N. Y. Supp. 865; *Sivaslian v. Akulian*, 166 N. Y. Supp. 535.

26. Ala.—*Drennen & Co. v. Jasper Inv. Co.*, 153 Ala. 322, 45 So. 157; *Howell v. Hallett*, Minor 102. Ark.—*Womsley v. Cummins*, 1 Ark. 125. N. Y.—*Layton v. McConnell*, 61 App. Div. 447, 70 N. Y. Supp. 679.

On justice's process, see 17 STAND-ARD PROC. 1017.

[a] Indorsement on a branch summons to another county which shows the identity of the cause of action against the several defendants is sufficient under a statute requiring an indorsement to be borne by such summons, to the effect that it is a branch of the original, and that all summons constitute a single cause of action. *Drennen & Co. v. Jasper Inv. Co.*, 153 Ala. 322, 45 So. 157.

[b] "A true minute of the day, month and year" when certain writs are signed, must be endorsed thereon. *Wheelock v. Sears*, 19 Vt. 559; *Pollard v. Wilder*, 17 Vt. 48.

[c] The names of the real parties in interest must be endorsed upon the writ, under the statute, in an action in the name of the probate court upon a guardian's bond. *Probate Court v. Lamphear*, 14 R. I. 291.

[d] Special authority to serve must accompany the summons. Though the statute does not require the authority of one specially authorized to serve a summons to be endorsed thereon, if the proof of such authorization is not of record in the clerk's office, the "court may require that the authority of the summons server shall be attached to or else be endorsed on the summons." *Mayor v. Millen*, 13 Daly (N. Y.) 458.

27. Ill.—*Eaton v. Graham*, 11 Ill.

the cause of action,²⁸ the name of plaintiff's attorney,²⁹ the name of the officer executing the process when an attachment is made on mesne process,³⁰ the time when the officer received the writ,³¹ that the action is for a statutory penalty,³² or to exhibit the party's affidavit

619. **Ind.**—Swift *v.* Woods, 5 Blackf. 97. **Ia.**—Hedinger *v.* Silsbee, 2 G. Gr. 363. **Kan.**—Dusenberry *v.* Bennett, 7 Kan. App. 123, 53 Pac. 82. **Miss.**—Foster *v.* Collins, 5 Smed. & M. 259. **Neb.**—Crowell *v.* Galloway, 3 Neb. 215. **Ohio.**—Hamilton *v.* Miller, 31 Ohio St. 87; Gillett *v.* Miller, 12 Ohio Cir. Ct. 209, 5 Ohio Cir. Dec. 588; Kious *v.* Kious, 2 Ohio Dec. (Reprint) 318.

[a] **Endorsement stating amount of original debt** does not necessarily show the amount actually demanded by the suit, as there may have been payments. Foster *v.* Collins, 5 Smed. & M. (Miss.) 259.

[b] **On writs from a justice's court** the endorsement supplies the *ad damnum* in a formal declaration and controls the recovery. Dowling *v.* Stewart, 4 Ill. 193. See also Toledo, P. & W. Ry. Co. *v.* Pence, 71 Ill. 174; and 17 STANDARD PROC. 1017.

[c] **Notice must be given of an amendment** increasing the amount of relief demanded, in case of default of defendant. Watson *v.* McCartney, 1 Neb. 131.

[d] **Failure to endorse amount of plaintiff's demand** on the summons is of no consequence unless the defendant fails to appear. Crowell *v.* Galloway, 3 Neb. 215.

[e] **Recovery will be limited (1) to amount endorsed on the writ** (Eaton *v.* Graham, 11 Ill. 619; Dowling *v.* Stewart, 4 Ill. 193; Maholm *v.* Marshall, 29 Ohio St. 611), (2) together with accrued interest and damages occasioned by an appeal (Haight *v.* McVeagh, 69 Ill. 624; Welch *v.* Karstens, 60 Ill. 117), (3) if defendant fails to appear. Crowell *v.* Galloway, 3 Neb. 215.

[f] **"The object is to enable the defendant to pay the debt and costs before any unnecessary expense is incurred."** Stone *v.* Cordell, 1 Ohio Dec. (Reprint) 166.

[g] **If more than a mere money judgment is sought, no endorsement whatever is necessary, as the statute simply requires it in case of "an action for the recovery of money only."** **Kan.**—Weaver *v.* Gardner, 14 Kan.

347; George *v.* Hatton, 2 Kan. 333. **Neb.**—Watson *v.* McCartney, 1 Neb. 131. **Ohio.**—Larimer *v.* Clemmer, 31 Ohio St. 499; Kious *v.* Kious, 2 Ohio Dec. (Reprint) 318.

[h] **Where the praecipe gives the information, the failure to endorse it on the writ is a mere irregularity.** Simpson *v.* Rice, 43 Kan. 22, 22 Pac. 1019; Kious *v.* Kious, 2 Ohio Dec. (Reprint) 318.

[i] **The amount shown by the endorsements should control when it differs from that shown in the body of the writ.** Com. *v.* McCoy, 8 Watts (Pa.) 153, 34 Am. Dec. 445; Griffith *v.* Lyle, 7 Phila. (Pa.) 244. *Contra* Peters *v.* Conway, 4 Bush (Ky.) 565.

28. Howell *v.* Hallett, Minor (Ala.) 102.

[a] **When not required by statute, the objection that the cause of action is not endorsed on the summons is frivolous.** Nance *v.* Webb, 42 Miss. 268.

29. **Cal.**—Shinn *v.* Cummins, 65 Cal. 97, 3 Pac. 133. **Idaho.**—Foore *v.* Simon Piano Co., 18 Idaho 167, 108 Pac. 1038, 65 Am. Dec. 726. **Ind.**—Hutchens *v.* Latimer, 5 Ind. 67. **Eng.**—Ablett *v.* Basham, 5 El. & Bl. 1019, 2 Jur. N. S. 285, 25 L. J. Q. B. 239, 85 E. C. L. 1019, 119 Eng. Reprint 760.

[a] **The object is that defendants may know whom to treat as such in the matter of notices or payment.** Hutchens *v.* Latimer, 5 Ind. 67.

[b] **If omitted, process is not invalidated.** Foore *v.* Simon Piano Co., 18 Idaho 167, 108 Pac. 1038, 65 Am. Dec. 726.

30. Stone *v.* Sprague, 24 N. H. 309.

[a] **An endorsement in pencil is not sufficient.** Stone *v.* Sprague, 24 N. H. 309; Meserve *v.* Hicks, 24 N. H. 295.

31. See the statutes.

[a] **Until set aside or vacated, by adequate proceedings for that purpose, the endorsement is taken as true.** White *v.* Johnson, 27 Ore. 282, 299, 40 Pac. 511, 50 Am. St. Rep. 726.

[b] **If incorrect it may be amended.** White *v.* Ladd, 34 Ore. 422, 56 Pac. 515.

32. Ten Eyck *v.* Mendel, 77 N. J. L.

which will authorize the writ "to be directed to an indifferent person" for service.³³ Statutes also may require the process to be endorsed with the plaintiff's name,³⁴ or, if he is a nonresident, with that of a sufficient resident citizen,³⁵ in order to fix liability for costs.³⁶ The change of endorser of such a writ, before service, does not affect its validity,³⁷ but after service such change must be by leave of court.³⁸

408, 72 Atl. 31; *Marselis v. Seaman*, 21 Barb. (N. Y.) 319. See the title "**Penalties, Forfeitures and Fines.**"

[a] Statute does not apply to penalties which are only incidental to the recovery, and depend upon the verdict of the jury and the operation of the law, but relates to actions brought primarily for the recovery of penalties and forfeitures prescribed by statute. *Layton v. McConnell*, 61 App. Div. 447, 70 N. Y. Supp. 679.

[b] If endorsement is not made, the service will be set aside on motion even after a general appearance if at the time of such appearance defendant had not learned of the nature of the cause of action. *Farmers' & Merchants State Bank v. Stringer*, 75 App. Div. 127, 77 N. Y. Supp. 410.

33. *Eno v. Frisbie*, 5 Day (Conn.) 122. See *supra*, IV, C.

34. *Me.*—*Stevens v. Getchell*, 11 Me. 443; *Stratton v. Foster*, 11 Me. 467. *Mass.*—*Feneley v. Mahoney*, 21 Pick. 212; *Robbins v. Hill*, 12 Pick. 569; *Clark v. Paine*, 11 Pick. 66. *N. H.*—*Meserve v. Hicks*, 24 N. H. 295.

[a] "The *prochein ami* is a party, within the meaning of the statute requiring original writs to be endorsed by the plaintiff, or his agent or attorney." *Crossen v. Dryer*, 17 Mass. 222.

35. *U. S.*—*Pullman's Palace Car Co. v. Washburn*, 66 Fed. 790. *Me.* *Bennett v. Holmes*, 79 Me. 51, 7 Atl. 902; *Stone v. McLanathan*, 39 Me. 131. *Mass.*—*Slate v. Ackley*, 8 Cush. 98; *Haywood v. Main*, 18 Pick. 226. *N. H.*—*Brackett v. Bartlett*, 19 N. H. 129; *Pettingill v. McGregor*, 12 N. H. 179.

[a] An endorsement "From the office of" the attorney who brought the action is a sufficient endorsement under the statute. *Seagrave v. Erickson*, 11 Cush. (Mass.) 89; *Slate v. Ackley*, 8 Cush. (Mass.) 98.

[b] The construction put upon such statutes is "that the party actually making the endorsement although nominally as the attorney of the

plaintiff, in a representative capacity, is still bound as indorser, personally." *Slate v. Ackley*, 8 Cush. (Mass.) 98; *Chapman v. Phillips*, 8 Pick. (Mass.) 25; *Chadwick v. Upton*, 3 Pick. (Mass.) 442; *Brackett v. Bartlett*, 19 N. H. 129; *Pettingill v. McGregor*, 12 N. H. 179.

[c] An agent or attorney (1) who shall endorse his name on an original writ, by clause of the statute, is made liable for the costs, in case of avoidance. *Hartwell v. Hemmenway*, 7 Pick. (Mass.) 117. (2) And though one endorse a writ with the name of the plaintiff corporation, by himself, the law would imply that the signer was the agent for the corporation; and the defendant will have the same remedy against him as if he had written his name only. *Middlesex Turnpike Corp. v. Tufts*, 8 Mass. 266.

[d] "Where the name of the attorney is not inserted, it is not a good endorsement; it does not bind the attorney, because, though he actually indorses the memorandum on the writ, he does not use his own name." *Slate v. Ackley*, 8 Cush. (Mass.) 98; *Robbins v. Hill*, 12 Pick. (Mass.) 569.

36. *Ely v. Forward*, 7 Mass. 25; *Meserve v. Hicks*, 24 N. H. 295.

[a] "The real intent and design of the statute in requiring an indorser, was to afford a security to the defendant for his costs in case of the failure of the suit." *Clark v. Paine*, 11 Pick. (Mass.) 66.

37. *Steward v. Riggs*, 9 Me. 51.

38. *Oysted v. Shed*, 8 Mass. 272; *Pettingill v. McGregor*, 12 N. H. 179; *Whitcher v. Whitcher*, 10 N. H. 440.

[a] The endorsement may be made after levy under the statute permitting amendments. *Garvin v. Legery*, 61 N. H. 153.

[b] "If the writ were not properly endorsed before service, the court will not permit it afterwards to be endorsed without the consent of the defendant." *Brackett v. Bartlett*, 19 N. H. 129; *Pettingill v. McGregor*, 12 N. H. 179.

Some of these statutes are mandatory,³⁹ some are directory.⁴⁰ Though the absence of the endorsement does not render the process absolutely void,⁴¹ failure in this respect is ground to abate the writ when seasonably taken advantage of;⁴² and in the case of some requirements, the omission may not be supplied by amendment, once it is objected to.⁴³ A compliance with these statutes may be sufficient though not literal,⁴⁴ and failure to make the endorsement may of course be waived

[c] A person "once having endorsed an original writ, cannot afterwards be discharged and another substituted in his place without the consent of the defendant in the suit, for he has acquired a right to his name as a security for his costs." *Caldwell v. Lovett*, 13 Mass. 422; *Ely v. Forward*, 7 Mass. 25.

39. Me.—*Liberty v. Haines*, 101 Me. 402, 64 Atl. 665. Mass.—*Haywood v. Main*, 18 Pick. 226; *Gould v. Barnard*, 3 Mass. 199. Miss.—*Foster v. Collins*, 5 Smed. & M. 259.

40. Idaho.—*Foore v. Simon Piano Co.*, 18 Idaho 167, 108 Pac. 1038. Ill. *Eaton v. Graham*, 11 Ill. 619. N. Y. *Cox v. New York C. & H. R. R. Co.*, 61 Barb. 615.

41. Ill.—*Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70; *Eaton v. Graham*, 11 Ill. 619. Kan.—*Simpson v. Rice*, 43 Kan. 22, 22 Pac. 1019; *Dusenberry v. Bennett*, 7 Kan. App. 123, 53 Pac. 82. Neb.—*Crowell v. Galloway*, 3 Neb. 215. N. H.—*Garvin v. Legery*, 61 N. H. 153; *Farnum v. Bell*, 3 N. H. 72. Ohio.—*Finckh v. Evers*, 25 Ohio St. 82; *Kious v. Kious*, 2 Ohio Dec. (Reprint) 318.

42. U. S.—*Brown v. Pond*, 5 Fed. 31. Ala.—*Howell v. Hallett*, Minor 102. Me.—*Pressey v. Snow*, 81 Me. 288, 17 Atl. 71; *Converse v. Damariscotta Bank*, 15 Me. 431. Miss.—*Foster v. Collins*, 5 Smed. & M. 259. N. Y. *Farmers' & Merchants' State Bank v. Stringer*, 75 App. Div. 127, 77 N. Y. Supp. 410. Ohio.—*Gillett v. Miller*, 12 Ohio Cir. Ct. 209, 5 Ohio Cir. Dec. 588.

43. U. S.—*Brown v. Pond*, 5 Fed. 31. Conn.—*Eno v. Frisbie*, 5 Day 122. Ind.—*Hutchins v. Latimer*, 5 Ind. 67. N. H.—*Pettingill v. McGregor*, 12 N. H. 179, 190. R. I.—*Probate Court v. Lamphear*, 14 R. I. 291.

[a] By statute certain process must be dismissed on motion for want of proper endorsement. *Pollard v. Wilder*, 17 Vt. 48.

[b] Where the statute provides that for failure to bear a prescribed

endorsement a writ shall abate, and no provision is made for amendment, none can be made. *Eno v. Frisbie*, 5 Day (Conn.) 122.

[c] If endorsement is required at time of signing the writ, it may not be supplied later. *Wheelock v. Sears*, 19 Vt. 559.

[d] Failure to make endorsement is ground for nonsuit. *Hedinger v. Silsbee*, 2 G. Gr. (Iowa) 363.

44. U. S.—*Brown v. Pond*, 5 Fed. 41. Cal.—*Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133. Fla.—*Dees v. Smith*, 55 Fla. 652, 46 So. 173. Kan. *Thompson v. Pfeiffer*, 60 Kan. 409, 56 Pac. 763. Mass.—*Hartwell v. Hemmenway*, 7 Pick. 117. N. J.—*Ferguson v. State*, 31 N. J. L. 283. N. Y. *Cox v. New York C. & H. R. R. Co.*, 61 Barb. 615.

[a] "To endorse means to put a name on the back of a paper." *Hartwell v. Hemmenway*, 7 Pick. (Mass.) 117.

[b] If the information "appears on the face and not on the back of the summons,"—"it is not endorsed on the summons." But the variance in form was held immaterial. *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133.

[c] The issuance of a second summons, containing the proper endorsement, cured an omission of such endorsement from a former summons served on the same day as the latter summons. *Simpson v. Rice*, 43 Kan. 22, 22 Pac. 1019.

[d] When notice is the object of the endorsement, if the process is accompanied by a copy of the declaration which contains the necessary information, this is a substantial compliance, though not a formal or technical compliance by an endorsement on the process itself. *Brown v. Pond*, 5 Fed. 31.

[e] Conformity in Substance Is Necessary.—"The statute requires a certain certificate to be made, and we might as well come to the conclusion that none was necessary, as that a dif-

by an appearance.⁴⁵ The endorsement need not be signed by the clerk and attested by the seal.⁴⁶ Unnecessary endorsements, which do not mislead, may be treated as surplusage.⁴⁷ Failure of an officer to endorse the time of receiving a process for service does not affect its validity.⁴⁸

N. ADDITIONAL REQUIREMENTS.—Other matter than that hereinbefore treated of is sometimes required by statute to be inserted in a summons,⁴⁹ such as the time⁵⁰ and place⁵¹ of filing the petition, the title of the cause,⁵² the file number,⁵³ an address where the answer

ferent one would answer.” Pollard v. Wilder, 17 Vt. 48.

45. Ill.—Happel v. Brethauer, 70 Ill. 166, 22 Am. Rep. 70. Ind.—Swift v. Woods, 5 Blackf. 97. Ia.—Hedinger v. Silsbee, 2 G. Gr. 363. Mass.—Seagrove v. Erickson, 11 Cush. 89. Neb. Crowell v. Galloway, 3 Neb. 215.

46. Abbey v. W. B. Grimes Dry Goods Co., 44 Kan. 415, 443, 24 Pac. 426; Peters v. Conway, 4 Bush (Ky.) 565.

[a] In a conflict between endorsement and attested words in a writ, the latter shall prevail. Peters v. Conway, 4 Bush (Ky.) 565.

47. Kan.—Weaver v. Gardner, 14 Kan. 347. Miss.—Pharis v. Conner, 3 Smed. & M. 87. Neb.—Krotter & Co. v. Norton, 84 Neb. 137, 120 N. W. 923; Hapgood Plow Co. v. Martin, 16 Neb. 27, 19 N. W. 512. Ohio.—Larimer v. Clemmer, 31 Ohio St. 499

[a] “No endorsement in this case was necessary: but inasmuch as one was made, it should have been sufficiently complete to have advised the defendants of all the relief prayed for. This notice is deceptive, and was calculated to mislead defendants.” Watson v. McCartney, 1 Neb. 131. Compare Weaver v. Gardner, 14 Kan. 347.

48. Ill.—Chickering v. Failes, 26 Ill. 507. Ind.—Johnson v. McLane, 7 Blackf. 501, 43 Am. Dec. 102. Ia. Cobb v. Newcomb, 7 Iowa 43. Miss. Nance v. Webb, 42 Miss. 268. Pa. In re Hale’s Appeal, 44 Pa. 438. Tex. DeWitt v. Dunn, 15 Tex. 106. Vt. Fletcher v. Pratt, 4 Vt. 182.

[a] The law will presume (1) process was delivered to the officer at the time they were issued, if nothing appears in the record to indicate the time they came into his hands (Chickering v. Failes, 26 Ill. 507), (2) “or the day of service may be taken as the time.” Cobb v. Newcomb, 7 Iowa 43.

[b] Statutes requiring such endorsements are merely directory. McMahon v. Green, 12 Ala. 71, 46 Am. Dec. 242.

49. See *infra*, this section.

[a] The description of the premises in controversy required to be inserted in the summons in an unlawful detainer action, must be such as to furnish a safe guide to the officer in delivering possession. Hitchcox v. Rawson, 14 Gratt. (55 Va.) 526; Gorman v. Steed, 1 W. Va. 1.

50. Dak.—Star v. Mahan, 4 Dak. 213, 30 N. W. 169. N. Y.—Jacquerson v. Van Erben, 2 Abb. Pr. 315. Tex. Simms v. Miears (Tex. Civ. App.), 190 S. W. 544.

[a] It is a fatal defect in a citation to misstate or fail to give date of filing petition. Simms v. Miears, (Tex. Civ. App.) 190 S. W. 544; LeMaster v. Dalhart R. E. Agency, 56 Tex. Civ. App. 302, 121 S. W. 185; Leavitt v. Brazelton, 28 Tex. Civ. App. 3, 66 S. W. 465. Compare Wood v. Warren (Tex. Civ. App.), 157 S. W. 301; Western Union Tel. Co. v. Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367. Contra, McKnight v. Grant, 13 Idaho 629, 92 Pac. 989, 121 Am. St. Rep. 287; Jacquerson v. Van Erben, 2 Abb. Pr. (N. Y.) 315.

51. Star v. Mahan, 4 Dak. 213, 30 N. W. 169; Cook v. Kelsey, 19 N. Y. 412; Merrill v. George, 23 How. Pr. (N. Y.) 331; Pignolet v. Daveau, 2 Hilt. (N. Y.) 584.

[a] A statement at the foot of the summons, and not on the body, showing the time and place of filing the complaint, is sufficient. Star v. Mahan, 4 Dak. 213, 30 N. W. 169; Cook v. Kelsey, 19 N. Y. 412; Pignolet v. Daveau, 2 Hilt. (N. Y.) 584.

52. Bank of Louisiana v. Elam, 10 Rob. (La.) 26; Caldwell v. Glenn, 6 Rob. (La.) 9.

53. Pruitt v. State, 92 Tex. 434, 49

may be served,⁵⁴ or place where it is to be filed.⁵⁵ If the information appears anywhere in the process it is generally sufficient.⁵⁶

V. SUPPLYING LOST PROCESS.—Lost or destroyed process may be supplied by leave of the court, upon application,⁵⁷ after notice to the opposite party,⁵⁸ upon sufficient proof of the original,⁵⁹ even after the expiration of the term at which judgment was rendered.⁶⁰

S. W. 366; *Durham v. Betterton*, 79 Tex. 223, 14 S. W. 1060.

[a] A citation which fails to show file number of the suit (1), as required by statute, will not support a judgment by default. *Durham v. Betterton*, 79 Tex. 223, 14 S. W. 1060; *Crenshaw v. Hempel* (Tex. Civ. App.), 130 S. W. 731; *Duke v. Spiller*, 51 Tex. Civ. App. 237, 111 S. W. 787; *Kirk v. Hampton*, 2 Wills. Civ. Cas. (Tex.) §719. (2) Likewise if the file number is misstated. *Houston, E. & W. T. Ry. Co. v. Erving*, 2 Wills. Civ. Cas. (Tex.) §122. (3) But the rule does not apply to suits in justices' courts, since the statute does not extend to them. *Valdez v. Cohen*, 23 Tex. Civ. App. 475, 56 S. W. 375.

54. *Hotchkiss v. Cutting*, 14 Minn. 537; *Cook v. Kelsey*, 19 N. Y. 412; *Weare v. Slocum*, 1 Code Rep. (N. Y.) 105, 3 How. Pr. 397; *Sullivan v. Harney*, 53 Misc. 249, 103 N. Y. Supp. 177.

[a] Name of the state need not be inserted when not specifically required by statute. *Cook v. Kelsey*, 19 N. Y. 412.

55. *Medley v. Voris*, 2 La. Ann. 140; *Caldwell v. Glenn*, 6 Rob. (La.) 9.

56. *Bank of Louisiana v. Elam*, 10 Rob. (La.) 26; *Baugh v. Baugh* (Tex. Civ. App.) 175 S. W. 725; *McLane v. Kirby*, 54 Tex. Civ. App. 113, 116 S. W. 118. But see *Crenshaw v. Hempel*, (Tex. Civ. App.) 130 S. W. 731.

57. Ill.—*Long v. Sutter*, 67 Ill. 185. Ky.—*Gentry v. Hutchcraft*, 7 Mon. 241, 18 Am. Dec. 172. N. H.—*Taylor v. Cobleigh*, 16 N. H. 105; *Whiteher v. Whiteher*, 10 N. H. 440. Ohio.—*Mount v. State*, 14 Ohio 295, 45 Am. Dec. 542.

[a] Every court of record has a supervising and protecting charge over its records, and may direct substitution in case the originals are lost. *Hollister v. Judges*, 8 Ohio St. 201, 204, 70 Am. Dec. 100.

[b] An order of court is the only means by which a copy of lost sum-

mons may be supplied. *Long v. Sutter*, 67 Ill. 185.

[c] A copy is substituted (1) in lieu of the original. Ark.—*Fowler v. More*, 4 Ark. 570. Ill.—*Long v. Sutter*, 67 Ill. 185. N. H.—*Whiteher v. Whiteher*, 10 N. H. 440. (2) If no copy exists, the contents may be supplied by parole. *Williams v. Richardson*, 66 Fla. 234, 63 So. 446, Ann. Cas. 1916D, 245; *Easterwood v. Burnett*, 59 Tex. Civ. App. 521, 126 S. W. 934. (3) "The court cannot give leave to file a writ materially different from the original. But we think the proper course, where leave is given to file a writ, is to make out one in the ordinary form, like the original, with a seal and a copy of the return, certified as such." *Whiteher v. Whiteher*, 10 N. H. 440.

58. *Long v. Sutter*, 67 Ill. 185.

[a] Where the writ has not been regularly filed (1) with the clerk, but has been kept in the possession of the plaintiff's attorney till lost, leave will not be granted to file a substitute, unless with the consent of the opposite party. *Mattocks v. Bishop*, 4 N. H. 439. (2) If lost by the officer, however, before return day, its loss may be supplied. *Taylor v. Cobleigh*, 16 N. H. 105.

59. Ark.—*Fowler v. More*, 4 Ark. 570. Ill.—*Long v. Sutter*, 67 Ill. 185. Ky.—*Williams v. Thompson*, 80 Ky. 325; *Gentry v. Hutchcraft*, 7 Mon. 241, 18 Am. Dec. 172.

[a] Certificate of the clerk that process had been issued and lost does not supply the want of the missing process. *Smith v. Trimble*, 27 Ill. 152.

[b] Affidavit, as substitute, will not be received. "We know of no precedent for this. It might lead to dangerous consequences. It is better that you should be put to the trouble of taking out another summons, than to introduce a practice hitherto unknown." *Littell v. Cassady*, Hard. (Ky.) 227.

60. *Southern R. Co. v. Dickens*, 163 Ala. 114, 50 So. 109; *Gentry v. Hutch-*

The statutes generally provide a method of supplying lost records, including process,⁶¹ and either this or the common law method may be pursued.⁶²

VI. ALTERATION OF PROCESS.—After completed process of the court is formally issued by the clerk, neither an attorney nor any other person may lawfully alter or change it.⁶³ Such an alteration in a judicial process, if made in a material part,⁶⁴ may be destructive of the writ;⁶⁵ and an alteration in the date,⁶⁶ direction,⁶⁷ or designation of the court to which it is returnable,⁶⁸ is material. Under some circumstances certain process has been held alterable by the parties or other persons, after issuance but before service,⁶⁹ such as

craft, 7 Mon. (Ky.) 241, 18 Am. Dec. 172.

61. See the statutes; also *McClanahan v. West*, 100 Mo. 309, 13 S. W. 674, and the title "Records."

62. *Mo.*—*Barnes v. Imhoff*, 254 Mo. 217, 162 S. W. 152; *McClanahan v. West*, 100 Mo. 309, 13 S. W. 674. *Pa.* *Richards' Appeal*, 122 Pa. 547, 15 Atl. 903. *Tex.*—*Johnson v. Skipworth*, 59 Tex. 473.

63. *White v. Jones*, 38 Ill. 159; *People v. Lamborn*, 2 Ill. 123; *Garrison v. Hoyt*, 25 Mich. 509.

What constitutes issuance, see *supra*, III. A.

[a] **Illegal and Highly Improper.**

(1) "An alteration of the process of the court between its delivery by the clerk to the party or his attorney, and its reception by the sheriff, is illegal and highly improper." *People ex rel. Wright v. Lamborn*, 2 Ill. 123. (2) "Courts can never permit such alteration of its process, thereby endangering the rights of parties, as effectually as any other species of forgery. If wrong, let it be returned, and issue legal process or apply to the court for leave to amend it, but no person, whether an officer or not, can be entrusted with such a power." *White v. Jones*, 38 Ill. 159.

64. *Conn.*—*Parsons v. Ely*, 2 Conn. 377. *Ill.*—*White v. Jones*, 38 Ill. 159. *Mich.*—*In re Knott*, 162 Mich. 10, 126 N. W. 1040.

[a] After the writ has been signed and issued, if the alteration is material it destroys the writ. *Parsons v. Ely*, 2 Conn. 377.

65. See cases cited *infra* this section.

66. *Parsons v. Ely*, 2 Conn. 377; *Merrill v. Townsend*, 5 Paige (N. Y.) 80.

[a] The correction of an incorrect

date by an attorney does not render a writ void, nor subject it to being quashed. *In re Knott*, 162 Mich. 10, 126 N. W. 1040.

67. *Rollins v. Rich*, 27 Me. 557.

68. *Parsons v. Ely*, 2 Conn. 377.

69. *Conn.*—*Starr v. Lyon*, 5 Conn. 538; *Parsons v. Ely*, 2 Conn. 377; *Towner v. Phelps*, 1 Root 250. *Me.* *Gardiner v. Gardiner*, 71 Me. 266. *Mass.*—*Gardner v. Webber*, 16 Pick. 251. *N. H.*—*Clough v. Curtis*, 62 N. H. 409. *N. J.*—*Klopping v. Stellmacher*, 36 N. J. L. 176. *Pa.*—*Com. v. Warfel*, 157 Pa. 444, 27 Atl. 763.

[a] Alterations are not limited to writs said to be "alive," that is, those of which the return day has not come. *McCracken v. Richardson*, 46 N. J. L. 50.

[b] Where service has not been had, alterations may be made. *Gardiner v. Gardiner*, 71 Me. 266; *Clindenin v. Allen*, 4 N. H. 385.

[c] **Practice of long standing** (1) to alter date and return day of writ. "The alterations in the writ were made in conformity to long established practice; and of this practice the court would take notice. . . . This practice is convenient, and we do not know that it is liable to abuse." *Gardner v. Webber*, 16 Pick. (Mass.) 251. (2) "The practice of sheriffs in changing the return day to suit their convenience in making service, is one of long standing, and in many cases is necessary to enable the sheriff to obtain service of the writ. Such alterations do not avoid the writ for irregularity." *Klopping v. Stellmacher*, 36 N. J. L. 176.

[d] **Consent of Plaintiff's Attorney Is Not Necessary.**—Whatever effect want of consent of the plaintiff's attorney might have in an action by the plaintiff against the sheriff for failure

original process, so called, which is issued by the plaintiff or his attorney,⁷⁰ or where it is the practice to permit lawyers to fill out forms of mesne process which have been issued in blank by the clerk under his seal and signature.⁷¹ The clerk, of course, has control of process issued by him until it is delivered to the officer for service,⁷² and, though there has been some disapproval of the practice,⁷³ it is

to serve promptly, it will not avoid the writ in favor of defendant, if plaintiff's attorney adopts the writ as served. *Klopping v. Stellmacher*, 36 N. J. L. 176.

[e] "In the English practice a writ stamped and sealed may be dated anew and made returnable to another return day, provided it is resealed." *Eastman v. Morrison*, 46 N. H. 136.

70. N. J.—*McCracken v. Richardson*, 46 N. J. L. 50. N. Y.—*Sloan v. Wattles*, 13 Johns. 158. Vt.—*Hunt v. Viall*, 20 Vt. 291.

See *infra*, IV, M.

[a] An attorney who makes a writ may authorize a change therein before service. *Hunt v. Viall*, 20 Vt. 291.

[b] Rule applies only to summons prepared by the attorney for service, the return day in which may be reasonably continued by alteration, and extended, by the attorney or sheriff, in such manner as may suit their convenience for service. *McCracken v. Richardson*, 46 N. J. L. 50.

71. Conn.—*Parsons v. Ely*, 2 Conn. 377. Ga.—*Bank of St. Marys v. Mumford*, 6 Ga. 44. Mass.—*Gardner v. Webber*, 16 Pick. 251. N. H.—*Eastman v. Morrison*, 46 N. H. 136; *Dearborn v. Twist*, 6 N. H. 44; *Clindenin v. Allen*, 4 N. H. 385. N. Y.—*Sullivan v. Alexander*, 18 Johns. 3. S. C.—See *Miller v. Hall*, 1 Spear 1.

Issuance in blank, see *supra*, IV, A.

[a] Where by immemorial usage the clerks have signed writs in blank and attorneys have filled them out, a subsequent alteration of course does not affect their validity. *Parsons v. Ely*, 2 Conn. 377.

[b] The plaintiff has control over the writ till served, where it is issued in blank. *Clindenin v. Allen*, 4 N. H. 385.

[c] Effect of Such Permissible Alterations.—(1) When the return day is advanced, and the date of the process is left as originally written, so that the return day appears to have been placed beyond the time permitted

by statute, the process is abatable. *Denison v. Crofts*, 74 Conn. 38, 49 Atl. 851; *Bank of St. Mary's v. Mumford*, 6 Ga. 44. (2) But it has also been held that the real date of the process becomes the date on which the change was made. (*Gardiner v. Gardiner*, 71 Me. 266; *Garrison v. Hoyt*, 25 Mich. 509), and (3) the date left standing on the process may be amended to that of the alteration (*Gardiner v. Gardiner*, 71 Me. 266); though, (4) if it was not actually intended to reissue the process at such time, but only to alter the return day, the defect is not curable by amendment. *Denison v. Crofts*, 74 Conn. 38, 49 Atl. 851, (5) and where the sheriff enlarged the return day, under a practice acquiesced in by the court, the date when the change was made has also been held not to be the date of issuance so as to permit the bar of limitation. *McCracken v. Richardson*, 46 N. J. L. 50.

[d] Blanks on which a writ has been once drawn (1) have so far performed their office as not to be capable of being altered and used again for another writ in another suit. *Parsons v. Shorey*, 48 N. H. 550; *Eastman v. Morrison*, 46 N. H. 136; *Lyford v. Bryant*, 38 N. H. 88; *Lovell v. Sabin*, 15 N. H. 29, 37; *Dearborn v. Twist*, 6 N. H. 44; *Durden v. Hammond*, 1 Barn. & C. 111, 8 E. C. L. 48, 107 Eng. Reprint 42. (2) But if not delivered to the officer for service, a blank which has been filled out in a case between other parties may be altered and reused. *Gardner v. Webber*, 16 Pick. (Mass.) 251.

72. *Miller v. Hall*, 1 Spear (S. C.) 1. See *supra*, III, A and C.

73. Mass.—See *Blanchard v. Waters*, 10 Mete. 185. Ohio.—*Faris v. State*, 3 Ohio St. 159. Vt.—*Sawyer v. Doane*, 19 Vt. 598.

[a] Though irregular for a justice of the peace to change the date on an execution and "reissue it," the writ is not thereby void. *Faris v. State*, 3 Ohio St. 159.

[b] The practice should be discour-

quite generally held that the clerk,⁷⁴ or other person who makes the writ,⁷⁵ may lawfully make a change in it after delivery to the officer, but before service, or may authorize another to make the alteration for him,⁷⁶ under the usual restrictions as to such acts of agency.⁷⁷ If the alteration makes a material change in the writ, it becomes in effect new process,⁷⁸ the distinction being recognized between an amendment curing a defect, and a change in a perfect process which creates an entirely different writ.⁷⁹ There can be no alteration or change after service, except by leave of court,⁸⁰ and a judgment by default upon process altered without authority has been held to work no estoppel.⁸¹ Upon the alteration of a writ without proper authority, the process may be treated as utterly destroyed,⁸² or the alteration

aged of altering final process to prevent its expiring. *Sawyer v. Doane*, 19 Vt. 598.

74. *Phillips v. Holland*, 78 N. C. 31; *Mississippi Mills v. Meyer*, 83 Tex. 433, 18 S. W. 748.

75. *Mich.*—*Garrison v. Hoyt*, 25 Mich. 509. *Ohio.*—*Faris v. State*, 3 Ohio St. 159. *Vt.*—*Sawyer v. Doane*, 19 Vt. 598.

76. *N. Y.*—*Sullivan v. Alexander*, 18 Johns. 3; *Sloan v. Wattles*, 13 Johns. 158. *Pa.*—*Com. v. Warfel*, 157 Pa. 444, 27 Atl. 763. *Vt.*—*Hunt v. Viall*, 20 Vt. 291.

[a] The sheriff may exercise the power given him by the proper authority. *Sloan v. Wattles*, 13 Johns. (N. Y.) 158; *Hunt v. Viall*, 20 Vt. 291.

[b] One prohibited by statute from filling out a process, may not act as such agent to make the alteration, without rendering the process void. *Garrison v. Hoyt*, 25 Mich. 509. But see *Hunt v. Viall*, 20 Vt. 291.

77. *Garrison v. Hoyt*, 25 Mich. 509.

[a] Such alteration is treated as the official act of the officer who issued the process, if made by his direction and in his presence, where no discretion is given the person acting as a mere clerk or amanuensis. *Garrison v. Hoyt*, 25 Mich. 509.

[b] Clerk may not telegraph authority to an attorney in another county to make a change in the direction of a process, so as to make it run to a different county from that specified when originally issued. *Mississippi Mills v. Meyer*, 83 Tex. 433, 18 S. W. 748.

78. *Mo.*—*Gardiner v. Gardiner*, 71 Me. 266. *Mich.*—*Garrison v. Hoyt*, 25 Mich. 509. *N. C.*—*Phillips v. Holland*, 78 N. C. 31.

But see *Hunt v. Viall*, 20 Vt. 291.

[a] Reissuance at the time of alteration saves a process from being abatable. *Denison v. Crofts*, 74 Conn. 38, 49 Atl. 851.

79. *Phillips v. Holland*, 78 N. C. 31. See *infra*, VIII, B, 2.

80. *Ga.*—*Adam Elect. Co. v. Witman*, 16 Ga. App. 574, 85 S. E. 819. *Me.*—*Harris v. Barker*, 87 Me. 270, 32 Atl. 896; *Bray v. Libby*, 71 Me. 276; *Childs v. Ham*, 23 Me. 74. *Mass.*—*Simeon v. Cramm*, 121 Mass. 492; *Brown v. Neale*, 3 Allen 74, 80 Am. Dec. 53. *N. H.*—*Clindenin v. Allen*, 4 N. H. 385.

[a] "The writ, when served, must be returned into the court by the officer who makes the service. Neither he nor the attorney who gave it to him can alter or add to it." *Bray v. Libby*, 71 Me. 276; *Brigham v. Este*, 2 Pick. (Mass.) 420.

[b] Alteration after service is forgery, if made without leave of the court. *White v. Jones*, 38 Ill. 159; *Clindenin v. Allen*, 4 N. H. 385.

81. *Brown v. Neale*, 3 Allen (Mass.) 74, 80 Am. Dec. 53. But see *Spaulding v. Chamberlin*, 12 Vt. 538, 36 Am. Dec. 358, and also *Gifford v. Morrison*, 37 Ohio St. 502, 41 Am. Rep. 537.

82. *Conn.*—*Denison v. Crofts*, 74 Conn. 38, 49 Atl. 851; *Parsons v. Ely*, 2 Conn. 377. *Ill.*—*White v. Jones*, 38 Ill. 159. *Me.*—*Bray v. Libby*, 71 Me. 276. *N. J.*—*McCracken v. Richardson*, 46 N. J. L. 50. *N. Y.*—*Merrill v. Townsend*, 5 Paige 80; *People v. Singer*, 1 Cow. 41. *Pa.*—See *Elwood Paper Co. v. Radziewicz*, 16 Pa. Co. Ct. 81. *Tex.*—*Mississippi Mills v. Meyer*, 83 Tex. 433, 18 S. W. 748.

[a] The alteration of a perfect writ may render it void. *Mississippi Mills v. Meyer*, 83 Tex. 433, 18 S. W. 748.

may be stricken out and the original reading restored, when justice requires this course.⁸³ However, after there has been a proper alteration of a writ, it has been held improper to permit such a restoration.⁸⁴

By statute it has been provided that process to commence suit shall not be altered after issuance, nor any blank filled up, except by the clerk,⁸⁵ or by direction of the court.⁸⁶

VII. ALIAS AND OTHER ADDITIONAL PROCESS.—A. IN GENERAL.⁸⁷—An alias is issued when the original process has not produced its effect,⁸⁸ as where the original has been returned⁸⁹ un-

[b] If a constable add a new name to a summons, without authority of the justice, he vitiates the whole process. *Deats v. Scranton*, 8 P. L. L. (Pa.) 164, 7 Luz. L. R. 179.

[c] It should appear of record who made the alteration. *Garrison v. Hoyt*, 25 Mich. 509.

[d] The objection may be waived in jurisdictional process. *Bray v. Libby*, 71 Me. 276; *Pattee v. Lowe*, 35 Me. 121.

[e] A change in the direction of a final process, by an attorney, after issuance, did not destroy the writ, since the attorney had the right originally to demand either of two readings, and the act of the clerk in filling in this part of the writ was purely ministerial. But "such alteration will rarely be made without some pressing need to justify it." *Blanchard v. Waters*, 10 Mete. (Mass.) 185. See also *Rollins v. Rich*, 27 Me. 557. But compare *Denison v. Crofts*, 74 Conn. 38, 49 Atl. 851, and *Mississippi Mills v. Meyer*, 83 Tex. 433, 18 S. W. 748.

83. *Me.*—*Rollins v. Rich*, 27 Me. 557. *Mass.*—*Brier v. Woodbury*, 1 Pick. 362. *N. Y.*—*People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020. *N. C.*—*Phillips v. Holland*, 78 N. C. 31. *Ohio.*—*Hollister v. Judges*, 8 Ohio St. 201, 70 Am. Dec. 100.

[a] A change made by a stranger, without authority of a party, has no effect upon the process as originally issued. *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020; *Phillips v. Holland*, 78 N. C. 31.

[b] An alteration fraudulently made by an officer, is without effect. *Brier v. Woodbury*, 1 Pick. (Mass.) 362.

84. *Phillips v. Holland*, 78 N. C. 31.

85. *Abney v. Ohio Lumb., etc. Co.*, 45 W. Va. 446, 32 S. E. 256; *Spragins*

v. West Virginia, etc. R. Co., 35 W. Va. 139, 13 S. E. 45.

86. *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020.

87. Effect on power of special judge, see 17 STANDARD PROC. 697, note 97 [b].

Alias execution, see 16 STANDARD PROC. 256, 296.

Alias writ of venire to summon jury, see 16 STANDARD PROC. 987.

88. *Ark.*—*Hughes v. Martin*, 1 Ark. 386, 389. *Colo.*—*Barndollar v. Patton*, 5 Colo. 46; *Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231. *D. C.*—*Parsons v. Hill*, 15 App. Cas. 532, 544. *Mo.*—*Mansur v. Pacific Mut. L. Ins. Co.*, 136 Mo. App. 726, 118 S. W. 1193. *Neb.*—*Davis v. Ballard*, 38 Neb. 830, 57 N. W. 527. *N. Y.*—*Merrill v. Townsend*, 5 Paige 80. *Ohio.*—*Williams' Admrs. v. Welton's Admr.*, 28 Ohio St. 451, 471; *Minor v. Board of Control*, 20 Ohio Cir. Ct. 4. *Va.*—*Richmond & D. R. Co. v. Rudd*, 88 Va. 648, 14 S. E. 361. *W. Va.*—*Gorman v. Steed*, 1 W. Va. 1.

[a] "An alias writ is one which is issued when a former writ has not produced its effect. The writ is so called from the words 'as we have formerly commanded you' being inserted after the usual commencement 'we command you.'" *Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231.

89. *Ala.*—*Curtis v. Gaines*, 46 Ala. 455. *Neb.*—*Walker v. Stevens*, 52 Neb. 653, 72 N. W. 1038; *Hanna v. Emerson*, 45 Neb. 708, 64 N. W. 229. *Ohio.*—*Williams' Admrs. v. Welton's Admr.*, 28 Ohio St. 451, 469. *S. C.*—*Parker v. Grayson*, 1 Nott & McC. 171; *Boggs v. Symmes*, 8 Rich. L. 443. *W. Va.*—*Oil & Gas Well Supply Co. v. Gartlan*, 58 W. Va. 267, 52 S. E. 524.

[a] By statute it is provided: "When a writ is returned 'not summoned' other writs may be issued

executed, or is lost or destroyed,⁹⁰ or for defects or irregularities in the service,⁹¹ or, by statute at least, for irregularities and defects in the original process itself;⁹² and it may be followed by successive pluries writs until its purpose has been effected.⁹³

B. COMPARISON OF COMMON LAW AND CODE ALIAS.—At common law where suit is commenced by the issuance of process, the alias is a continuation of the original valid process,⁹⁴ and must correspond

until the defendant or defendants shall be summoned." *Walker v. Stevens*, 52 Neb. 653, 72 N. W. 1038; *Williams' Admrs. v. Welton's Admr.*, 28 Ohio St. 451, 469.

90. *Williams' Admrs. v. Welton's Admr.*, 28 Ohio St. 451.

[a] It is within the power of the court to allow a new writ to be made and delivered to the sheriff, when the former has been lost or destroyed. *White v. Lovejoy*, 3 Johns. (N. Y.) 448.

91. *Mansur v. Pacific Mut. L. Ins. Co.*, 136 Mo. App. 726, 118 S. W. 1193; *Danville & W. R. Co. v. Brown*, 90 Va. 340, 18 S. E. 278; *Wynn v. Wyatt's Admx.*, 11 Leigh (38 Va.) 584.

92. *Colo.*—*Barndollar v. Patton*, 5 Colo. 46. *Mo.*—*Mansur v. Pacific Mut. L. Ins. Co.*, 136 Mo. App. 726, 118 S. W. 1193. *Va.*—*Danville & W. R. Co. v. Brown*, 90 Va. 340, 18 S. E. 278.

[a] An alias summons "is employed in cases where the original summons is defective in form or manner of service, and cannot be held to have performed its function." *Mansur v. Pacific Mut. L. Ins. Co.*, 136 Mo. App. 726, 118 S. W. 1193.

[b] If the first process is void, the one subsequently issued is not an alias but becomes the original. *Ill.*—*Rattan v. Stone*, 4 Ill. 540. *Neb.*—See *Walker v. Stevens*, 52 Neb. 653, 72 N. W. 1038. *N. C.*—*Folk v. Howard*, 72 N. C. 527. *Pa.*—*Everett v. Niagara Ins. Co.*, 142 Pa. 322, 21 Atl. 817.

93. *Ark.*—*Hughes v. Martin*, 1 Ark. 386. *Mich.*—*Johnson v. Mead*, 58 Mich. 67, 24 N. W. 665. *Va.*—*Danville & W. R. Co. v. Brown*, 90 Va. 340, 18 S. E. 278. *W. Va.*—*Oil & Gas Well Supply Co. v. Gartlan*, 58 W. Va. 267, 52 S. E. 524.

[a] "The only limitation in law upon the power of the plaintiff in a suit to have issued as many writs as he may deem proper, is that he is not permitted to harass or vex the defendant with unnecessary costs." *Dan-*

ville & W. R. R. Co. v. Brown, 90 Va. 340, 18 S. E. 278.

[b] No length of time between the first and last process destroys the effect of such a proceeding if continuous process is taken out and returned "non est inventus" from term to term. In this case seventeen years had elapsed between the issuing of the two writs. *Ontario Bank v. Rathbun*, 19 Wend. (N. Y.) 291.

94. *Ill.*—*Rattan v. Stone*, 4 Ill. 540. *N. Y.*—*Ontario Bank v. Rathbun*, 19 Wend. 291. *Pa.*—*Everett v. Niagara Ins. Co.*, 142 Pa. 322, 21 Atl. 817; *McClurg v. Fryer*, 15 Pa. 293; *O'Neill's Estate*, 29 Pa. Super. 415; *Lynn v. McMillen*, 3 Pen. & W. 170. *Va.*—*Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. 754. *W. Va.*—*Oil & Gas Well Supply Co. v. Gartlan*, 58 W. Va. 267, 52 S. E. 524; *Gorman v. Steed*, 1 W. Va. 1.

[a] The Original and Alias Form But One Process.—(1) The alias is "a continuation or reiteration of the original, and so indissolubly connected as to be one." *McClurg v. Fryer*, 15 Pa. 293. (2) The "alias is but the continuation of the original, and dependent upon it, it must stand or fall with it; and the original being quashed for the causes assigned, the alias ought also to have been quashed." *Gorman v. Steed*, 1 W. Va. 1.

[b] An action is deemed commenced on the day the first writ issued. *Slatton v. Jonson*, 4 Hayw. (Tenn.) 197; *Oil & Gas Well Supply Co. v. Gartlan*, 58 W. Va. 267, 52 S. E. 524.

[c] Effect of the Alias When Served Not Retroactive.—By the service of such alias the defendant is not brought within the jurisdiction of the court as of date of the issuance of the original summons, so as to give validity to any proceedings taken in the meantime, and before the defendant was actually before the court. *First Nat. Bank v. Cooke*, 3 Pa. Super. 278.

with it in all essential parts.⁹⁵ Moreover, when process has been commenced, it must be pursued without any chasm,⁹⁶ and every subsequent process must be dated on the day of the return of the preceding one,⁹⁷ and a failure to maintain this regular succession of writs re-

95. **Ky.**—*Morgan's Exrx. v. Morgan*, 2 Bibb 388. **Md.**—*State v. Logan*, 33 Md. 1. **S. C.**—*Boggs v. Symmes*, 8 Rich. L. 443.

[a] The variance (1) between the original and alias to be material, must be in a material part, such as in this case, a failure to name one of the defendants. *Morgan's Exrx. v. Morgan*, 2 Bibb (Ky.) 388. (2) The damages laid in the original writ are important and an essential part of it, and in this particular the alias must correspond,—though a slight change in the words used would not be material. *Boggs v. Symmes*, 8 Rich. L. (S. C.) 443.

[b] Where code changes the form of summons pending service, the continuity of the original suit is not broken by a conformity to the statutory requirements in the summons issued subsequent to the statutory change. *State v. Logan*, 33 Md. 1.

96. **Md.**—*Hazlehurst v. Morris*, 28 Md. 67. **Mich.**—*Johnson v. Mead*, 58 Mich. 67, 24 N. W. 665. **N. Y.**—*Low v. Little*, 17 Johns. 346; *Ontario Bank v. Rathbun*, 19 Wend. 291. **N. C.**—*Battle v. Baird*, 118 N. C. 854, 24 S. E. 668; *Etheridge v. Woodley*, 83 N. C. 11. **Pa.**—*Curcier's Estate*, 28 Pa. 261; *McClurg v. Fryer*, 15 Pa. 293. **S. C.**—*Parker v. Grayson*, 1 Nott & McC. 171. **Tenn.**—*Cherry v. Mississippi Val. Ins. Co.*, 16 Lea 292; *Dougherty v. Shown*, 1 Heisk. 302; *Slatton v. Jonson*, 4 Hayw. 197.

[a] An "interval" (1) interrupts the continuity of the suit. *Johnson v. Mead*, 58 Mich. 67, 24 N. W. 665. (2) "Where a party institutes a suit and the summons proves ineffectual to bring the defendant into court and is returned by the sheriff, in order to keep the suit alive, the summons must be regularly renewed from term to term until the defendant is taken. The omission so to renew it operates (as) a discontinuance of the action." *Hazlehurst v. Morris*, 28 Md. 67. (3) "The original summons must be followed by appropriate successive processes in order to a continuous single action referable to the date of its issue."

Etheridge v. Woodley, 83 N. C. 12. (4) An alias may be connected with the original writ not served, so as to make both part of the same process, but not if issuance of the alias is delayed beyond the period recognized by law. *Curcier's Estate*, 28 Pa. 261.

[b] A continuance roll (1) was made up at common law, in each case where the process was returned unserved, and the continuity of the proceeding was kept up by the entering of continuances from term to term and issuance of new process, until service was finally had. **Cal.**—*Dupuy v. Shear*, 29 Cal. 238. **D. C.**—*Parsons v. Hill*, 15 App. Cas. 532. **Mich.**—*Johnson v. Mead*, 58 Mich. 67, 24 N. W. 665. **N. Y.**—*Ontario Bank v. Rathbun*, 19 Wend. 291. (2) This roll came finally to be permitted to be made up at any time after the return of a process on which the service was had, by leave of court (*Johnson v. Mead*, 58 Mich. 67, 24 N. W. 665); (3) but the English practice of making the continuances out of court, and entering them at any subsequent time has not generally obtained in this country (**D. C.**—*Parsons v. Hill*, 15 App. Cas. 532. **Md.**—*Hazlehurst v. Morris*, 28 Md. 67. **S. C.**—*State Bank v. Baker*, 3 McCord 281. **Tenn.**—*Slatton v. Jonson*, 4 Hayw. 197), (4) though it was adopted in some jurisdictions. **U. S.**—*Schlosser v. Leshner*, 1 Dall. 411, 1 L. ed. 200. **N. Y.**—*Davis v. West*, 5 Wend. 63. **Pa.**—*Magaw v. Clark*, 1 Watts 528. But see *Low v. Little*, 17 Johns. (N. Y.) 346.

97. 3 Bl. Com. 282, and the following: **U. S.**—*United States v. Parker*, 2 Dall. 373, 1 L. ed. 421, 26 Fed. Cas. No. 15,992. **Mich.**—*Johnson v. Mead*, 58 Mich. 67, 24 N. W. 665. **N. Y.**—*People ex rel. Ellinghausen v. Leask*, 1 Abb. N. C. 299. **S. C.**—*Parker v. Grayson*, 1 Nott & McC. 171. **Tenn.**—*Slatton v. Jonson*, 4 Hayw. 197.

[a] If the original is returned (1) before the return day named in the writ, the alias may issue forthwith (*Rammel v. Watson*, 31 N. J. L. 281; *People ex rel. Ellinghausen v. Leask*, 1

sults in a discontinuance,⁹⁸ so far as dating the suit from the time of the issuance of the first writ is concerned.⁹⁹ A distinction, however, has been made between jurisdictional and final process, as to the necessity of successive writs.¹ But the service of a subsequent writ gives jurisdiction, regardless of whether it is a technical alias,² and the formalities requisite to a good alias at common law are immaterial except in so far as they may affect questions concerning the time when the suit is to be regarded as commenced;³ hence if the process

Abb. N. C. [N. Y.] 299), if (2) nothing in the statute inhibits this practice. *Hakes v. Macklin*, 170 Mich. 228, 136 N. W. 509.

98. Cal.—See *Dupuy v. Shear*, 29 Cal. 238. Ky.—*Morgan's Exrx. v. Morgan*, 2 Bibb 388. Md.—*Hazlehurst v. Morris*, 28 Md. 67. Mich.—*Johnson v. Mead*, 58 Mich. 67, 24 N. W. 665. N. C.—*Penniman v. Daniel*, 91 N. C. 431. Pa.—*Lynn v. McMillen*, 3 Pen. & W. 170; *Jones v. Orum*, 5 Rawle 249. S. C.—*State Bank v. Baker*, 3 McCord 281; *Parker v. Grayson*, 1 Nott & McC. 171. Tenn.—*Cherry v. Mississippi Val. Ins. Co.*, 16 Lea 292; *Armstrong v. Harrison*, 1 Head 379.

[a] "A discontinuance results from the voluntary act of the plaintiff in not going on regularly by the issue of successive connecting process, and thereby producing a break or hiatus to which such effect is ascribed." *Penniman v. Daniel*, 91 N. C. 431.

[b] A discontinuance by the court is necessary to terminate the suit; and though a party has the right to have the suit dismissed upon motion, he may waive the right by appearance and defense to the merits. *Cherry v. Mississippi Val. Ins. Co.*, 16 Lea (Tenn.) 292, *disapproving* *Maxwell v. Lea*, 6 Heisk. (Tenn.) 247, holding that the suit discontinues at the close of the term to which the last summons was returnable, where no alias is issued, without affirmative action of the court. See also *Armstrong v. Harrison*, 1 Head (Tenn.) 379.

99. *United States v. Parker*, 2 Dall. 373, 1 L. ed. 421, 26 Fed. Cas. No. 15,992; *Parker v. Grayson*, 1 Nott & McC. (S. C.) 171.

[a] The retrospective effect is not given the alias if a hiatus occurs. *Parker v. Grayson*, 1 Nott & McC. (S. C.) 171.

1. *Thomson v. Beveridge*, 3 Mackey (D. C.) 170. But see *Hazlehurst v. Morris*, 28 Md. 67; and 16 STANDARD PROC. 262, 263,

2. Ala.—*Smith v. Blakeney*, 8 Port. 128. Mich.—*Frantz v. Detroit United Ry.*, 147 Mich. 199, 110 N. W. 531; *Axtell v. Gibbs*, 52 Mich. 639, 18 N. W. 395. Neb.—*Ensign v. Roggencamp*, 13 Neb. 30, 12 N. W. 811. N. C.—*Battle v. Baird*, 118 N. C. 854, 24 S. E. 668. Pa.—*Lynn v. McMillen*, 3 Pen. & W. 170.

[a] Process is not void though insufficient as an alias. *Axtell v. Gibbs*, 52 Mich. 639, 18 N. W. 395.

[b] Errors in original do not prevent attaching of jurisdiction by service of a correct subsequent process. *Scull v. Kuykendall*, Hempst. 9, 21 Ed. Cas. No. 12,570b; *Goodlett v. Hansell*, 56 Ala. 346.

3. Cal.—*Dupuy v. Shear*, 29 Cal. 238. N. Y.—*Livingston v. Ostrander*, 9 Wend. 306; *Davis v. West*, 5 Wend. 63; *Soulden v. Van Rensselaer*, 3 Wend. 472. N. C.—*Battle v. Baird*, 118 N. C. 854, 24 S. E. 668; *Etheridge v. Woodley*, 83 N. C. 11; *Hanna v. Ingram*, 53 N. C. 55. Pa.—*Everett v. Niagara Ins. Co.*, 142 Pa. 322, 21 Atl. 817. S. C.—*Boggs v. Symmes*, 8 Rich. L. 443.

[a] Must be an alias to have retrospective effect, if the bar of limitation has intervened between taking out the first and the subsequent process. Mich.—*Johnson v. Mead*, 58 Mich. 67, 24 N. W. 665. N. Y.—*Soulden v. Van Rensselaer*, 3 Wend. 472. N. C.—*Hanna v. Ingram*, 53 N. C. 55. [b] The writ is regarded as primary process commencing a new suit, where it is insufficient as a continuance of previous writ. *Dupuy v. Shear*, 29 Cal. 238; *Soulden v. Van Rensselaer*, 3 Wend. (N. Y.) 472.

[c] The Form and Name Are Not Conclusive.—"The present writ is an alias summons in form, and was duly issued as such; but calling it an alias will not make it one in effect, if in fact the original was dead at the time this issued. The service of the original was set aside, but the writ itself

fails as an alias it should nevertheless be sustained, if it can be done, as a new writ in a new suit.⁴ Moreover, the common-law rules applicable to cases where the process issues before the filing of the declaration, furnish no guide to those in which a pleading is first filed and summons issues thereon,⁵ the continuity of the original suit in the latter cases depending upon the diligence of the plaintiff in endeavoring to procure service, instead of upon the uninterrupted issuance of writs of summons.⁶

Under various practice acts a second jurisdictional process has no necessary connection with the former one,⁷ and defects in the first cannot be pleaded in abatement of the second.⁸ The alias usually provided for by statute need not conform to the original, as at common law;⁹ it may be used to bring in new parties.¹⁰ The statutory alias issued to a defendant who was not served with the original, does not necessarily have to contain the names of the other defend-

remained, and beyond question kept the action alive, at least until the entry of the nonsuit." *Everett v. Niagara Ins. Co.*, 142 Pa. 322, 21 Atl. 817.

4. *Ala.*—*Smith v. Blakeney*, 8 Port. 128. *Ill.*—*Rattan v. Stone*, 4 Ill. 540. *Mich.*—*Frantz v. Detroit United Ry.*, 147 Mich. 199, 110 N. W. 531; *Johnson v. Mead*, 58 Mich. 67, 24 N. W. 665; *Axtell v. Gibbs*, 52 Mich. 639, 18 N. W. 395. *Neb.*—*Hanna v. Emerson*, 45 Neb. 708, 64 N. W. 229.

[a] The words descriptive of an alias may be stricken out as surplusage. *Rattan v. Stone*, 4 Ill. 540.

[b] Issuance of alias may be deemed commencement of action for the purpose of sustaining such alias summons issued long after the petition is filed, where the statute prescribes that an action is commenced by the filing of the petition and issuance of the summons; it is not necessary to refile the petition in such cases. *Davis v. Ballard*, 38 Neb. 830, 57 N. W. 527. See the title "*Suits and Actions.*"

5. *Dupuy v. Shear*, 29 Cal. 238; *Parsons v. Hill*, 15 App. Cas. (D. C.) 532, 538, 548. See *supra*, III, D.

[a] The English practice of successive writs and continuances has no place in our rules of procedure. *Bliss v. Duncan*, 44 App. Cas. (D. C.) 93; *Parsons v. Hill*, 15 App. Cas. (D. C.) 532.

6. *Cal.*—*Dupuy v. Shear*, 29 Cal. 238. *D. C.*—*Parsons v. Hill*, 15 App. Cas. 532. *Pa.*—*O'Neill's Estate*, 29 Pa. Super. 415.

[a] If defendant is known to be

absent from the jurisdiction, successive summons are not necessary. *Bliss v. Duncan*, 44 App. Cas. (D. C.) 93.

7. *Cal.*—*Dupuy v. Shear*, 29 Cal. 238. *Ga.*—See *Westbrook v. Hays*, 89 Ga. 101, 14 S. E. 879. *Nev.*—*Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738.

[a] The technical alias is unknown under the system of code practice where terms of court are abolished, and "there is no necessity for one. The summons specifies no return day, and when it has once been issued it may be served and returned at any time without reference to the time of the commencement of the next term of court. . . . If more than one summons is authorized by the Practice Act, the second has no necessary connection with, or dependence upon, the first. It is based upon the complaint alone." *Dupuy v. Shear*, 29 Cal. 238. See *Barndollar v. Patton*, 5 Colo. 46; *Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738.

8. *Goodlett v. Hansell*, 56 Ala. 346; *Mansur v. Pacific Mut. L. Ins. Co.*, 136 Mo. App. 726, 118 S. W. 1193.

[a] The alias becomes the leading process when the original is not served. *Goodlett v. Hansell*, 56 Ala. 346.

9. *Doyle v. Hampton*, 159 Cal. 729, 116 Pac. 39. See *supra*, this section.

10. *Doyle v. Hampton*, 159 Cal. 729, 116 Pac. 39; *Pittsburgh v. Eyth*, 201 Pa. 341, 50 Atl. 769.

[a] Where the wrong defendant is summoned in the first instance, the original action cannot be made to subsist and continue by the issuance of an alias summons addressed to differ-

ants,¹¹ nor does the omission of their names work a discontinuance as to such parties;¹² so, too, if all names are included, there is no waiver of service as to those served under the original.¹³ In case of summons issued by the plaintiff, a second or subsequent notice is not an alias or pluries writ,¹⁴ and hence need not contain the formalities required of such writs,¹⁵ nor does its issuance depend on the return of the original.¹⁶

C. THE FORM.—To be regular, an alias process should show on its face that it is an alias;¹⁷ this is usually done by inserting the words "as you have been before commanded" after the command,¹⁸ and if nothing appears on its face, or in the record to show that it is an alias, it may be concluded to be an original.¹⁹ A mere endorsement of "alias" or "pluries" on the process is not sufficient to give it that character.²⁰ Under the practice which obtains in a few states of "renewing" writs by changing the return day thereof, when they are about to expire before being fully executed,²¹ the renewed writ is not regarded as an alias or a different one from that originally issued.²² The necessity of complying with formalities is the same in the case of an alias or pluries as of an original writ.²³

ent defendants. *Elias v. Hayes*, 24 Misc. 754, 53 N. Y. Supp. 858.

11. *Lewis v. Grace*, 44 Ala. 307; *Reed v. Boyd*, 84 Ill. 66.

Necessity of naming parties, see *supra*, IV, D, 1.

[a] A branch summons is not a common law writ, but a product of the statute, and need not be a copy of the original; and need not give the names of all the other defendants in addition to that of the party served therewith. *Lewis v. Grace*, 44 Ala. 307.

12. *Lewis v. Grace*, 44 Ala. 307.

[a] Under common law practice of procuring service before filing the pleadings, omission of the name of one of the original defendants not served, from a subsequent alias, is a discontinuance of the action as to him. *Morgan's Exrs. v. Morgan*, 2 Bibb 388. See also *Magaw v. Clark*, 6 Watts (Pa.) 528.

13. *McBeath v. Spann*, 7 Ala. 201.

[a] Service upon the original is not waived by issuance of alias for other defendants. Where the original summons is returned not executed as to part of defendants, the issuance of an alias including the names of all defendants without any direction as to how far the original had been executed, does not waive the service upon those served under the first process. *McBeath v. Spann*, 7 Ala. 201.

14. *Lane v. Ball*, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975.

15. *Lane v. Ball*, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975.

[a] "As we have heretofore commanded you" or "as we have often commanded you" need not be inserted. *Lane v. Ball*, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975.

16. *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593.

17. *Scott v. Allen*, 1 Tex. 508; *Fairbanks v. Devereaux*, 48 Vt. 550.

18. *Colo.*—*Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231. *Ill.*—*Rattan v. Stone*, 4 Ill. 540. *Tex.*—*Snow v. Nash*, 50 Tex. 216; *Graves v. Hall*, 13 Tex. 379.

19. *Snow v. Nash*, 50 Tex. 216, 223. See *Bolling v. Anderson*, 4 Baxt. (Tenn.) 550.

20. *Simpson v. Simpson*, 64 N. C. 427; *Bolling v. Anderson*, 4 Baxt. (Tenn.) 550.

21. See *supra*, VI.

22. *Roberts v. Church*, 17 Conn. 142.

[a] The conversion of a first process into an alias by changing the date, though irregular, does not render a writ void. *Faris v. State*, 3 Ohio St. 159.

23. *Den ex dem. Huggins v. Ketchum*, 20 N. C. 414; *Hickam v. Larkey*, 6 Gratt. (47 Va.) 210.

[a] An alias cannot issue to the second term where the statute requires process to issue to the next ensuing

D. PREREQUISITES.—1. **In General.**—At common law the return of the prior process is a necessary prerequisite to the issuing of an alias or pluries,²⁴ but this does not always hold true under modern practice,²⁵ and an alias upon which actual service may be had, may issue pending publication, if the nonresident comes within the jurisdiction.²⁶ However, the conditions under which the statute authorizes additional process must exist in order to justify the alias,²⁷ and the right thereto may be controlled by the state of facts shown by the return upon the original;²⁸ yet failure to observe the procedure

term. *Folk v. Howard*, 72 N. C. 527.

[b] **A statute requiring the alias to be in the same form** as the original, does not necessitate its being in the same language. *Hill v. Morgan*, 9 Idaho 718, 734, 76 Pac. 323.

24. *Cal.*—*Dupuy v. Shear*, 29 Cal. 238. *Mich.*—*Johnson v. Mead*, 58 Mich. 67, 24 N. W. 665. *Neb.*—*Ensign v. Roggencamp*, 13 Neb. 30, 12 N. W. 811. *N. J.*—See *Rammel v. Watson*, 31 N. J. L. 281. *N. Y.*—*Merrill v. Townsend*, 5 Paige 80; *Low v. Little*, 17 Johns. 346; *White v. Lovejoy*, 3 Johns. 448. *Pa.*—*Magaw v. Clark*, 6 Watts 528. *S. C.*—*Boggs v. Symmes*, 8 Rich. L. 443; *Parker v. Grayson*, 1 Nott & McC. 171.

[a] **The rule is applicable only when the process first issued is valid;** and manifestly cannot be invoked where the prior writ from its inception was absolutely void. *Walker v. Stevens*, 52 Neb. 653, 72 N. W. 1038; *Williams' Admrs. v. Welton's Admr.*, 28 Ohio St. 451.

[b] **Errors in Return Do Not Affect Plaintiff's Rights.**—It is the renewals of the writs without intermission which keeps the action alive, "and these results could not be affected by the form of the sheriff's returns to the writs, intervening between the first and last issue. When the plaintiff, after the first return, had his writ regularly renewed he did all that was in his power to do, and all that was required of him by the law." *Hazlehurst v. Morris*, 28 Md. 67. See also *Axtell v. Gibbs*, 52 Mich. 639, 18 N. W. 395. But see *Magaw v. Clark*, 6 Watts (Pa.) 528.

Return of execution as prerequisite to alias, see 16 STANDARD PROC. 258, 296.

25. *Cal.*—See *Dupuy v. Shear*, 29 Cal. 238. *Ohio.*—*Williams' Admrs. v. Welton's Admr.*, 28 Ohio St. 451, 469. *Tex.*—*Lauderdale v. Ennis Stationery*

Co., 80 Tex. 496, 16 S. W. 308. *W. Va.* *State v. Citizens' Trust & Guaranty Co.*, 72 W. Va. 181, 77 S. E. 902.

[a] **Two or more original summonses** (1) may issue simultaneously, to different counties, as a precaution against failure of service. *State v. Citizens' Trust & Guaranty Co.*, 72 W. Va. 181, 77 S. E. 902. (2) "We can see no substantial reasons for not allowing another summons to issue within the life of the former when it has been lost, destroyed, or in any way become unavailable for use, at the proper time." *Williams' Admrs. v. Welton's Admr.*, 28 Ohio St. 451, 471.

26. *Lebensberger v. Scofield*, 139 Fed. 380, 71 C. C. A. 476; *Axtell v. Gibbs*, 52 Mich. 639, 18 N. W. 395.

27. *Cal.*—*Bank of Venice v. Hutchinson*, 19 Cal. App. 219, 125 Pac. 252. *Colo.*—*Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231. *Fla.*—*Doggett v. Jordan*, 3 Fla. 215. *Me.*—*Briggs v. Davis*, 34 Me. 158.

[a] **A statute permitting the alternative of proceeding to judgment against one or more defendants served, or of continuing the cause and procuring other process for those not served, does not give the right to both these remedies.** *Doggett v. Jordan*, 3 Fla. 215.

[b] **By procuring issuance of an irregular alias**, a party does not preclude himself from pursuing his statutory remedy after the void alias is stricken out. *Grover v. Sims*, 5 Blackf. (Ind.) 498.

[c] **The court has inherent power, aside from statute, to award further process to bring parties before it to answer its judgment.** *Barndollar v. Patton*, 5 Colo. 46; *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342.

28. *Fla.*—*Doggett v. Jordan*, 3 Fla. 215. *Tenn.*—*Carlisle v. Cowan*, 85 Tenn. 165, 2 S. W. 26. *Tex.*—*Lauderdale v.*

of the statute has been held to be merely a voidable defect.²⁹ The plaintiff is generally not entitled to an alias if the former process has served its purpose.³⁰ Statutes permitting attachments do not supersede the right to successive writs of summonses.³¹

2. Necessity of Order for Alias.—Originally, under the common law, the court awarded the alias,³² and it is now generally issued only upon the order of the court,³³ though the statutes are not uncommon

Ennis Stationery Co., 80 Tex. 496, 16 S. W. 308.

[a] The return that the defendant is "not to be found in my county" (1) implies that the defendants were residents and evading service of process, and authorizes an alias. *Carlisle v. Cowan*, 85 Tenn. 165, 2 S. W. 26. (2) A return of "not in the county" is plainly and materially different from "does not reside in the county." Hence the right to an alias contingent upon the latter return does not accrue upon the former being made. *Doggett v. Jordan*, 3 Fla. 215.

[b] No amendment to pleading is necessary to justify alias to another county. *Lauderdale v. Ennis Stationery Co.*, 80 Tex. 496, 16 S. W. 308; *Baber v. Brown*, 54 Tex. 99.

29. *Culbertson v. Milhollin*, 22 Ind. 362, 85 Am. Dec. 428.

30. *Colo.*—*Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231. *Neb.*—*Ensign v. Roggencamp*, 13 Neb. 30, 12 N. W. 811. *Ohio.*—*Minor v. Board of Control*, 20 Ohio Cir. Ct. 4. *W. Va.*—*Gorman v. Steed*, 1 W. Va. 1.

But see *Parsons v. Hill*, 15 App. Cas. (D. C.) 532.

[a] During pendency of a contested motion to quash, (1) an alias summons cannot properly issue. If at the time of filing plaintiff had appeared and confessed the defect, or had confessed it at any subsequent time, an alias could issue. But defendant is not obliged to appear and answer in obedience to a second summons while his motion to quash is pending, and without any action or admission on the part of the plaintiff or the court indicating the necessity therefor. *Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231; *Minor v. Board of Control*, 20 Ohio Cir. Ct. 4. (2) The first writ "performed its office until the court acted upon it, and while performing its office, another writ could neither strengthen its efficacy nor destroy its effect; the two could not be co-

ordinate and concurrent and exist together." *Whitman v. Sheets*, 20 Ohio Cir. Ct. 1.

[b] An order of record that an alias summons be issued necessarily must constitute an abandonment of the original service and process. *Mansur v. Pacific Mut. L. Ins. Co.*, 136 Mo. App. 726, 118 S. W. 1193. See also *Finley v. Richards*, 1 Blackf. (Ind.) 487.

31. *Howell v. Shepard*, 48 Mich. 472, 12 N. W. 661.

[a] Alias or pluries summons need not be resorted to, where an ancillary attachment which lawfully issued in aid of a suit brought by summons had the same operation and effect as if the action had been brought by original summons. *Swan v. Roberts*, 2 Coldw. (Tenn.) 153, 161.

32. *Cal.*—*Dupuy v. Shear*, 29 Cal. 238. *D. C.*—*Parsons v. Hill*, 15 App. Cas. 532. *N. Y.*—*Low v. Little*, 17 Johns. 346.

[a] "Under the practice as it formerly existed, all writs were made returnable in term. This rendered it necessary on the return of the writ non est inventus, to prepare a continuance roll with a placita of the term of which the first writ was returnable, after which the writ was entered according to its tenor, and this was followed by entries of appearance of the plaintiff, the return of non est inventus, and an award of an alias or pluries writ returnable at the following term." *Johnson v. Mead*, 58 Mich. 67, 24 N. W. 665.

33. *Colo.*—*Farris v. Walter*, 2 Colo. App. 450, 31 Pac. 231. *Fla.*—*Doggett v. Jordan*, 3 Fla. 215. *Ga.*—*Medical College v. Rushing*, 124 Ga. 239, 52 S. E. 333; *Rowland v. Towns*, 120 Ga. 74, 47 S. E. 581; *Peck v. La Roche*, 86 Ga. 314, 12 S. E. 638. *Ky.*—*Jackson v. Bank of Lockport*, 144 Ky. 43, 137 S. W. 767; *Gentry v. Hutchcraft*, 7 Mon. 241, 18 Am. Dec. 172. *Mich.*—*Frantz v. Detroit United Ry.*, 147 Mich.

permitting the clerk to issue it upon application of a party or his attorney, without a formal order therefor.³⁴ An order for an alias improvidently made may be stricken out on motion,³⁵ likewise, an alias will be quashed if issued after the case has been stricken from the docket.³⁶

VIII. RAISING AND CURING OBJECTIONS. — A. OBJECTIONS.

1. **In General.**³⁷ — Since all irregularities are not jurisdictional,³⁸ and as voidable process is good until set aside,³⁹ defects of form and

199, 110 N. W. 531. **N. C.**—Battle v. Baird, 118 N. C. 854, 24 S. E. 668.

[a] **Entry of continuance by the judge** does not import that the court has granted any leave or order to issue a second process or extend the time for service. *Peck v. La Roche*, 86 Ga. 314, 12 S. E. 638.

[b] **An order after issuance**, made on the same day, is a ratification of the clerk's act. *Jackson v. Bank of Lockport*, 144 Ky. 43, 137 S. W. 767.

[c] **Issuance without an order of the court** (1), though irregular, does not render the writ void. *Ensign v. Roggencamp*, 13 Neb. 30, 12 N. W. 811. (2) *Contra*, where the statute provides for issuance of only one process by the clerk. *Peck v. La Roche*, 86 Ga. 314, 12 S. E. 638.

[d] **Proper direction to the clerk** will be presumed to have been given before the issuance of the alias, in the absence of a showing to the contrary. *Hill v. Morgan*, 9 Idaho 718, 734, 76 Pac. 323; *Lauderdale v. Ennis Stationery Co.*, 80 Tex. 496, 16 S. W. 308.

[e] **Omission of Clerk To Issue.** Though it was the clerk's duty to issue the alias on an order therefor by the court, this "cannot have the effect of supplying the unissued process or paper to the injury of the opposing party to the action." The blame for the omission "cannot be a substitute for the process itself." *Etheridge v. Woodley*, 83 N. C. 12.

34. **Cal.**—*Dunker v. Lutz*, 48 Cal. 464. **Idaho.**—*Hill v. Morgan*, 9 Idaho 718, 733, 76 Pac. 323. **Tex.**—*Lauderdale v. Ennis Stationery Co.*, 80 Tex. 496, 16 S. W. 308; *Pierson v. Beard* (Tex. Civ. App.), 181 S. W. 765. **Va.** *Park Land & Imp. Co. v. Lane*, 106 Va. 304, 55 S. E. 690.

35. **Cal.**—*Dupuy v. Shear*, 29 Cal. 238. **Me.**—*Briggs v. Davis*, 34 Me. 158. **N. Y.**—*Elias v. Hayes*, 24 Misc. 754, 53 N. Y. Supp. 858.

36. *Everett v. Niagara Ins. Co.*, 142

Pa. 322, 21 Atl. 817; *Park Land & Imp. Co. v. Lane*, 106 Va. 304, 55 S. E. 690.

[a] **An express order awarding an alias avails** nothing if the case has been previously dismissed, and must be treated as a nullity. *Armstrong v. Harrison*, 1 Head (Tenn.) 379.

[b] **When an actual discontinuance has been made to appear**, by reason of lack of diligence in issuing new process, the court may properly vacate the writ which has been served upon the defendant, and discontinue the cause, and remit the plaintiff to a new action. *Parsons v. Hill*, 15 App. Cas. (D. C.) 532.

37. **Grounds of objection**, see *supra*, this article the sections dealing with particular aspects of the process.

38. **Ala.**—*Lewis v. Grace*, 44 Ala. 307. **Kan.**—*Dusenberry v. Bennett*, 7 Kan. App. 123, 53 Pac. 82. **Md.**—*Post v. Bowen*, 35 Md. 232. **Minn.**—*Hotchkiss v. Cutting*, 14 Minn. 537. **Neb.** *Hanna v. Emerson*, 45 Neb. 708, 64 N. W. 229; *McPherson v. First Nat. Bank*, 12 Neb. 202, 10 N. W. 707. **N. Y.**—*Wiggins v. Richmond*, 58 How. Pr. 376.

See *supra*, IV.

[a] **The validity of provisional remedies** is not defeated by mere irregularities in the summons. **Idaho.** *Ridenbaugh v. Sandlin*, 14 Idaho 472, 94 Pac. 827, 125 Am. St. Rep. 175. **Kan.**—*Simpson v. Rice*, 43 Kan. 22, 22 Pac. 1019. **N. D.**—*Gans v. Beasley*, 4 N. D. 140, 59 N. W. 714.

39. **Fla.**—*Guarantee Trust & Safe Deposit Co. v. Buddington*, 23 Fla. 514, 2 So. 885. **Ill.**—*Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275. **Pa.**—*Williamson v. McCormick*, 126 Pa. 274, 17 Atl. 591. **Vt.**—*Roy v. Phelps*, 83 Vt. 174, 75 Atl. 13; *Paine v. Ely*, 1 D. Chip. 37, N. Chip. 11.

[a] **"There is great difference between erroneous process, and irregular (that is void) process; the first stands valid and good until it is reversed;**

mere irregularities must be seasonably objected to,⁴⁰ by the appropriate form of attack,⁴¹ in the court below.⁴²

2. Time To Object.—The time for objecting to defects in process obviously depends upon the character of the process in question.⁴³ Objections to the sufficiency of the summons, citation or similar process must be seasonably made.⁴⁴ Objections to process issued to compel appearance are waived by a voluntary general appearance.⁴⁵ Pleas⁴⁶

the latter is an absolute nullity from the beginning." *Paine v. Ely*, 1 D. Chip. (Vt.) 37.

40. See *infra*, VIII, A, 2.

41. **U. S.**—United States *v.* Turner, 50 Fed. 734. **Fla.**—Guarantee Trust & Safe Deposit Co. *v.* Buddington, 23 Fla. 514, 2 So. 885. **Ga.**—Telford *v.* Coggins, 76 Ga. 683. **Nev.**—Sweeney *v.* Schultes, 19 Nev. 53, 6 Pac. 44, 8 Pac. 768. **N. H.**—Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352. **Ore.**—North Pacific Cycle Co. *v.* Thomas, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636. **Wis.**—Rowen *v.* Taylor, 1 Pinn. 235.

[a] "The general tendency of the decisions is to look with disfavor upon mere technical objections which relate solely to the form of the process or proceedings. Sweeney *v.* Schultes, 19 Nev. 53, 6 Pac. 44, 8 Pac. 768.

42. **Ala.**—Peebles *v.* Weir, 60 Ala. 413; Johnson *v.* King, 20 Ala. 270; Sawyer *v.* Price, 6 Ala. 285. **Fla.**—Guarantee Trust & Safe Deposit Co. *v.* Buddington, 23 Fla. 514, 2 So. 885. **Ill.**—Fonville *v.* Monroe, 74 Ill. 126. **Kan.**—Dusenberry *v.* Bennett, 7 Kan. App. 123, 53 Pac. 82. **Mass.**—Brewer *v.* Sibley, 13 Mete. 175; Cooke *v.* Gibbs, 3 Mass. 193. **Ohio.**—Kious *v.* Kious, 2 Ohio Dec. (Reprint) 318. **Ore.**—North Pacific Cycle Co. *v.* Thomas, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636. **W. Va.**—Fisher, Sons & Co. *v.* Crowley, 57 W. Va. 312, 50 S. E. 422.

[a] **Where Not Part of the Record.** "Process in England, and our writs answering to those called process in England, form no part of the record; errors in them cannot be assigned for error: hence the only remedy is to move to set aside the proceedings; and that should be done before appearance unless the writ is wholly void." *Wibright v. Wise*, 4 Blackf. (Ind.) 137.

[b] **Motion cannot be made in one action (1) to set aside a process in another action.** *T. v. Foundation*

Co., 119 App. Div. 151, 104 N. Y. Supp. 263; *West's Exrs. v. Nixon's Exrs.*, 3 Grant Cas. (Pa.) 236. (2) But it is not error to suspend the trial of an action in order to consider a motion to amend process in another case affecting the action on trial. *Phillips v. Holland*, 78 N. C. 31.

43. See titles dealing with particular process.

44. **Ala.**—Johnson *v.* Perry, 4 Stew. & P. 45. **Fla.**—Guarantee Trust & Safe Deposit Co. *v.* Buddington, 23 Fla. 514, 2 So. 885. **Ga.**—Beutell *v.* Oliver, 89 Ga. 246, 15 S. E. 307; Atlanta Nat. Bank *v.* Douglass, 51 Ga. 205, 21 Am. Rep. 234. **Ill.**—Eaton *v.* Graham, 11 Ill. 619. **Ind.**—Swift *v.* Woods, 5 Blackf. 97. **La.**—State *v.* Webster Parish Police Jury, 120 La. 163, 45 So. 47, 124 Am. St. Rep. 430, 14 L. R. A. (N. S.) 794. **Me.**—White *v.* Wall, 40 Me. 574; Trafton *v.* Rogers, 13 Me. 315. **Mass.**—Ripley *v.* Warren, 2 Pick. 592. **Minn.**—Hanna *v.* Russell, 12 Minn. 80. **N. H.**—Reynolds *v.* Darnell, 19 N. H. 394. **N. Y.**—Pollard *v.* Union Pac. R. Co., 7 Abb. Pr. (N. S.) 70. **Pa.**—Williamson *v.* McCormick, 126 Pa. 274, 17 Atl. 591. **Vt.**—Wheelock *v.* Sears, 19 Vt. 559; Pollard *v.* Wilder, 17 Vt. 48. **Wis.**—Hlsley *v.* Harris, 10 Wis. 95.

[a] **After revival of a judgment by scire facias**, it is too late to question the sufficiency of process in the original suit. *Heighway v. Pendleton*, 15 Ohio 735, 753.

[b] **Too late (1) after amendment** (Nashville & C. R. R. Co. *v.* Wade, 2 Baxt. [Tenn.] 444), (2) but objection may be renewed after an amendment which fails to cure the defect. *Mills v. Bishop, Kirby* (Conn.) 4.

45. See the title "Appearances;" also 17 STANDARD PROC. 702.

46. **Ala.**—Peebles *v.* Weir, 60 Ala. 413; Tankersley *v.* Richardson, 2 Stew. 130. **Ill.**—Grand Lodge B. of L. F. *v.* Cramer, 60 Ill. App. 212. **Ind.**—Wibright *v.* Wise, 4 Blackf. 137. **Me.**—Bray *v.* Libby, 71 Me. 276; Stevens

in abatement, or motions based on matter in abatement⁴⁷ are generally required to be presented at the first term of court; and the right to make such objections comes too late after demurrer,⁴⁸ answer or plea to merits,⁴⁹ trial,⁵⁰ default,⁵¹ or judgment.⁵² If process is void, it is subject to the consequences of its imperfection, if not waived,⁵³ at any time.⁵⁴

3. Form of Objection.—A plea in abatement is the proper means of attacking a process when the defects are not apparent on its face,⁵⁵

v. Getchell, 11 Me. 443. **Md.**—*Ritter v. Offutt*, 40 Md. 207. **Mass.**—*Joyner v. Inhabitants of School Dist.*, 3 Cush. 567; *Stevens v. Ewer*, 2 Mete. 74; *Ripley v. Warren*, 2 Pick. 592; *Gilbert v. Nantucket Bank*, 5 Mass. 97. **N. Y.**—*Bronson v. Earl*, 17 Johns. 63; *Hunter v. Lester*, 10 Abb. Pr. 260, 18 How. Pr. 347; *Lederer v. Adams*, 58 Hun 603, 11 N. Y. Supp. 481, 19 Civ. Proc. 294, 33 N. Y. St. 799. **Ohio.** *Kious v. Kious*, 2 Ohio Dec. (Reprint) 318; *Kerns v. Roberts*, 2 Ohio Dec. (Reprint) 537. **S. C.**—*Hanks v. Ingram*, 2 Bailey 440. **Vt.**—*Hill v. Morey*, 26 Vt. 178; *Wheelock v. Sears*, 19 Vt. 559.

See generally the title "Abatement, Pleas of."

47. Me.—*Nickerson v. Nickerson*, 36 Me. 417; *Shorey v. Hussey*, 32 Me. 579; *Trafton v. Rogers*, 13 Me. 315. **Mass.**—*Simonds v. Parker*, 1 Mete. 508. **N. H.**—*Parsons v. Swett*, 32 N. H. 87, 64 Am. Dec. 352.

48. Beard v. Smith, 9 Iowa 50; *Ripley v. Warren*, 2 Pick. (Mass.) 592.

49. Miss.—*Wooten v. Wingate*, 6 Smed. & M. 271. **N. H.**—*Lovell v. Sabin*, 15 N. H. 29, 37. **N. Y.**—*Bronson v. Earl*, 17 Johns. 63.

50. Ga.—*Gay v. Cheney*, 58 Ga. 304. **Miss.**—*Wooten v. Wingate*, 6 Smed. & M. 271. **N. C.**—*McBride v. Welborn*, 119 N. C. 508, 26 S. E. 125; *Worthington v. Arnold*, 13 N. C. 363.

51. Benedict v. Hadlow Co., 52 Fla. 188, 42 So. 239.

52. Reynolds v. Atlanta Nat. B. & L. Assn., 104 Ga. 703, 30 S. E. 942.

53. Pollard v. Wilder, 17 Vt. 48.

Waiver by appearance, see the title "Appearances," and 17 STANDARD PROC. 702.

54. Ga.—*Brady v. Hardeman*, 17 Ga. 67. **Me.**—*Tibbetts v. Shaw*, 19 Me. 204; *Bailey v. Smith*, 12 Me. 196. **Mich.** *Turrill v. Walker*, 4 Mich. 177. **Miss.** *McLeod v. Harper*, 43 Miss. 42. **S. C.** *Wood v. Crosby*, 2 Hill 520. **Vt.**

Pollard v. Wilder, 17 Vt. 48.

[a] **For prohibited practice process** will be dismissed on motion at any time. *Winchell v. Pond*, 19 Vt. 198.

55. U. S.—*Wall v. Chesapeake & O. Ry. Co.*, 95 Fed. 398, 37 C. C. A. 129; *Electric Vehicle Co. v. Craig Toledo Motor Co.*, 157 Fed. 316. **Ark.**—*Powers v. Swigart*, 8 Ark. 363. **Conn.**—*Cady v. Gay*, 31 Conn. 395. **Fla.**—*Putnam Lumb. Co. v. Ellis-Young Co.*, 50 Fla. 251, 39 So. 193; *Campbell v. Chaffee*, 6 Fla. 724. **Ill.**—*Willard v. Zehr*, 215 Ill. 148, 74 N. E. 107; *Greer v. Young*, 120 Ill. 184, 11 N. E. 167; *Montana Columbian Club v. Ketchum*, 54 Ill. App. 334. **Ky.**—*Owings v. Beall*, 3 Litt. 103. **Me.**—*Doherty v. Bird*, 102 Atl. 229; *Mahan v. Sutherland*, 73 Me. 158; *Hall v. Gilmore*, 40 Me. 578; *Chamberlain v. Lake*, 36 Me. 388; *Cook v. Lothrop*, 18 Me. 260. **Mass.**—*Haynes v. Saunders*, 11 Cush. 537; *Stevens v. Ewer*, 2 Mete. 74; *Prescott v. Tufts*, 7 Mass. 209. **Miss.**—*Lamb v. Russell*, 81 Miss. 382, 32 So. 916; *Mayfield v. Barnard*, 43 Miss. 270; *Foster v. Collins*, 5 Smed. & M. 259, 267. **N. H.** *Rogers v. Odell*, 39 N. H. 417; *Haverhill Ins. Co. v. Prescott*, 38 N. H. 398; *Scruton v. Deming*, 36 N. H. 432. **N. Y.** *Miller v. Stettiner*, 22 How. Pr. 518, 7 Bosw. 692. **S. C.**—*Smith v. Alston*, 1 Mill 104. **Vt.**—*Johnson v. Nash*, 20 Vt. 40.

[a] **Failure to comply with conditions precedent** should be objected to by plea in abatement. **Ind.**—*Hust v. Conn*, 12 Ind. 257. **Ky.**—*Gearhart v. Olmstead*, 7 Dana 441. **Tenn.**—*Carlisle v. Cowan*, 85 Tenn. 165, 2 S. W. 26; *Posey v. McCubbins*, 5 Yerg. 235. **W. Va.**—*Ryan v. Piney Coal & Coke Co.*, 72 W. Va. 630, 78 S. E. 789.

[b] **The agency of the party** (1) recited in process, to be such, should be put in issue by plea in abatement (*Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124; *Lanza v. McNulta*, 46 Ill. App. 69), but (2) a motion to quash is sufficient in the fed-

but for patent defects, a motion to quash,⁵⁶ or a mere suggestion to the court,⁵⁷ is sufficient, or the plea in abatement may also be used as well.⁵⁸ A motion to quash the process is not a sufficient pleading to attack irregularities after judgment has been rendered,⁵⁹ and where the statute requires the objection to be made by plea in abatement,⁶⁰ a motion to quash should be overruled.⁶¹ A demurrer is not the proper means, under modern practice, of testing the sufficiency of process,⁶² nor of objecting to a variance between the process and pleading,⁶³ though it was formerly used to some extent,⁶⁴ and may

eral court. *Wall v. Chesapeake & O. Ry. Co.*, 95 Fed. 398, 37 C. C. A. 129.

56. **U. S.**—*United States v. Banister*, 70 Fed. 44. **Fla.**—*Campbell v. Chaffee*, 6 Fla. 724. **Ill.**—*McCulloch v. Ellis*, 28 Ill. App. 439. **Ky.**—*Stapp v. Thomason*, 2 Litt. 214. **Me.**—*Pattee v. Lowe*, 35 Me. 121; *Cook v. Lothrop*, 18 Me. 260. **Mass.**—*Hawkes v. Kennebeck*, 7 Mass. 461. **Miss.**—*Pharis v. Conner*, 3 Smed. & M. 87. **Mo.**—*Curfman v. Fidelity & Deposit Co.*, 167 Mo. App. 507, 152 S. W. 126. **N. H.**—*Hibbard v. Clark*, 54 N. H. 521; *Parker v. Barker*, 43 N. H. 35, 80 Am. Dec. 130; *Haverhill Ins. Co. v. Prescott*, 38 N. H. 398; *Lyford v. Bryant*, 38 N. H. 88; *Parsons v. Swett*, 32 N. H. 87, 64 Am. Dec. 352; *Merrill v. Palmer*, 13 N. H. 184; *Tilton v. Parker*, 4 N. H. 142. **N. Y.**—*Nellis v. Rowles*, 41 Misc. 313, 84 N. Y. Supp. 753. **N. C.**—*Thomas v. Womack*, 64 N. C. 657. **Tenn.**—*Padgett v. Ducktown Sulphur, C. & I. Co.*, 97 Tenn. 690, 37 S. W. 698; *Armstrong v. Harrison*, 1 Head 379. **Vt.**—*Barrows v. McGowan*, 39 Vt. 238; *Washburn v. Hammond*, 25 Vt. 648; *Culver v. Balch*, 23 Vt. 618.

[a] "Where the facts are undisputed and the law certain, the service of summons and complaint may be vacated, on motion, for want of jurisdiction. *Crowley v. Royal Exch. Shipping Co.*, 10 Daly (N. Y.) 409, 2 Civ. Proc. 174.

57. *Elliott v. Holmes*, 1 McLean 466, 8 Fed. Cas. No. 4,392.

[a] A suggestion to the court, by counsel without appearance, has been held sufficient to bring before the court a variance between the declaration and the process as to the name of the party served as defendant. *Elliott v. Holmes*, 1 McLean 466, 8 Fed. Cas. No. 4,392.

58. **U. S.**—*Miller v. Gages*, 4 McLean 436, 17 Fed. Cas. No. 9,571. **Me.**—*Bray v. Libby*, 71 Me. 276. **N. H.**

Lyford v. Bryant, 38 N. H. 88. **Vt.**—*Boright v. Williams*, 87 Vt. 245, 88 Atl. 735. **Va.**—*Lane Bros. & Co. v. Bauserman*, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872.

[a] *Contra.*—Patent defects are not subject to plea in abatement (*Campbell v. Chaffee*, 6 Fla. 724), (2) where the process is part of the record. *Armstrong v. Harrison*, 1 Head (Tenn.) 379.

59. *Bridewell v. Mooney*, 25 Ark. 524; *Baldwin v. Burt*, 54 Neb. 287, 74 N. W. 594.

60. *Waddill v. John*, 48 Ala. 232; *Yonge v. Broxon*, 23 Ala. 684; *Ware v. Todd*, 1 Ala. 199.

61. *Waddill v. John*, 48 Ala. 232; *Nabors v. Thomason*, 1 Ala. 590.

62. **Ind.**—*Hust v. Conn*, 12 Ind. 257. **Me.**—*Marcus v. Rovinsky*, 95 Me. 106, 49 Atl. 420. **Mass.**—*Cooke v. Gibbs*, 3 Mass. 193. **N. Y.**—*Cochran v. American Opera Co.*, 20 Abb. N. C. 114, 120.

[a] A statute authorizing a demurrer as a proper mode of questioning the jurisdiction of the court, does not apply to questions of the regularity of a summons. *Heney v. Chartered Co.*, 71 Misc. 237, 128 N. Y. Supp. 436.

63. *Wilkinson v. Pomeroy*, 10 Blatchf. 534, 29 Fed. Cas. No. 17,675; *Culver v. Whipple*, 2 G. Gr. (Iowa) 365.

64. **Miss.**—*Foster v. Collins*, 5 Smed. & M. 259, 267. **N. C.**—*Thomas v. Womack*, 64 N. C. 657. **S. C.**—*Bull v. Traynham*, 3 Rich. L. 433.

[a] "The writ is part of the record and a variance between it and the declaration may be pleaded in abatement, or made the subject of a special demurrer." *Bull v. Traynham*, 3 Rich. L. (S. C.) 433.

[b] "Under the old English practice, the whole original writ was repeated in the declaration," and a material variance might be taken advantage of by arrest of judgment, writ

still be used where the writ is both pleading and process, as in scire facias.⁶⁵ But if the process is totally void, it is immaterial that the regular practice was not followed in bringing the defect to the court's notice.⁶⁶

4. Collateral Attack.⁶⁷—Mere irregularities in process cannot be taken advantage of in a collateral attack on the judgment,⁶⁸ but if the process is void it may be attacked collaterally as well as directly.⁶⁹

5. Who May Attack Process.—A party may move to quash his own writ,⁷⁰ but irregularities in process against a codefendant are not available to any other party.⁷¹ Persons who subsequently acquire rights in property may, by proper proceedings, question the sufficiency of process involved in the title thereto.⁷²

6. Sufficiency of Plea in Abatement.—The plea in abatement must be stated with the greatest certainty,⁷³ and all defects relied on as grounds for relief must be distinctly pointed out,⁷⁴ excluding alternatives and such supposable matter as would defeat the plea.⁷⁵ It must

of error, plea in abatement or demurrer. *Wilkinson v. Pomeroy*, 10 Blatchf. 524, 29 Fed. Cas. No. 17,675.

65. *McFadden v. Fortier*, 20 Ill. 509; *Farnum v. Bell*, 3 N. H. 72.

66. *Winchell v. Pond*, 19 Vt. 198. See the following section.

67. Collateral attack on judgment, see 15 STANDARD PROC. 377, 662, 693.

Presumption as to process on collateral attack, see 15 STANDARD PROC. 428, 664, 695.

68. Cal.—*Hunt v. Loucks*, 28 Cal. 372, 99 Am. Dec. 404; *Peck v. Strauss*, 33 Cal. 678. Ill.—*Hogue v. Corbit*, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232; *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275. Mich.—*Lyon v. Baldwin*, 194 Mich. 118, 160 N. W. 428, L. R. A. 1917C, 148. Miss.—*McLeod v. Harper*, 43 Miss. 42. Ore.—*North Pacific Cycle Co. v. Thomas*, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636. Vt.—*Spaulding v. Chamberlin*, 12 Vt. 538, 36 Am. Dec. 358.

See 15 STANDARD PROC. 441, 669.

[a] **Alteration of process** which does not render it void may not be shown on collateral attack. *Spaulding v. Chamberlin*, 12 Vt. 538, 36 Am. Dec. 358.

[b] **Plea of irregularities in a scire facias to revive the judgment** is a collateral attack. *McLeod v. Harper*, 43 Miss. 42.

69. *Kelso v. Norton*, 74 Kan. 442, 87 Pac. 184; *Staunton P. B. & L. Co. v. Haden*, 92 Va. 201, 23 S. E. 285. See 15 STANDARD PROC. 441.

70. *Womsley v. Cummins*, 1 Ark. 125.

71. *Tinney v. Vittur*, 134 La. 549, 64 So. 407.

72. Cal.—See *Newmark & Co. v. Chapman*, 53 Cal. 557. Nev.—*Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738. N. Y.—*Deimel v. Scheveland*, 16 Daly 34, 9 N. Y. Supp. 482.

73. Ark.—*Powers v. Swigart*, 8 Ark. 363. Conn.—*Colburn v. Tolles*, 13 Conn. 524; *Parsons v. Ely*, 2 Conn. 377. Ill.—*Cheney v. City Nat. Bank*, 77 Ill. 562. Me.—*Southard v. Hill*, 44 Me. 92, 69 Am. Dec. 85. Miss.—*Hurst v. Strong*, 1 How. 123. Neb.—*Forbes v. McHaffie*, 32 Neb. 742, 49 N. W. 721; *Smelt v. Knapp*, 16 Neb. 53, 20 N. W. 20; *Crowell v. Galloway*, 3 Neb. 215. Vt.—*Bowman v. Stowell*, 21 Vt. 309; *Pearson v. French*, 9 Vt. 349.

See generally the titles "Abatement, Pleas of;" "Certainty in Pleading."

[a] **The rule does not require the court to misunderstand or refuse to comprehend the ordinary import of the language used.** *Colburn v. Tolles*, 13 Conn. 524.

74. Conn.—*Gould v. Smith*, 30 Conn. 88. Neb.—*Bucklin v. Strickler*, 32 Neb. 602, 49 N. W. 371; *Brown v. Goodyear*, 29 Neb. 376, 45 N. W. 618; *Freeman v. Burks*, 16 Neb. 328, 20 N. W. 207. N. Y.—*Perkins v. Mead*, 22 How. Pr. 476; *Delisser v. New York, N. H. & H. R. Co.*, 27 Jones & S. 233, 14 N. Y. Supp. 382, 39 N. Y. St. 242. Tenn.—*Nelson v. Cummins*, 1 Overt. 436. Vt.—*Thibault v. Connecticut Val. Lumb. Co.*, 80 Vt. 333, 67 Atl. 819.

75. Conn.—*Parsons v. Ely*, 2 Conn. 377, 381. Me.—*Tweed v. Libbey*, 37 Me. 49; *Patten v. Starrett*, 20 Me.

be in due form,⁷⁶ and pray for the proper relief.⁷⁷ Under the practice in some states the original process should be attached as an exhibit;⁷⁸ if new matter not apparent on the face of the writ is added, it should be verified.⁷⁹ If made after the usual time for such pleas, sufficient reasons for the delay should be assigned.⁸⁰ The rule that a plea in abatement should give the plaintiff a better writ,⁸¹ does not apply to process in all cases.⁸²

A demurrer to the sufficiency of the plea is proper.⁸³

7. Issues on Proceedings To Abate.—An issue of fact may be formed and tried upon the plea in abatement,⁸⁴ or motion to set

145. **Vt.**—*Bowman v. Stowell*, 21 **Vt.** 309; *Pearson v. French*, 9 **Vt.** 349.

[a] **Degree of Certainty.**—"In pleas in abatement, it is required, not only that they contain the utmost certainty, precision, and technical accuracy; but, in general, that they even anticipate and exclude, what, according to the rules that govern other pleadings, it would be incumbent upon the adverse party, to reply." *Parsons v. Ely*, 2 **Conn.** 377, 381.

76. Grand Lodge B. of L. F. v. Cramer, 60 **Ill. App.** 212; *Robbins v. Hill*, 12 **Pick. (Mass.)** 569. See generally the title "**Abatement, Pleas of.**"

[a] **The Plea May Be Both to Writ and Declaration.**—*Southard v. Hill*, 44 **Me.** 92, 69 **Am. Dec.** 85.

77. Conn.—*Colburn v. Tolles*, 13 **Conn.** 524. **Kan.**—*Foster v. Markland*, 37 **Kan.** 32, 14 **Pac.** 452. **Mass.**—*Brigham v. Este*, 2 **Pick.** 420. **Neb.**—*Bucklin v. Strickler*, 32 **Neb.** 602, 49 **N. W.** 371.

[a] **The plea concludes properly by praying judgment of the process.** *Colburn v. Tolles*, 13 **Conn.** 524.

78. Medley v. Voris, 2 **La. Ann.** 140; *Stone v. Sprague*, 24 **N. H.** 309.

[a] **Unless referred to in the plea, the court will not examine the writ.** *Pearson v. French*, 9 **Vt.** 349.

79. Ark.—*Powers v. Swigart*, 8 **Ark.** 363. **Mass.**—*Hooper v. Jellison*, 22 **Pick.** 250. **N. J.**—*Missell v. Hayes*, 86 **N. J. L.** 348, 91 **Atl.** 322. **Tenn.**—*Carlisle v. Cowan*, 85 **Tenn.** 165, 2 **S. W.** 26.

[a] **The proper practice is to support the plea by deposition, not by ex parte affidavit.** *Missell v. Hayes*, 86 **N. J. L.** 348, 91 **Atl.** 322.

80. Grand Lodge B. of L. F. v. Cramer, 60 **Ill. App.** 212; *Bray v. Libby*, 71 **Me.** 276.

81. See the title "Abatement, Pleas of."

82. Me.—*Brown v. Gordon*, 1 **Greenl.** 165. **Mass.**—*Wilson v. Nevers*, 20 **Pick.** 20; *Guild v. Richardson*, 6 **Pick.** 364, 369. **Va.**—*Warren v. Saunders*, 27 **Gratt. (68 Va.)** 259.

83. Conn.—*Denison v. Crofts*, 74 **Conn.** 38, 49 **Atl.** 851. **Ky.**—*Stapp v. Thomason*, 2 **Litt.** 214. **N. C.**—*Buchanan, Dunlap & Co. v. Kennon*, 1 **N. C.** 530.

[a] **Matter not pleadable in abatement may be ignored.** *Stapp v. Thomason*, 2 **Litt. (Ky.)** 214.

[b] **On overruling demurrer to plea, defendant should be allowed to plead.** *Renner v. Reed*, 3 **Ark.** 339.

84. Ga.—*Dozier v. Lamb*, 59 **Ga.** 461. **La.**—*Ponder v. Boone*, 134 **La.** 583, 64 **So.** 476. **Mass.**—*Stevens v. Ewer*, 2 **Metc.** 74. **N. J.**—*Schenck v. Schenck's Exrs.*, 10 **N. J. L.** 274. **Pa.**—*Briggs v. Garrett*, 111 **Pa.** 404, 2 **Atl.** 513, 56 **Am. Rep.** 274.

[a] **The writ will be presumed to have been duly issued and duly served, until the contrary is shown.** *Parsons v. Hill*, 15 **App. Cas. (D. C.)** 532.

[b] **"The constitutional right to a jury trial obtains whenever there is any question at issue involving the life, liberty, or property of the citizen. But a motion to quash a service of summons, or any other process or order, for insufficiency in the service, involves no such substantial right."** *Wall v. Chesapeake & O. Ry. Co.*, 95 **Fed. Cir.** 37, 37 **C. C. A.** 129.

[c] **The court takes judicial notice (1) of the process by which it acquired jurisdiction.** *Penney v. Bryant*, 70 **Neb.** 127, 96 **N. W.** 1033; *Stewart v. Rosengren*, 66 **Neb.** 445, 92 **N. W.** 586. (2) **The writ is a matter of record, and over need not be craved.** *Renner v. Reed*, 3 **Ark.** 339.

[d] **If only one defendant files plea**

aside.⁸⁵ The court, however, cannot properly determine the merits of the case upon such a hearing.⁸⁶

8. Ruling Upon Objection.—The court may properly refuse to set aside process for inaccuracies which could not have misled,⁸⁷ and it is made a rule by statute in many states that technical objections,⁸⁸ or those which do not affect the substantial rights of the parties⁸⁹ shall be disregarded. A process may be valid as to one defendant and void as to another, though they are sued jointly.⁹⁰ When the

in abatement, it is error to abate as to the other who tendered no issue on the facts. *Foster v. Collins*, 5 Smed. & M. (Miss.) 259.

85. *Lyon v. Baldwin*, 194 Mich. 118, 160 N. W. 428, L. R. A. 1917C, 148; *Caille Bros. Co. v. Saginaw Circ. Judge*, 155 Mich. 480, 483, 120 N. W. 6; *Stringer v. Dean*, 61 Mich. 196, 201, 27 N. W. 886.

[a] **The Court Should Try.**—Such motions should not ordinarily be sent to the referee. *Buchholtz v. Florida East Coast Ry. Co.*, 59 App. Div. 566, 69 N. Y. Supp. 682.

86. *Atlantic & P. Tel. Co. v. Baltimore & O. R. R. Co.*, 87 N. Y. 355.

87. U. S.—*Emmons v. Marbelite Plaster Co.*, 193 Fed. 181. **Cal.** *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133; *King v. Blood*, 41 Cal. 314. **Ga.** *Lamb v. McElwaney*, 143 Ga. 490, 85 S. E. 705. **Kan.**—*Goff v. Russell*, 3 Kan. 206. **La.**—*State ex rel. Davis v. Police Jury*, 120 La. 163, 45 So. 47, 124 Am. St. Rep. 430, 14 L. R. A. (N. S.) 794. **Neb.**—*Davis v. Jennings*, 78 Neb. 462, 111 N. W. 128. **Nev.** *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. **N. J.**—*Titus v. Whitney*, 16 N. J. L. 85, 31 Am. Dec. 228. **N. Y.**—*Macoun v. New York, etc. R. Co.*, 50 N. Y. 176; *Brown v. Eaton*, 37 How. Pr. 325. **N. C.**—*Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708; *Jackson v. McLean*, 90 N. C. 64; *Henderson v. Graham*, 84 N. C. 496. **Pa.**—*Com. v. Warfel*, 157 Pa. 444, 27 Atl. 763. **Wash.** *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760. **W. Va.**—*Moore v. Moore*, 93 S. E. 937; *Koen v. Fairmont Brew. Co.*, 69 W. Va. 94, 70 S. E. 1098; *White v. Sydenstricker*, 6 W. Va. 46. **Wis.** *Warren v. Gordon*, 10 Wis. 499.

[a] **Mere dilatory motions**, (1) based upon special appearances are not favored under the present practice. It is the policy of the code that all of its provisions shall be liberally construed with the view to assist parties in obtaining justice, and that errors

and defects in pleadings or proceedings, not affecting the substantial rights of the parties shall be disregarded by the courts on appeal or error as well as at nisi prius. *Griffing v. Smith*, 26 Colo. App. 220, 142 Pac. 202; *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. (2) "A writ should not be quashed for a mere formal defect, unless violative of a mandatory provision of positive law, or such as might reasonably mislead the defendant to his prejudice." *Koen v. Fairmount Brew. Co.*, 69 W. Va. 94, 70 S. W. 1098.

[b] **The power of quashing writs** (1) should be confined to proceedings that are irregular, defective or improper. *Crawford v. Stewart*, 38 Pa. 34. (2) It rests upon the assumption that the process is void. *Lane v. Ball*, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975.

88. Ga.—*Richmond & D. R. Co. v. Benson*, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; *Mitchell v. Long*, 74 Ga. 94. **Ind.**—*Southern Ind. Ry. Co. v. Indianapolis & L. Ry. Co.*, 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197; *Ind.—State v. Davis*, 73 Ind. 359. **Minn.**—*Hanna v. Russell*, 12 Minn. 80. **Miss.**—*Brandt Merc. Co. v. Lang*, 100 Miss. 328, 56 So. 447. **N. H.** *Garvin v. Legery*, 61 N. H. 153; *Lebanon v. Griffin*, 45 N. H. 558; *Reynolds v. Damrell*, 19 N. H. 394. **Pa.** *Benjamin v. Armstrong*, 2 Serg. & R. 392.

89. Colo.—*Sage Inv. Co. v. Haley*, 59 Colo. 504, 149 Pac. 437; *Burkhardt v. Haycox*, 19 Colo. 339, 35 Pac. 730; *Griffing v. Smith*, 26 Colo. App. 220, 142 Pac. 202; *Rich v. Collins*, 12 Colo. App. 511, 56 Pac. 207. **Neb.**—*Ensign v. Roggencamp*, 13 Neb. 30, 12 N. W. 811. **Nev.**—*Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. **N. Y.**—*Loring v. Binney*, 38 Hun 152, 8 Civ. Proc. 297, 3 How. Pr. 120.

90. *Neal-Millard Co. v. Owens*, 115 Ga. 959, 42 S. E. 266. See also *Stanford v. Bradford*, 45 Ga. 97.

wrong kind of process is issued, it should be quashed upon objection.⁹¹ Upon defendant's filing a motion to quash a process,⁹² or a plea in abatement thereto,⁹³ or a motion to set aside a judgment for insufficiency of process,⁹⁴ the plaintiff may move to amend; and if the latter motion be sustained, the objection to the process is properly overruled.⁹⁵ Even after a process has been quashed, it is not error to set aside the order and permit an amendment curing the defect.⁹⁶ In some instances the writ itself is quashed for defects in the service,⁹⁷ while in others only the service and return are set aside.⁹⁸

9. Effect of Ruling on the Action.—When a writ is quashed, the case stands as though no writ had issued, and defendant is not bound to appear until served with a valid writ,⁹⁹ except where the motion

[a] If there is error in the counter-part, both it and the original should be quashed. *Womsley v. Cummins*, 1 Ark. 125.

91. U. S.—See *Barnard v. Field*, 1 Dall. 348, 1 L. ed. 170. **Me.**—*Richardson v. Rich*, 66 Me. 249; *White v. Wall*, 40 Me. 574. **Tenn.**—*Posey v. McCubbins*, 5 Yerg. 235. **Vt.**—*Bowman v. Stowell*, 21 Vt. 309.

92. Ark.—*Fisher v. Collins*, 25 Ark. 97. **Ga.**—*Lassiter v. Carroll*, 87 Ga. 731, 13 S. E. 825. **Mass.**—*Hamilton v. Ingraham*, 121 Mass. 562. **Mich.**—*Kidd v. Dougherty*, 59 Mich. 240, 26 N. W. 510. **Miss.**—*Brandt Merc. Co. v. Lang*, 100 Miss. 328, 56 So. 447; *Maxey v. Strong*, 53 Miss. 280. **Neb.**—*Dobry v. Western Mfg. Co.*, 57 Neb. 228, 77 N. W. 656; *Rathman v. Peycke*, 37 Neb. 384, 55 N. W. 1070; *Struthers v. McDowell*, 5 Neb. 491. **N. H.**—*Parker v. Barker*, 43 N. H. 35, 80 Am. Dec. 130. **N. Y.**—*Wohlfarth v. Nat. Export Assn.*, 107 N. Y. Supp. 540. **Tex.**—*Galveston, H. & S. A. Ry. Co. v. Coker*, (Tex. Civ. App.) 135 S. W. 179.

93. Ala.—*Herring v. Kelly*, 96 Ala. 559, 11 So. 600. **Ark.**—*Mitchell v. Conley*, 13 Ark. 414. **Vt.**—*Chadwick & Co. v. Divol*, 12 Vt. 499.

94. Dusenberry v. Bennett, 7 Kan. App. 123, 53 Pac. 82.

95. U. S.—*Gulf C. & S. F. Ry. Co. v. James*, 48 Fed. 148, 1 C. C. A. 53. **Ala.**—*Lewis v. Collier*, 157 Ala. 533, 47 So. 790. **Ill.**—*Shepard v. Ogden*, 3 Ill. 257. **Mo.**—*Jump v. Batton's Creditors*, 35 Mo. 193, 86 Am. Dec. 146. **N. H.**—*Parker v. Barker*, 43 N. H. 35, 80 Am. Dec. 130. **N. Y.**—*Thurber-Whyland Co. v. Klittner*, 62 Hun 620, 16 N. Y. Supp. 828, 42 N. Y. St. 157. **Pa.**—*Paul v. Johnson*, 9 Phila. 32. **Tex.**—*Galveston, H. & S. A. Ry.*

Co. v. Coker (Tex. Civ. App.), 135 S. W. 179; *Texas & P. Ry. Co. v. Truesdell*, 21 Tex. Civ. App. 125, 51 S. W. 272.

But see *Witherell v. Randall*, 30 Me. 168; *Tibbetts v. Shaw*, 19 Me. 204; *Hall v. Jones*, 9 Pick. (Mass.) 446.

As to amendment, see *infra*, VIII, B.

96. Whittenberg v. Lloyd, 49 Tex. 633.

[a] **Mandamus will lie to compel a court to vacate an order quashing a summons**, where the order is not subject to revision on appeal, and substantial injury has been worked by it. *Ex parte Hill*, 165 Ala. 365, 51 So. 786.

97. Cal.—*Roberts v. Superior Court*, 30 Cal. App. 714, 159 Pac. 465. **Mich.**—*Lyon v. Baldwin*, 194 Mich. 118, 160 N. W. 428, L. R. A. 1917C, 148. **Ohio.**—*Smith v. Johnson*, 57 Ohio St. 486, 49 N. E. 693.

See the title "**Service of Process and Papers.**"

98. U. S.—*Wall v. Chesapeake & O. R. Co.*, 95 Fed. 398, 37 C. C. A. 129. **Cal.**—*Hancock v. Preuss*, 40 Cal. 572. **N. Y.**—*Delisser v. New York, N. H. & H. R. Co.*, 27 Jones & S. 233, 20 Civ. Proc. 312, 14 N. Y. Supp. 382, 39 N. Y. St. 242.

See *Lane v. Ball*, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975, and the title "**Service of Process and Papers.**"

[a] **A defect in the return cannot be the basis of a motion to quash both the summons and return.** *Hopkins v. Baltimore & O. R. Co.*, 42 W. Va. 535, 26 S. E. 187.

99. Ark.—*Bird v. Mathis*, 6 Ark. 379. **Mich.**—*Ricaby v. Gentle*, 122 Mich. 336, 80 N. W. 1093. **N. Y.**—*Delisser v. New York, N. H. & H. R. Co.*, 27 Jones & S. 233, 20 Civ. Proc. 312, 14 N. Y. Supp. 382, 39 N. Y. St. 242.

to quash is regarded as an entrance of appearance.¹ The suit itself is not abated by reason of the setting aside of the process.² The same issues once tried cannot be raised in a different form.³

10. Waiver of Objections.—Where the filing of the plaintiff's pleading gives the court jurisdiction of the action, the defendant may waive summons entirely.⁴ Objections to process by which a party is brought before the court are waived by any act which would be construed to be a general appearance,⁵ or by delay in objecting.⁶ Ac-

1. See **Colo.**—*Erdman v. Hardesty*, 14 Colo. App. 395, 60 Pac. 360. **Ky.** *Stapp v. Thomason*, 2 Litt. 214. **Tex.** *Feibleman v. Edmonds*, 69 Tex. 334, 6 S. W. 417.

2. **Ia.**—*Minott v. Vineyard*, 11 Iowa 90; *Beard v. Smith*, 9 Iowa 50. **Mass.** *Bean v. Green*, 4 Cush. 279. **N. Y.**—*Delisser v. New York, N. H. & H. R. Co.*, 27 Jones & S. 233, 20 Civ. Proc. 312, 14 N. Y. Supp. 382, 39 N. Y. St. 242. **Wash.**—*Embree v. McLennan*, 18 Wash. 651, 52 Pac. 241.

[a] "Another service can be made and the action proceed. If the original process were exhausted, a new summons could be issued." *Wall v. Chesapeake & O. Ry. Co.*, 95 Fed. 398, 37 C. C. A. 129.

3. *Foye v. Guardian Print. & Pub. Co.*, 109 Fed. 368; *Grand Lodge B. of L. F. v. Cramer*, 60 Ill. App. 212.

4. See *supra*, II, A; III, A.

[a] A codefendant may waive the issuance of a second original process. *Humphries v. McWhorter*, 25 Ga. 37; *James v. Edw. Thompson Co.*, 17 Ga. App. 578, 87 S. E. 842.

5. **U. S.**—*Wolf v. Cook*, 40 Fed. 432. **Ala.**—*Peebles v. Weir*, 60 Ala. 413; *Stanley v. Mobile Bank*, 23 Ala. 652. **Ark.**—*Grider v. Apperson & Co.*, 38 Ark. 388. **Cal.**—*Hayes v. Shattuck*, 21 Cal. 51. **Conn.**—*Denison v. Crafts*, 74 Conn. 38, 49 Atl. 353; *In re Hotchkiss' Appeal*, 32 Conn. 353. **D. C.** *Hutchins v. Munn*, 28 App. Cas. 271. **Fla.**—*Benedict v. Hadlow Co.*, 52 Fla. 188, 42 So. 239; *Pearce v. Thackery*, 13 Fla. 574. **Ga.**—*Stallings v. Stallings*, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; *Lyons v. Planters' Loan & Sav. Bank*, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155; *Sapp v. Parrish*, 3 Ga. App. 234, 59 S. E. 821. **Ill.** *Tewalt v. Irwin*, 164 Ill. 592, 46 N. E. 13; *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124. **Ind.**—*Hays v. McKee*, 2 Blackf. 11. **Mass.**—*Day v. Floyd*, 130 Mass. 488. **Mich.**—*Reed v. McCready*, 170 Mich. 532, 136 N. W.

488; *Goodspeed v. Smith*, 161 Mich. 688, 126 N. W. 975. **Minn.**—*Hinkley v. St. Anthony Falls W. Power Co.*, 9 Minn. 55. **Mo.**—*Williams v. Browning*, 45 Mo. 475. **Neb.**—*Crowell v. Gallo-way*, 3 Neb. 215. **N. J.**—*Logan v. Lawshe*, 62 N. J. L. 567, 41 Atl. 751. **N. Y.**—*Reed v. Chilson*, 142 N. Y. 152, 36 N. E. 884; *Italian Imp. Co. v. Spodaro*, 63 Misc. 320, 117 N. Y. Supp. 135; *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 107 N. Y. Supp. 1020; *Jaworower v. Rovere*, 162 N. Y. Supp. 1075. **Ore.**—*North Pac. Cycle Co. v. Thomas*, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636. **Pa.**—*Loeb v. Allen*, 32 Pa. Super. 137. **Tex.**—*Feibleman v. Edmonds*, 69 Tex. 334, 6 S. W. 417; *Mecca Fire Ins. Co. v. First State Bank (Tex. Civ. App.)*, 135 S. W. 1083. **Va.**—*Lane Bros. & Co. v. Bauserman*, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872. **Wis.**—*Ilisley v. Harris*, 10 Wis. 95.

See the title "Appearances."

[a] The motion to quash must be disposed of before appearing to the action or it is waived. *Lane Bros. & Co. v. Bauserman*, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872.

[b] A confession of judgment on an interplea does not waive the error in overruling a motion to quash, as against the original plaintiff. *State ex rel. Collins v. Parks*, 34 Okla. 335, 126 Pac. 242.

[c] Under a statute requiring appearance to be by serving a notice of appearance or a copy of a pleading, the filing of motions does not waive defects in the summons. *Jaworower v. Rovere*, 162 N. Y. Supp. 1075.

[d] After appearing and moving for a restraining order, an irregularity in process cannot be availed of. *McDowell v. Justice*, 167 N. C. 493, 83 S. E. 803.

6. **Me.**—*Bray v. Libby*, 71 Me. 276; *Richardson v. Rich*, 66 Me. 249. **Mass.** *Brewer v. Sibley*, 13 Mete. 175. **Miss.** *McLeod v. Harper*, 43 Miss. 42. **Mo.**

ceptance of service of a void process does not waive the right to question the validity of the process,⁷ but mere irregularities are usually waived.⁸ Answering to the merits, after the overruling, of objection to process, generally does not waive the objection,⁹ but in some jurisdictions the contrary rule prevails.¹⁰

B. AMENDMENTS. — 1. In General.¹¹ — Process is generally regarded as amendable.¹² While a court has inherent power to amend its process,¹³ this power is generally specially conferred by statute.¹⁴

Belkin v. Rhodes, 76 Mo. 643. **N. H.** *Parsons v. Swett*, 32 N. H. 87, 64 Am. Dec. 352.

See *supra*, VIII, A, 2.

[a] **By failure to attend and object**, on the day fixed for trial, the defendant waived the right to interpose the objection that the court obtained no jurisdiction over his person by service of a process which gave less than the statutory number of days' notice before the date therein fixed for trial. *McDonald v. Floyd*, 91 S. C. 118, 73 S. E. 769. Compare *Adkins v. Moore*, 43 S. C. 173, 20 S. E. 985.

7. *White v. Brown*, 10 Ga. App. 530, 73 S. E. 853; *Sexton v. Brooks' Heirs*, 12 La. 596.

8. **Ga.**—*Penn Tobacco Co. v. Leman*, 109 Ga. 428, 34 S. E. 679. **N. C.**—*Battle v. Baird*, 118 N. C. 854, 24 S. E. 668. **S. C.**—*Wicker v. Pope*, 6 Rich. L. 366.

[a] **A stipulation waiving all irregularities** estops one to object thereafter. *Ayres v. Hill*, 82 Ala. 401, 2 So. 892; *Ammons v. Brunswick-Balke-Collender Co.*, 5 Ind. Ter. 636, 82 S. W. 937.

9. **U. S.**—*Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237. **Conn.**—*Morse v. Rankin*, 51 Conn. 326. **Ia.**—*Converse v. Warren*, 4 Iowa 158. **Ky.**—*Muir v. Edelen*, 156 Ky. 212, 160 S. W. 1048; *Chesapeake, O. & S. W. R. Co. v. Heath's Adm.*, 87 Ky. 651, 9 S. W. 832. **Mass.**—*Ames v. Winsor*, 19 Pick. 247. **N. Y.**—*Dewey v. Greene*, 4 Denio 93; *Avery v. Slack*, 17 Wend. 85. **N. C.** *Mullen v. Norfolk, etc. Canal Co.*, 114 N. C. 8, 19 S. E. 106. **Okla.**—*Bes Line Const. Co. v. Schmidt*, 16 Okla. 429, 85 Pac. 711, 713. **S. C.**—*McDonald v. Floyd*, 91 S. C. 118, 73 S. E. 769. **W. Va.**—*Fisher v. Crowley*, 57 W. Va. 312, 50 S. E. 422; *Quesenberry v. People's Bldg., etc. Assn.*, 44 W. Va. 512, 30 S. E. 73.

See 2 STANDARD PROC. 533.

10. *Improved Match Co. v. Michi-*

gan Mut. F. Ins. Co., 122 Mich. 256, 80 N. W. 1088; *Webster v. Wheeler*, 119 Mich. 601, 78 N. W. 657; *Stelling v. Peddicord*, 78 Neb. 779, 111 N. W. 793; *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801, 89 N. W. 269, 93 Am. St. Rep. 484. See 2 STANDARD PROC. 534.

11. **Amendment of return**, see the title "Returns."

12. **Colo.**—*Erdman v. Hardesty*, 14 Colo. App. 395, 60 Pac. 360. **Ga.**—*Lassiter v. Carroll*, 87 Ga. 731, 13 S. E. 825; *Baldwin v. McMichael*, 68 Ga. 828; *Kelly v. Fudge*, 2 Ga. App. 759, 59 S. E. 19. **Ind.**—*Beck v. Williams*, 5 Blackf. 374. **Mass.**—*Drew v. Farnsworth*, 186 Mass. 365, 71 N. E. 783. **Mich.**—*Goodspeed v. Smith*, 161 Mich. 688, 126 N. W. 975. **N. Y.**—*Bronson v. Earl*, 17 Johns. 63. **N. C.**—*Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708; *Cheatham v. Crews*, 81 N. C. 343; *Thomas v. Womack*, 64 N. C. 657. **R. I.** *Quaglieri v. Venditti*, 102 Atl. 177.

13. **Ark.**—*Fisher v. Collins*, 25 Ark. 97; *King v. State Bank*, 9 Ark. 185, 47 Am. Dec. 739. **N. Y.**—*Gibbon v. Freel*, 93 N. Y. 93, 65 How. Pr. 273, 2 McCarty Civ. Proc. 482. **W. Va.** *Fisher v. Crowley*, 57 W. Va. 312, 50 S. E. 422.

For correction by writ of error coram nobis, see 15 STANDARD PROC. 133 and 371.

[a] **At the Common Law.** "Though by the common law, some writs were amendable, the power of amendment only exists as to slight and formal defects. Even in this respect, some writs were not amendable by the common law courts." . . . "as our summons corresponds to the common law judicial writs, it is amendable to the same extent, without the aid of any statute." *Fisher, Sons & Co. v. Crowley*, 57 W. Va. 312, 50 S. E. 422.

14. **U. S.**—*Armstrong v. Kansas City S. Ry. Co.*, 192 Fed. 608 (citing the Arkansas statute); *Wolf v. Cook*,

They are remedial and should be construed liberally.¹⁵ Matters of form,¹⁶ mere clerical errors,¹⁷ and defects which have not misled any-

40 Fed. 432; *Brown v. Pond*, 5 Fed. 31, construing the New York code. **Ark.** *Anthony v. Beebe*, 7 Ark. 447. **Cal.** *Baldwin v. Foster*, 157 Cal. 643, 108 Pac. 714. **Conn.**—*Mills v. Bishop*, Kirby 4. **Fla.**—*Gilmer v. Bird*, 15 Fla. 410. **Idaho.**—*Empire Mill Co. v. District Court*, 26 Idaho 383, 149 Pac. 499; *Hiddenbaugh v. Sandlin*, 14 Idaho 472, 94 Pac. 827, 125 Am. St. Rep. 175. **Kan.** *Taylor v. Buck*, 61 Kan. 694, 60 Pac. 736, 78 Am. St. Rep. 346. **Me.**—*Ripley v. Inhabitants of Harmony*, 111 Me. 91, 88 Atl. 161. **Mass.**—*Nash v. Brophy*, 13 Mete. 476. **Mich.**—*Groat v. Detroit United Ry.*, 153 Mich. 165, 116 N. W. 1081; *Final v. Backus*, 18 Mich. 218, 229. **Miss.**—*Brandt Merc. Co. v. Lang*, 100 Miss. 328, 56 So. 447. **Mo.**—*McMenamy Inv. & R. E. Co. v. Stillwell C. Co.*, 175 Mo. App. 668, 158 S. W. 427. **Mont.**—*Choate v. Spencer*, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424. **Neb.**—*Barker Co. v. Central West Inv. Co.*, 75 Neb. 43, 105 N. W. 985. **N. H.**—*Reynolds v. Damrell*, 19 N. H. 394. **N. Y.** *Talcott v. Rozenberg*, 3 Daly 203, 8 Abb. Pr. (N. S.) 287; *Jones v. Conlon*, 48 Misc. 172, 95 N. Y. Supp. 255. **N. C.** *Fountain v. Pitt County*, 171 N. C. 113, 87 S. E. 990; *McBride v. Welborn*, 119 N. C. 508, 26 S. E. 125. **W. Va.** *Ryan v. Piney Coal & Coke Co.*, 72 W. Va. 630, 78 S. E. 789. **Wis.**—*Hammond-Chandler Lumb. Co. v. Industrial Com.*, 163 Wis. 596, 158 N. W. 292.

[a] By statute the plaintiff may always amend, upon payment of costs, if the plea in abatement be ruled in favor of the defendant. *Mills v. Bishop*, Kirby (Conn.) 4.

[b] In the federal court (1) amendments have been allowed, although under the statutes of the state in which the court is held, the state court could have no power to allow such an amendment. *Wall v. Chesapeake & O. Ry. Co.*, 95 Fed. 398, 37 C. C. A. 129; *Erstein v. Rothschild*, 22 Fed. 61. (2) State practice may enlarge but not diminish those powers of amendment conferred on federal courts by the acts of congress. *Norton v. Dover*, 14 Fed. 106. (3) If amendable under the state law, the federal court will allow amendments to process in removed causes. *Wolf v. Cook*, 40 Fed. 432.

[c] **Statute of Henry VI.**—(1) "As early as the time of Henry VI, parliament intervened to mitigate the rigor of the law, and to prevent miscarriage of justice arising from the subtleties of the common-law lawyers and the mischievous errors of the clerks of courts, and by statute (8 Hen. VI, c. 12), authorized the courts to amend writs and process issued by them, and to reform all therein arising from misprision of the clerk." *Wolf v. Cook*, 40 Fed. 432. See also *Fisher Sons & Co. v. Crowley*, 57 W. Va. 312, 50 S. E. 422. (2) This statute is in force in Indiana. *Hunter v. Burns-ville Tpk. Co.*, 56 Ind. 213, 222.

15. **Ala.**—*Peebles v. Woir*, 60 Ala. 413. **Mass.**—*Mesbery v. Beard*, 226 Mass. 332, 115 N. E. 420; *McLaughlin v. West End St. R. Co.*, 186 Mass. 150, 71 N. E. 317. **Tenn.**—*Jones v. Miller*, 1 Swan 319. **Wis.**—*Hammond-Chandler Lumb. Co. v. Industrial Com.*, 163 Wis. 596, 158 N. W. 292.

[a] **Remedial to Both Parties.** These statutes are intended to be remedial to the defendant as well as the plaintiff." *Gearhart v. Olmstead*, 7 Dana (Ky.) 441.

[b] **The statutes of some states are merely declaratory of the common law and add nothing to it.** *Fisher v. Crowley*, 57 W. Va. 312, 50 S. E. 422.

16. **Ala.**—*Johnson v. Whitfield*, 124 Ala. 508, 27 So. 406, 82 Am. St. Rep. 196; *Lewis v. Grace*, 44 Ala. 307. **Ark.** *Woolford v. Dugan*, 2 Ark. 131, 35 Am. Dec. 52. **Cal.**—*Newmark & Co. v. Chapman*, 53 Cal. 557. **Ind.**—*Dunkle v. Elston*, 71 Ind. 585. **Mass.**—*Nash v. Brophy*, 13 Mete. 476. **N. H.**—*Reynolds v. Damrell*, 19 N. H. 394. **N. Y.** *McDonald v. Walsh*, 5 Abb. Pr. 68. **N. C.**—*Jackson v. McLean*, 90 N. C. 64. **Tex.**—*Graves v. Hall*, 13 Tex. 379. **Vt.**—*Hoyt v. Smith*, 83 Vt. 412, 76 Atl. 107. **W. Va.**—*Fisher v. Crowley*, 57 W. Va. 312, 50 S. E. 422. **Wis.** *Kentzler v. Chicago, M. & St. P. Ry. Co.*, 47 Wis. 641, 3 N. W. 369.

17. **U. S.**—*Furniss v. Ellis*, 2 Brock. 14, 9 Fed. Cas. No. 5,162. **Ark.**—*Haines v. McCormick*, 5 Ark. 663. **Ga.**—*Richmond & D. R. R. Co. v. Benson & Co.*, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446. **Ind.**—*State v. Hood*, 6 Blackf. 260; *Doe ex dem. Wilkins v.*

one,¹⁸ are amendable; and corrections may be made either by inserting matter omitted,¹⁹ or by striking out objectionable matter.²⁰ But amendments are not usually permissible where the defect is one of substance,²¹ unless by express or implied authority of statute.²² However, absolute general rules as to such matters are difficult if not impossible to formulate, and the propriety of particular amendments has therefore been treated in connection with the appropriate phases of the form and contents of the process.²³

Before a court can allow amendment it must have acquired²⁴ juris-

Rue, 4 Blackf. 263, 29 Am. Dec. 368. **Me.**—Griffin v. Pinkham, 60 Me. 123. **Mass.**—Blanchard v. Waters, 10 Mete. 185.

For amendment of particular defects, see *supra*, the various subtitles under IV.

18. Ames v. Weston, 16 Me. 266; Fountain v. Pitt County, 171 N. C. 113, 87 S. E. 990.

19. Brown v. Cook, 77 W. Va. 356, 87 S. E. 454, L. R. A. 1916D, 220.

20. **Ark.**—Lowenstein v. Gaines, 64 Ark. 499, 43 S. W. 762. **Del.**—Ennis v. Ennis, 5 Harr. 390. **Ga.**—Lamb v. McElwaney, 143 Ga. 490, 85 S. E. 705. **Me.**—Ripley v. Inhabitants of Harmony, 111 Me. 91, 88 Atl. 161; Richardson v. Rich, 66 Me. 249; Harvey v. Cutts, 51 Me. 604. **Pa.**—Herring v. Reade, 13 Phila. 67.

[a] **Process designed for the recovery of real estate only,** if it contains a command relating to personal property, may be amended by striking out the objectionable matter. Herring v. Reade, 13 Phila. (Pa.) 67.

21. **Ark.**—Blanks v. Rector, 24 Ark. 496, 88 Am. Dec. 780. **Me.**—Bailey v. Smith, 12 Me. 196. **Mont.**—Sharman v. Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645. **Tex.**—McKay v. Paris Exch. Bank, 75 Tex. 181, 12 S. W. 529, 16 Am. St. Rep. 884; Morris v. Balkham, 75 Tex. 111, 12 S. W. 970, 16 Am. St. Rep. 874; Battle v. Guedry, 58 Tex. 111. **Vt.**—Pollard v. Wilder, 17 Vt. 48.

22. **Ark.**—Anthony v. Beebe, 7 Ark. 447. **Mich.**—Final v. Backus, 18 Mich. 218, 229. **N. Y.**—Leetch v. Atlantic Mut. Ins. Co., 4 Daly 518; Talcott v. Rozenberg, 3 Daly 203, 8 Abb. Pr. (N. S.) 287.

[a] **Amendment Statutes Do Not Authorize Manufacture of New Process.**—A statute giving the court power to amend any process, pleading or proceeding in a pending action, either

in form or in substance, for the furtherance of justice, on such terms as may be just, at any time before final judgment, "though broad and sweeping in its terms, never was designed to enable the court to manufacture a process or pleading anew." Anthony v. Beebe, 7 Ark. 447.

[b] **Omissions May Be Supplied by Amendment.**—(1) Leetch v. Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518. (2) But jurisdictional omissions work a destruction of the process. See Mojariet v. Saenz, 80 N. Y. 547, 78 How. Pr. 505; Blossom v. Estes, 22 Hun 472, 59 How. Pr. (N. Y.) 381.

23. See *supra*, IV.

[a] **Limits of Power Are Difficult To Prescribe.**—"The power to amend process, so as to correct clerical misprisions and supply omissions of matters of form, is almost universally conceded; and in view of the numerous amendments, both of form and of substance, allowed by the courts, it is difficult to prescribe limits to this salutary power." Newmark & Co. v. Chapman, 53 Cal. 557.

[b] **The tendency of modern decisions is to favor amendments** when the spirit of justice can be advanced and promoted. Archibald v. Thompson, 2 Colo. 388.

24. **Ill.**—Durham v. Heaton, 28 Ill. 264, 81 Am. Dec. 275. **Ind.**—Goodwine v. Barnett, 2 Ind. App. 16, 28 N. E. 115. **Mont.**—Choate v. Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424. **Ore.**—Starkey v. Lunz, 57 Ore. 147, 110 Pac. 702, Ann. Cas. 1912D, 783. **Vt.**—Roy v. Phelps, 83 Vt. 174, 75 Atl. 13.

[a] **After removal,** the federal court has the power to permit amendments of process. Stone v. Speare, 175 Fed. 584.

[b] **Amendment statutes presuppose** the pendency of an action of which the court has acquired jurisdic-

diction of the action. And there must first be a process to amend,²⁵ one with at least sufficient of the elements of a good process to give jurisdiction.²⁶ It is also frequently stated as a corollary to this rule that there must be something to amend by,²⁷ but the rule is not

tion. **Mont.**—Choate *v.* Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424. **N. Y.** Leetch *v.* Atlantic Mut. Ins. Co., 4 Daly 518. **Ore.**—See Starkey *v.* Lunz, 57 Ore. 147, 110 Pac. 702, Ann. Cas. 1912D, 783.

25. U. S.—United States *v.* Turner, 50 Fed. 734; Dwight *v.* Merritt, 4 Fed. 614, 18 Blatch. 305, 59 How. Pr. 320. **Ga.**—Lassiter *v.* Carroll, 87 Ga. 731, 13 S. E. 825. **Mass.**—Brigham *v.* Este, 2 Pick. 420.

[a] "Entire absence of process cannot be supplied by amendment; but where there is original process, as in the present instance, it is in the power of the court to retain the case, allowing such amendment and granting such further time for service as may be required to give due notice to the defendant." Lassiter *v.* Carroll, 87 Ga. 731, 13 S. E. 825.

26. U. S.—Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252. **Ga.**—Neal-Millard Co. *v.* Owens, 115 Ga. 959, 42 S. E. 266; Lowrey *v.* Richmond & D. R. Co., 83 Ga. 504, 10 S. E. 123. **Mass.**—Brigham *v.* Este, 2 Pick. 420. **Mont.**—Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645.

[a] In the absence of an appearance, an amendment after service may be made only when the process served was sufficient to give jurisdiction over the defendant. **U. S.**—United States *v.* Turner, 50 Fed. 734; Brown *v.* Pond, 5 Fed. 41. **Ind.**—Dunkle *v.* Elston, 71 Ind. 585. **Kan.**—Dusenberry *v.* Bennett, 7 Kan. App. 123, 53 Pac. 82. **N. Y.**—McGill *v.* Weil, 19 Civ. Proc. 43, 10 N. Y. Supp. 246.

[b] "You can't amend a party into court, after judgment by default." Dusenberry *v.* Bennett, 7 Kan. App. 123, 53 Pac. 82.

27. U. S.—United States *v.* Turner, 50 Fed. 734; Middleton Paper Co. *v.* Rock River Paper Co., 19 Fed. 252; Dwight *v.* Merritt, 4 Fed. 614, 18 Blatchf. 305, 59 How. Pr. 320; Furniss *v.* Ellis, 2 Brock. 14, 9 Fed. Cas. No. 5,162. **Ga.**—Fitzgerald *v.* Garvin, Charlt. 281. **Ind.**—Makepeace *v.* Lukens, 27 Ind. 435, 92 Am. Dec. 263;

State *v.* Hood, 6 Blackf. 260. **Ky.** Johnson *v.* Bank of Kentucky, 5 Mon. 119; Stapp *v.* Thomason, 2 Litt. 214; Bridges *v.* Ridgley, 2 Litt. (Ky.) 395. **Me.**—Witherel *v.* Randall, 30 Me. 168; Porter *v.* Haskell, 11 Me. 177. **Miss.** Joiner *v.* Delta Bank, 71 Miss. 382, 14 So. 464. **Mont.**—Sharman *v.* Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645. **N. J.**—Van Ness *v.* Harrison, 3 N. J. L. 214. **N. Y.**—Cramer *v.* Van Alstyne, 9 Johns. 386; Bunn *v.* Thomas, 2 Johns. 190. **S. C.**—Hubbell *v.* Fogartie, 1 Hill 167, 26 Am. Dec. 163. **Tex.**—Graves *v.* Hall, 13 Tex. 379. **Vt.**—Dean *v.* Swift, 11 Vt. 331. **Wis.**—Whitney *v.* Brunette, 15 Wis. 61, 68.

[a] **Origin and Meaning of the Phrase.**—(1) The statute of 8 Henry VI, ch. 12, provides that the King's judges shall have the power to examine records, process, etc., and to reform "all that which to them in their discretion, seemeth to be misprision of the clerks therein," and declares that the "variance shall be by the said judges reformed and amended, according to the first writing." Under these statutes (adopted in a number of states) "it has accordingly been held that such amendment of the record cannot be made unless there be something to amend by." Makepeace *v.* Lukens, 27 Ind. 435, 92 Am. Dec. 263. See Albers *v.* Whitney, 1 Story 310, 1 Fed. Cas. No. 137; 1 Tidd Pr. 713. (2) "In Wynne *v.* Thomas, Wille's R. 563, the lord chief justice stated the law thus: 'The true rule is, that original writs may be amended by 8 H. 6, c. 12, where it is only the misprision and negligence of the clerk, but a mistake occasioned by the negligence or ignorance of the clerk is not amendable by that statute, nor any other mistake, where there is nothing to amend it by.'" Makepeace *v.* Lukens, 27 Ind. 435, 92 Am. Dec. 263. (3) "There are two rules by which we are to be governed; the one is, that no amendments in original writs can be made, unless it be the misprision of the clerk; the other, that nothing can be amended unless there is something to do it by." King *v.* King, 7 Mod.

absolutely adhered to.²⁸ It is axiomatic²⁹ that a void process cannot be amended so as to relate back and perform the functions of a valid one.³⁰ But a process may be sufficient if not objected to, and

250, 87 Eng. Reprint 1222; Ray v. Lister, Andrews 351, 95 Eng. Reprint 430. (4) "In every case cited by Mr. Tidd, in his Practice, where amendments have been permitted under the English statutes, a subsequent paper, pleading, order or proceeding, in the progress of the case, has been corrected by something in the record or proceedings of prior, or at least equal, date, with the matter in which the error is sought to be amended." Makepeace v. Lukens, 27 Ind. 435, 441, 92 Am. Dec. 263. (5) "As long as the plaintiff has anything by which he can amend his subsequent proceedings, he has the right to do so, as for instance he can amend his declaration by the writ, the replication by the declaration, the judgment by the verdict and issue, and the execution by the judgment." Hubbell v. Fogartie, 1 Hill (S. C.) 167, 26 Am. Dec. 163. (6) "A summons can be amended by the precipe—if a fl. fa., by the judgment." Durham v. Heaton, 28 Ill. 264, 81 Am. Dec. 275.

[b] In a more modern sense, it is sometimes vaguely used to mean simply that the process must be only irregular and not entirely void. Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252. See 1 STANDARD PROC. 853, and 15 STANDARD PROC. 98.

[c] In the appellate court an amendment of process will not be allowed, though it was probably due to an error of the clerk, where nothing appears upon the record evidencing that such is the fact. Ellis v. Ewbanks, 4 Ill. 190.

28. Leetch v. Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

[a] **Exceptions to Rule.**—"The old rule was that an amendment would be allowed where there was anything to amend by (1 Arch. Practice, 67); but even this was not adhered to, and amendments have been allowed where there was nothing to amend by. (Rutherford v. Mein et al. 2 Smith (Eng.), 392; Carr v. Shaw, 7 Term R. 299; 1 Tidd Pr. 130, 9th Lond. ed.) In the first of these cases it was urged that the writ being radically defective, the application was not to amend, but to supply; but the court allowed it upon

the authority of the case above referred to from the 7th Term Reports, where they said 'the amendment was allowed without anything debors to amend by.' " Leetch v. Atlantic Mut. Ins. Co., 4 Daly (N. Y.) 518.

29. State v. Davis, 73 Ind. 359; Choate v. Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424.

30. **Ala.**—*Ex parte* Howard Harrison Iron Co., 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928. **Ark.**—Mitchell v. Conley, 13 Ark. 414. **Cal.**—Brann v. Blum, 138 Cal. 644, 72 Pac. 168; Newmark & Co. v. Chapman, 53 Cal. 557. **Colo.**—Archibald v. Thompson, 2 Colo. 388. **Conn.**—Eno v. Frisbie, 5 Day 122. **D. C.**—Adrianee, Platt & Co. v. Heiskell, 8 App. Cas. 240. **Ga.**—Neal-Millard Co. v. Owens, 115 Ga. 959, 42 S. E. 266; Lowrey v. Richmond & D. R. Co., 83 Ga. 504, 10 S. E. 123; Scarborough v. Hall, 67 Ga. 576; Caldwell v. Alexander Seed Co., 17 Ga. App. 571, 87 S. E. 843; Adam Elect. Co. v. Witman, 16 Ga. App. 574, 85 S. E. 819; Beach Lumb. Co. v. Baxley Bank Co., 8 Ga. App. 251, 68 S. E. 946. **Ill.**—Sidwell v. Schumacher, 99 Ill. 426; McCormick v. Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Durham v. Heaton, 28 Ill. 264, 81 Am. Dec. 275. **Ia.**—Barber v. Swan, 4 G. Gr. 352, 61 Am. Dec. 124. **Me.**—Porter v. Haskell, 11 Me. 177. **Minn.**—See Oxmon v. Modern Woodmen, 124 Minn. 390, 145 N. W. 171. **Miss.**—Joiner v. Delta Bank, 71 Miss. 382, 14 So. 464. **Mont.**—Sharman v. Huot, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645; Choate v. Spencer, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424. **N. J.**—Den ex dem. Inskeep v. Lecony, 1 N. J. L. 111. **N. M.**—Tipton v. Cordova, 1 N. M. 383. **N. Y.**—Leetch v. Atlantic Mut. Ins. Co., 4 Daly 518; Bartholomew v. Chautauque County Bank, 19 Wend. 99; Burk v. Barnard, 4 Johns. 309. **N. C.**—Redmond v. Mullenax, 113 N. C. 505, 18 S. E. 708. **Ore.**—Brandt v. Brandt, 40 Ore. 477, 67 Pac. 508. **Vt.** Roy v. Phelps, 83 Vt. 174, 75 Atl. 13. **Wis.**—Hammond-Chandler Lumb. Co. v. Industrial Com., 163 Wis. 596, 158 N. W. 292.

[a] **Void for matter contained in**

yet not amendable if the amendment is opposed.³¹

Where summons is not process it is nevertheless amendable in the sound discretion of the court.³²

The amendment is usually made upon motion for leave.³³

On failure to amend after leave, a party will be deemed to have elected to stand on the original.³⁴

2. Changing Character of Process.—The substitution of a totally different process is not an amendment.³⁵ To come within the rule allowing amendments there must have been a misprision, error, or oversight in the process as originally made;³⁶ hence if a perfect process is changed into a different writ, this is not an amendment,³⁷ and the court cannot allow such a change as an amendment.³⁸

process though not for omissions. *Leetch v. Atlantic Mut. Ins. Co.*, 4 Daly (N. Y.) 518.

[b] **Process which is amendable is not void**, but will support a judgment. *Ala.*—*Ex parte Howard-Harrison Iron Co.*, 119 *Ala.* 484, 24 *So.* 516, 72 *Am. St. Rep.* 928. *Cal.*—*Newmark & Co. v. Chapman*, 53 *Cal.* 557. *Colo.*—*Archibald v. Thompson*, 2 *Colo.* 388. *D. C.*—*Adriance, Platt & Co. v. Heiskell*, 8 *App. Cas.* 240. *Ore.*—*Brandt v. Brandt*, 40 *Ore.* 477, 67 *Pac.* 508.

[c] **"A void writ has no vitality**, and nothing exists by which it can be amended—the breath of life cannot be infused into it, and it is a nullity. Not so with a writ voidable only.

. . . All voidable process can be made perfect, by proper amendments—void process cannot be." *Durham v. Heaton*, 28 *Ill.* 264, 81 *Am. Dec.* 275.

[d] **Process issued by an attorney** when it should have been issued by the clerk, is no process at all and cannot be amended. *Middleton Paper Co. v. Rock River Paper Co.*, 19 *Fed.* 252.

31. *Conn.*—*Eno v. Frisbie*, 5 *Day* 122. *N. H.*—*Pettingill v. McGregor*, 12 *N. H.* 179, 190. *Vt.*—*Pollard v. Wilder*, 17 *Vt.* 48.

[a] **Distinctions.**—"The difference between the proceedings being void, and being liable to be dismissed on motion, cannot be disguised. . . . If the writ is void, it of course, is subject to the consequences of its imperfections at any stage of the proceedings. If the writ is not necessarily void, but possesses some imperfection that must be met by an introductory proceeding, there must be a time in which the notice of the court is to be called to the defect." *Pollard v. Wilder*, 17 *Vt.* 48.

32. *Morrison County Lumb. Co. v.*

Duclos, 131 *Minn.* 173, 154 *N. W.* 952; *Lockway v. Modern Woodmen*, 116 *Minn.* 115, 133 *N. W.* 398, *Ann. Cas.* 1913A, 555.

33. *Ala.*—*Lewis v. Grace*, 44 *Ala.* 307. *Ga.*—*Mitchell v. Long*, 74 *Ga.* 94. *Ind.*—*Kaufman v. Sampson*, 9 *Ind.* 520; *Doe ex dem. Wilkins v. Rue*, 4 *Blackf.* 263, 29 *Am. Dec.* 368. *Kan.*—*Dusenberry v. Bennett*, 7 *Kan. App.* 123, 53 *Pac.* 82. *Me.*—*Lawrence v. Chase*, 54 *Me.* 196; *McLellan v. Crofton*, 6 *Greenl.* 307. *Miss.*—*Harrison v. Agricultural Bank*, 2 *Smed. & M.* 307. *Neb.*—*Barker Co. v. Central West Inv. Co.*, 75 *Neb.* 43, 105 *N. W.* 985. *N. H.*—*Lebanon v. Griffin*, 45 *N. H.* 558. *N. Y.*—*Wohlfarth v. National Export Assn.*, 107 *N. Y. Supp.* 540. *Pa.*—*Dresher v. Williams*, 4 *Pa. Co. Ct.* 4. *Mo.*—*Wheeler v. Smith*, 18 *Wis.* 651; *Ilisley v. Harris*, 10 *Wis.* 95.

[a] **A subsequent purchaser** may move to amend a process. *Doe ex dem. Wilkins v. Rue*, 4 *Blackf. (Ind.)* 263, 29 *Am. Dec.* 368.

Amendment upon motion to quash, see *supra*, VIII, A, 8.

34. *Goldie v. Stewart*, 76 *Neb.* 168, 107 *N. W.* 245.

35. *Brigham v. Este*, 2 *Pick. (Mass.)* 420; *Leetch v. Atlantic Mut. Ins. Co.*, 4 *Daly (N. Y.)* 518.

36. *Phillips v. Holland*, 78 *N. C.* 31.

37. *Ark.*—*Anthony v. Beebe*, 7 *Ark.* 447. *N. C.*—*Phillips v. Holland*, 78 *N. C.* 31. *W. Va.*—*Fisher v. Crowley*, 57 *W. Va.* 312, 50 *S. E.* 422.

[a] **"An amendment presupposes the existence of a defect** which it is the office of the former to cure." *Miss. Mills v. Meyer*, 83 *Tex.* 433, 18 *S. W.* 748.

38. *Ind.*—*Rittenour v. McCausland*, 5 *Blackf.* 540. *Me.*—*Cameron v. Tyler*, 71 *Me.* 27; *Matthews v. Blossom*, 15

3. Discretion of Court.—Within the limitations hereinbefore set forth, the allowance of amendments is largely a matter of discretion of the court,³⁹ on such terms as may be proper under the circumstances;⁴⁰ but a party may be entitled, as a matter of right, to an amendment to enable a process to speak the truth, when by an inadvertence it does not,⁴¹ and if wrongfully refused, the judgment will be reversed on appeal.⁴² An amendment is allowable where no sub-

Me. 400; *Carter v. Thompson*, 15 Me. 464. **N. J.**—*Kennedy v. Chumar*, 26 N. J. L. 305. **N. C.**—Anonymous, 2 N. C. 401. **R. I.**—*Wileox v. Sherman*, 2 R. I. 540.

[a] **Court cannot manufacture a process anew**, under the power of amendment. *Anthony v. Beebe*, 7 Ark. 447.

39. U. S.—*Frank v. Union Cent. Life Ins. Co.*, 130 Fed. 224; *Gulf, C. & S. F. Ry. Co. v. James*, 48 Fed. 148, 1 C. C. A. 53. **Ark.**—*Thompson v. McHenry*, 18 Ark. 537; *Haines v. McCormick*, 5 Ark. 663. **Ga.**—*Smith v. Bell*, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151. **Me.**—*Gardiner v. Gardiner*, 71 Me. 266; *Hayford v. Everett*, 68 Me. 505; *White v. Wall*, 40 Me. 574. **Mich.**—*Groat v. Detroit United Ry.*, 153 Mich. 165, 116 N. W. 1081. **Minn.**—*Lockway v. Modern Woodmen*, 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555. **Miss.**—*Foster v. Collins*, 5 Smed. & M. 259. **N. H.**—*Parker v. Barker*, 43 N. H. 35, 80 Am. Dec. 130; *Parsons v. Swett*, 32 N. H. 87, 64 Am. Dec. 352. **N. Y.**—*Weare v. Slocum*, 3 How. Pr. 397, 1 Code Rep. 105. **N. C.**—*Jackson v. McLean*, 90 N. C. 64; *Henderson v. Graham*, 84 N. C. 496. **S. C.**—*Wicker v. Pope*, 6 Rich. L. 366.

[a] **Not an Arbitrary Discretion.** "The question whether amendments are to be allowed, is in some cases within the discretion of the court * * * if the allowance of the motion would work either surprise or delay, the judge may, in his discretion, refuse it. But the discretion of the judge in relation to amendments is not a mere capricious exercise of power and will, it is a legal discretion, and ought to be governed by, and exercised according to the rules of law." *Hubbell v. Fogartie*, 1 Hill (S. C.) 167, 26 Am. Dec. 163.

[b] **The power to permit amendments** (1) should be freely exercised in order to attain the justice of the case. *Jones v. Miller*, 1 Swan (Tenn.) 319. (2) It is the duty of the court

to exercise its discretion over amendments for the full protection of those who are absent from the record, and beyond the jurisdiction of the court. *Frank v. Union Cent. Life Ins. Co.*, 130 Fed. 224.

[c] **Statutory Limitations Must Be Observed.**—"The motion to amend could be properly granted in the discretion of the court, only upon its being shown by affidavit that it might rightfully have been so made originally, unless that appears on the face of the writ and return,"—in accordance with the statutory restriction governing amendments. *Parker v. Barker*, 43 N. H. 35, 80 Am. Dec. 130.

[d] **On motion to quash**, it is within the court's discretion to allow an amendment. *Parsons v. Swett*, 32 N. H. 87, 64 Am. Dec. 352.

[e] **As Affected by Bar of Limitation.**—(1) An amendment should be permitted to cure an irregularity, if by setting aside the summons the plaintiff would be barred. *Weare v. Slocum*, 3 How. Pr. (N. Y.) 397, 1 Code Rep. 105. (2) *Contra.*—An amendment cannot be allowed to defeat the bar of limitation if complete. *Flatley v. Memphis & C. R. Co.*, 9 Heisk. (Tenn.) 230.

40. U. S.—*Norton v. Dover*, 14 Fed. 106. **Me.**—*Harvey v. Cutts*, 51 Me. 604. **N. Y.**—*McElwain v. Corning*, 12 Abb. Pr. 16. **N. C.**—*Jackson v. McLean*, 90 N. C. 64; *Thomas v. Womack*, 64 N. C. 657. **Tenn.**—*Jones v. Miller*, 1 Swan 319.

[a] **Protection to the opposite party**, against costs and surprise, should be afforded by affixing appropriate terms to the leave to amend. *Jones v. Miller*, 1 Swan (Tenn.) 319.

41. Phillips v. Holland, 78 N. C. 31.

42. Ark.—*Lowenstein v. Gaines*, 64 Ark. 499, 43 S. W. 762. **Ga.**—*Saunders v. Smith*, 3 Ga. 121. **N. Y.**—*Martin v. Johnson*, 8 Daly 511.

[a] **Review of Discretion.**—Amendments of process "ought to rest in the

stantial rights of other parties are affected.⁴³

4. **Time of Amendment.**—a. *In General.*—Matters of mere form are usually amendable at any stage of the cause.⁴⁴ The time when an amendment may be allowed is often controlled by statute,⁴⁵ a common reading being that the process may be amended before or after judgment.⁴⁶ Amendments, however, will not be permitted to disturb vested rights of third persons which have accrued in the meantime,⁴⁷ unless such persons are charged with actual or constructive notice.⁴⁸ Amendments have been allowed before entry of the case,⁴⁹ before or during trial,⁵⁰ after verdict,⁵¹ after default,⁵² after judg-

discretion of the court allowing or refusing them, and that this discretion, if reviewed at all by the appellate court, ought rather to be revised where the amendment is wrongfully refused, than where it is erroneously allowed." *Mitchell v. Conley*, 13 Ark. 414. See *Fisher v. Collins*, 25 Ark. 97.

43. **U. S.**—*Chamberlain v. Bittersohn*, 48 Fed. 42; *Norton v. Dover*, 14 Fed. 106. **Colo.**—*Erdman v. Hardesty*, 14 Colo. App. 395, 60 Pac. 360. **Mass.**—*Neszery v. Beard*, 226 Mass. 332, 115 N. E. 420. **N. Y.**—*Martin v. Johnson*, 8 Daly 541. **N. C.**—*Page v. McDonald*, 159 N. C. 38, 74 S. E. 642.

44. *Nash v. Brophy*, 13 Mete. (Mass.) 476; *Purcell v. McFarland's Heirs*, 23 N. C. 34, 35 Am. Dec. 734.

[a] Especially before judgment, may a correction in process be made by amendment, since the defendant has an opportunity to answer. *Morrison County Lumb. Co. v. Duclos*, 131 Minn. 173, 154 N. W. 952.

[b] A purely clerical error may be amended at any time before trial when no injury is shown to have accrued to the opposite party. *Irvin v. Bevil*, 80 Tex. 332, 16 S. W. 21; *Cartwright v. Chabert*, 3 Tex. 261, 49 Am. Dec. 742; *Galveston H. & S. A. Ry. Co. v. Coker*, (Tex. Civ. App.), 135 S. W. 179.

[c] Whenever attacked collaterally, clerical errors may be amended. *Lyon v. Baldwin*, 194 Mich. 118, 160 N. W. 428.

[d] **Laches Destroys Right To Amend.**—If there is no service of the petition and process, and the plaintiff is guilty of laches, the writ becomes abortive, and the court loses jurisdiction to amend the process and to have service perfected. *McClendon v. Ward-Truitt Co.*, 19 Ga. App. 495, 91 S. E. 1000.

45. **Ala.**—*Peebles v. Weir*, 60 Ala. 413. **Cal.**—*Baldwin v. Foster*, 157 Cal. 643, 108 Pac. 714. **Ind.**—*Hunter v.*

Burnsville Turnpike Co., 56 Ind. 213, 223. **Md.**—*Ritter v. Offutt*, 40 Md. 207. **Wis.**—*Sabin v. Austin*, 19 Wis. 421, at any time.

46. **Kan.**—*Taylor v. Buck*, 61 Kan. 694, 60 Pac. 736, 78 Am. St. Rep. 346; *Dusenberry v. Bennett*, 7 Kan. App. 123, 53 Pac. 82. **Mich.**—*Final v. Backus*, 18 Mich. 218, 229. **Mo.**—*McMenamy Inv. & R. E. Co. v. Stillwell C. Co.*, 175 Mo. App. 668, 158 S. W. 427. **N. Y.**—*Gibbon v. Freel*, 93 N. Y. 93, 65 How. Pr. 273, 2 McCarty Civ. Proc. 482; *Talcott v. Rozenberg*, 3 Daly 203, 8 Abb. Pr. (N. S.) 287. **N. C.**—*Henderson v. Graham*, 84 N. C. 496.

47. **Ala.**—*Cawthorn v. Knight*, 11 Ala. 579, 582. **Cal.**—*Newmark & Co. v. Chapman*, 53 Cal. 557. **Ga.**—*Saunders v. Smith*, 3 Ga. 121. **N. C.**—*Phillips v. Holland*, 78 N. C. 31; *Williams v. Sharpe*, 70 N. C. 582; *President, etc. of Bk. of Cape Fear v. Williamson*, 24 N. C. 147. **Ohio.**—*Ohio Life Ins. & Tr. Co. v. Urbana Ins. Co.*, 13 Ohio 220. **Pa.**—*Leeds v. Lockwood*, 84 Pa. 70. **Tenn.**—*Flatley v. Memphis & C. R. Co.*, 9 Heisk. 230.

48. *Rollins v. Rich*, 27 Me. 557; *Fairfield v. Paine*, 23 Me. 498, 41 Am. Dec. 357; *Whittier v. Varney*, 10 N. H. 291, 301.

[a] Third persons "should stand chargeable with notice of all facts, the existence of which is indicated and rendered probable by what is stated in the record." *Whittier v. Varney*, 10 N. H. 291, 301.

49. *Johnson v. Abbott*, 60 N. H. 150.

50. *Peebles v. Weir*, 60 Ala. 413.

51. *Neszery v. Beard*, 226 Mass. 332, 115 N. E. 420; *Laxton v. Hay*, 211 Mass. 463, 98 N. E. 29, Ann. Cas. 1913B, 709; *Drew v. Farnsworth*, 186 Mass. 365, 71 N. E. 783.

52. *Sage Inv. Co. v. Haley*, 59 Colo. 504, 149 Pac. 437.

ment,⁵³ after levy or sale under execution,⁵⁴ and upon trial of a subsequent action against the officer in which the validity of the writ is involved.⁵⁵

b. *Amendment After Return.*—Though a summons which has been served has performed its office and must be returned,⁵⁶ the court may order it withdrawn and corrected,⁵⁷ and re-served, if necessary,⁵⁸ provided that the return day named in the process shows that sufficient time remains in which to perfect service during the life of the process.⁵⁹

5. *Notice of Amendment.*—Formal amendments which do not affect the rights of the parties have been allowed without notice in some jurisdictions.⁶⁰ If the defendant appear, though only to object to the process, this is sufficient to authorize an amendment, without further notice,⁶¹ but in the absence of any sort of appearance, justice may require that notice of the proceeding to amend be served on the

53. *Ga.*—*Scudder v. Massengill*, 88 Ga. 245, 14 S. E. 571. *Kan.*—*Kirkwood v. Reedy*, 10 Kan. 453. *N. Y.*—*Thurber-Whyland Co. v. Klittner*, 62 Hun 620, 16 N. Y. Supp. 828, 42 N. Y. St. 157.

[a] The authority to amend the record after proceedings have ceased to be in fieri is founded upon the acts of parliament, which have been declared to be in force in this state. *Jenkins v. Long*, 23 Ind. 460. See also *Makepeace v. Lukens*, 27 Ind. 435, 92 Am. Dec. 263.

[b] Where neither the course nor result of the judgment would have been changed, if the amendment had been made before judgment, it may be made as well after. *Boudreaux v. Eastman*, 59 N. H. 467.

54. *Fla.*—*Adams v. Higgins*, 23 Fla. 13, 1 So. 321. *Ill.*—*Bybee v. Ashby*, 7 Ill. 151, 43 Am. Dec. 47. *Ind.*—*Hunter v. Burnsville Tpk. Co.*, 56 Ind. 213, 223; *Doe ex dem. Wilkins v. Rue*, 4 Blackf. 263, 29 Am. Dec. 368. *Me.*—*Sawyer v. Baker*, 3 Greenl. 29. *N. H.*—*Vogt v. Ticknor*, 48 N. H. 242. *S. C.*—*Giles v. Pratt*, 1 Hill 239, 26 Am. Dec. 170; *Hubbell v. Fogartie*, 1 Hill 167, 26 Am. Dec. 163. *Wis.*—*Davelaar v. Blue Mound Inv. Co.*, 110 Wis. 470, 86 N. W. 185.

[a] Defect in substance may not be amended after sale. *Morris v. Balkham*, 75 Tex. 111, 72 S. W. 970, 16 Am. St. Rep. 874; *McKay v. Paris Exch. Bank*, 75 Tex. 181, 12 S. W. 529, 16 Am. St. Rep. 884; *Battle v. Guedry*, 58 Tex. 111.

55. *Hargrave v. Penrod*, 1 *Ill.* 401,

12 Am. Dec. 201; *Dominick v. Eacker*, 3 Barb. (N. Y.) 17.

56. *Bray v. Libby*, 71 Me. 276.

57. *Bray v. Libby*, 71 Me. 276. *Contra*, *Parsons v. Hill*, 15 App. Cas. (D. C.) 532, 544.

[a] Under terms of the statute, a summons may be withdrawn, after filed, on the court's order, and after being amended, may be served. *Empire Mill Co. v. District Court*, 27 Idaho 383, 149 Pac. 499; *Ridenbaugh v. Sandlin*, 14 Idaho 472, 94 Pac. 827, 125 Am. St. Rep. 175.

58. *Cal.*—*Hancock v. Preuss*, 40 Cal. 572. *Idaho.*—*Ridenbaugh v. Sandlin*, 14 Idaho 472, 94 Pac. 827, 125 Am. St. Rep. 175. *Nev.*—*Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738.

59. See *supra*, IV, F, 2, b.

60. *Cal.*—*Broek v. Martinovitch*, 55 Cal. 516. *Ill.*—*Sidway v. Marshall*, 83 Ill. 438; *Bybee v. Ashby*, 7 Ill. 151, 43 Am. Dec. 47. *Mass.*—*Dewey v. Peeler*, 161 Mass. 135, 36 N. E. 800, 42 Am. St. Rep. 399. *N. Y.*—*Stuyvesant v. Weil*, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562. *S. C.*—*Giles v. Pratt*, 1 Hill 239, 26 Am. Dec. 170. *Tex.*—*Morris v. Balkham*, 75 Tex. 111, 12 S. W. 970, 16 Am. St. Rep. 874.

61. *U. S.*—*Norton v. Dover*, 14 Fed. 106. *Cal.*—*Polock v. Hunt*, 2 Cal. 193. *Ga.*—*Lassiter v. Carroll*, 87 Ga. 731, 13 S. E. 825; *Townsend v. Stoddard & Co.*, 26 Ga. 430. *Mass.*—*Hamilton v. Ingraham*, 121 Mass. 562. *Nev.*—*Sweeney v. Schultes*, 19 Nev. 53, 6 Pac. 44, 8 Pac. 768. *Ohio.*—*Stone v. Cordell*, 1 Ohio Dec. (Reprint) 166.

defendant.⁶² If substantial rights of the defendant are to be affected by the change in the process, there should be notice.⁶³

6. Effect of Amendment.—Ordinarily, process, when amended, justifies the original service, or any official action previously taken under it.⁶⁴ As a general rule the amendment relates back to the date of original process,⁶⁵ but this rule is not without exceptions.⁶⁶ In some instances the amendment has been considered effective only from its date,⁶⁷ and is not operative prior to the time it is granted so as to affect the intervening rights of third persons,⁶⁸ or, in some jurisdictions to defeat limitation, if complete.⁶⁹ An alteration which in effect makes a new process is generally treated as a reissuance, instead of an amendment of the original process.⁷⁰ An amendment may,⁷¹ or may not,⁷² entitle the other party to a continuance.

62. *Frank v. Union Cent. Life Ins. Co.*, 130 Fed. 224; *Morton v. Dover*, 14 Fed. 106.

63. *Ark.*—*Fisher v. Collins*, 25 *Ark.* 97; *Mitchell v. Conley*, 13 *Ark.* 414. *Colo.*—*Sage Inv. Co. v. Haley*, 59 *Colo.* 504, 149 *Pac.* 437. *Neb.*—*Watson v. McCartney*, 1 *Neb.* 131. *N. C.*—*Simpson v. Simpson*, 64 *N. C.* 427.

[a] Amendments should always be upon notice to the opposite party. *Fisher v. Collins*, 25 *Ark.* 97.

[b] "The reasons are obvious. A void writ is not a writ, and an amendment which would give such a writ force and effect would call the process into being at the time of the so-called amendment." *Elmen v. Chicago B. & Q. R. R. Co.*, 75 *Neb.* 37, 105 *N. W.* 987.

64. *Page v. McDonald*, 159 *N. C.* 38, 74 *S. E.* 642; *Elliott v. Tyson*, 117 *N. C.* 114, 23 *S. E.* 102.

65. *Ala.*—*Ware v. Kent*, 123 *Ala.* 427, 26 *So.* 208, 82 *Am. St. Rep.* 132. *Ark.*—*Hall v. Lackmond*, 50 *Ark.* 113, 6 *S. W.* 510, 7 *Am. St. Rep.* 84. *Fla.*—*Adams v. Higgins*, 23 *Fla.* 13, 1 *So.* 321. *Ga.*—*Cox v. Strickland*, 120 *Ga.* 104, 47 *S. E.* 912; *Jarrett v. City Elect. R. Co.*, 120 *Ga.* 472, 47 *S. E.* 927; *Saunders v. Smith*, 3 *Ga.* 121. *Ill.*—*Durham v. Heaton*, 28 *Ill.* 264, 81 *Am. Dec.* 275; *Lewis v. Lindley*, 28 *Ill.* 147. *Me.*—*Heath v. Whidden*, 29 *Me.* 108. *Neb.*—*Barker Co. v. Central West Inv. Co.*, 75 *Neb.* 43, 105 *N. W.* 985; *Taylor v. Courtney*, 15 *Neb.* 190, 198, 16 *N. W.* 842. *N. H.*—*Morse v. Dewey*, 3 *N. H.* 535. *N. J.*—*Den ex dem. Inskip v. Lecony*, 1 *N. J. L.* 111. *N. Y.*—*Gribbon v. Freely*, 93 *N. Y.* 93, 65 *How. Pr.* 273, 2 *McCarty Civ. Proc.* 482; *Abels v. Westervelt*, 24 *How. Pr.*

284. *N. C.*—*Leathers v. Morris*, 101 *N. C.* 184, 7 *S. E.* 783; *Phillips v. Holland*, 78 *N. C.* 31; *Purcell v. McFarland's Heirs*, 23 *N. C.* 34, 35 *Am. Dec.* 734. *Pa.*—*Sickler v. Overton*, 3 *Pa.* 325; *Cluggage v. Duncan's Lessee*, 1 *Serg. & R.* 111. *S. C.*—*Giles v. Pratt*, 1 *Hill* 239, 26 *Am. Dec.* 170. *Tenn.* *Flatley v. Memphis & C. R. Co.*, 9 *Heisk.* 230. *Tex.*—*Whittenberg v. Lloyd*, 49 *Tex.* 633. *Wis.*—*Davelaar v. Blue Mound Inv. Co.*, 110 *Wis.* 470, 86 *N. W.* 185.

[a] "It is considered as issued in the form in which it stands when amended." *Giles v. Pratt*, 1 *Hill* (*S. C.*) 239, 26 *Am. Dec.* 170.

66. *Crofford v. Cothran*, 2 *Sneed* (*Tenn.*) 492. See *supra*, VI.

67. *Texas & P. Ry. Co. v. Truesdell*, 21 *Tex. Civ. App.* 125, 51 *S. W.* 272.

68. *Phillips v. Holland*, 78 *N. C.* 31.

[a] "For some purposes, no doubt, the amendment does relate back to the issuance of the original summons, but this doctrine of relation is a mere fiction of law, and should not be applied so as to affect the rights of other parties." *Flatley v. Memphis & C. R. R. Co.*, 9 *Heisk.* (*Tenn.*) 230.

69. *Elmen v. Chicago, B. & Q. Ry. Co.*, 75 *Neb.* 37, 105 *N. W.* 987; *Flatley v. Memphis & C. R. Co.*, 9 *Heisk.* (*Tenn.*) 230; *Crofford v. Cothran*, 2 *Sneed* (*Tenn.*) 492. Compare *McCracken v. Richardson*, 46 *N. J. L.* 50.

70. See *supra*, VI.

71. *Jarrett v. City Elect. R. Co.*, 120 *Ga.* 472, 47 *S. E.* 927.

72. *Nimmon v. Worthington*, 1 *Ind.* 376 *Smith* 226; *Beck v. Williams*, 5 *Blackf. (Ind.)* 374.

7. Necessity of Actual Correction.—Generally the actual amendment should be made,⁷³ but voidable process is sometimes considered as amended, though no actual correction is made.⁷⁴ Such process may be treated as amended, without a formal amendment, when attacked collaterally,⁷⁵ or in equity, where it would be impracticable to make a physical correction of the imperfection,⁷⁶ and sometimes on appeal.⁷⁷ If the process, though imperfect, is validated by a curative statute, no amendment is needed;⁷⁸ nor is amendment necessary where the motion to quash is such an appearance as to waive the defect.⁷⁹

IX. ABUSE OF PROCESS.—A. IN GENERAL.⁸⁰—The courts will not permit their process to “be debased to the purpose of fraud and oppression,”⁸¹ but will promptly interfere to prevent such an abuse.⁸²

B. REMEDIES.—1. **Generally.**—Process is within the court’s control for the purpose of preventing an abuse thereof.⁸³ The process may be set aside upon application.⁸⁴ An action lies for the malicious

73. *Goldie v. Stewart*, 76 Neb. 168, 107 N. W. 245.

74. *Cal.*—*O’Donnell v. Merguire*, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389. *Fla.*—*Campbell v. Chaffee*, 6 Fla. 724. *Me.*—*Corthell v. Egery*, 74 Me. 41. *Tex.*—*Graves v. Hall*, 13 Tex. 379.

See *supra*, VIII, A, 8.

75. *Ark.*—*Burgett v. Williford*, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96. *Cal.*—*Newmark & Co. v. Chapman*, 53 Cal. 557. *Ill.*—*Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275. *Ia.*—*Williams v. Brown*, 28 Iowa 247. *Me.*—*Morrell v. Cook*, 31 Me. 120. *Mich.*—*Lyon v. Baldwin*, 194 Mich. 118, 160 N. W. 428. *N. J.*—*Den ex dem. Inskeep v. Lecony*, 1 N. J. L. 111. *N. Y.*—*Wright v. Nostrand*, 94 N. Y. 31. *N. C.*—*Sheppard v. Bland*, 87 N. C. 163. *Pa.*—*Owen v. Simpson*, 3 Watts 87. *S. C.*—*Hubbell v. Fogartie*, 1 Hill 167, 26 Am. Dec. 163. *Tex.*—*Portis v. Parker*, 8 Tex. 23, 58 Am. Dec. 95. *Wis.*—*Sabin v. Austin*, 19 Wis. 421.

76. *Wolf v. Cook*, 40 Fed. 432; *Graves v. Hall*, 13 Tex. 379.

77. *Campbell v. Chaffee*, 6 Fla. 724; *Kaufman v. Sampson*, 9 Ind. 520.

78. *Kipp v. Burton*, 29 Mont. 96, 74 Pac. 85, 101 Am. St. Rep. 544, 63 L. R. A. 325.

79. *Spratley v. Kitchens*, 55 Miss. 578; *Harrison v. Agricultural Bank*, 2 Smed. & M. (Miss.) 307.

80. See the title “Malicious Prosecution.”

81. *Ill.*—*Wanzer v. Bright*, 52 Ill. 35. *Mich.*—*Rosenthal v. Circuit Judge*, 98 Mich. 208, 57 N. W. 112, 39 Am.

St. Rep. 535, 22 L. R. A. 693. *N. C.*—*Sneeden v. Harris*, 109 N. C. 349, 13 S. E. 920, 14 L. R. A. 389. *Eng.*—*Stein v. Valkenhuyzen*, E. B. & E. 65, 27 L. J. Q. B. 236, 96 E. C. L. 65, 4 Jur. N. S. 411, 120 Eng. Reprint 431.

82. *Wanzer v. Bright*, 52 Ill. 35.

83. *Ala.*—*Anniston Pipe Works v. Williams*, 106 Ala. 324, 18 So. 111, 54 Am. St. Rep. 51. *Ga.*—*Richmond & D. R. Co. v. Benson*, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446. *N. Y.*—*Walkenshaw v. Perzel*, 32 How. Pr. 310. *Ore.*—*White v. Johnson*, 27 Ore. 282, 40 Pac. 511, 50 Am. St. Rep. 726.

[a] But courts will not instruct ministerial officers how to perform their ministerial duty in executing the precept of the law. “For courts to permit marshals or sheriffs to suspend the execution of the law’s command every time a private individual might see fit to protest to him, and come back for ‘instructions’ would simply lead to confusion worse confounded.” *Huntington’s Devises v. Taylor*, 156 Fed. 700; *Bowie v. Brahe*, 4 Duer (N. Y.) 676, 2 Abb. Pr. 161.

84. *Wanzer v. Bright*, 52 Ill. 35.

[a] **For Unlawful Use, Final Process May Be Set Aside.**—(1) *Fairbanks v. Devereaux*, 48 Vt. 550; *Hopkins v. Hayward*, 34 Vt. 474. (2) Upon the hearing of a motion to dismiss a writ on the ground of abuse of process, oral testimony and affidavits are admissible, though the motion alleges that it appears from an inspection of the writ. *Gardner v. Webber*, 16 Pick. (Mass.) 251. (3) And audita querela is a proper proceeding by which to set

abuse of lawful process, civil,⁸⁵ or criminal.⁸⁶

2. Action for Abuse of Process.—a. *Nature of Action.*—(I.) *Distinctions.*—The difference between an action for the abuse of process and one for the malicious use of process has been the source of considerable confusion in the decisions of the courts,⁸⁷ though the actions

it aside. *Fairbanks v. Devereaux*, 48 Vt. 550.

85. Ind.—Whitsell *v. Study*, 37 Ind. App. 429, 76 N. E. 1010. **Ia.**—Nix *v. Goodhill*, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434. **Mass.**—Wood *v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95. **Mich.**—Antcliff *v. June*, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621. **N. Y.**—Foy *v. Barry*, 87 App. Div. 291, 84 N. Y. Supp. 335. **Pa.**—Kramer *v. Stock*, 10 Watts 115.

[a] *Injury to feelings* is generally not a proper item of recovery, where the act charged is simply a violation of the right of property. *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664.

[b] *Exemplary Damages Are Allowable.*—**Cal.**—Foley *v. Martin*, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123; *Nightingale v. Scannell*, 18 Cal. 315. **Ga.**—Woodley *v. Coker*, 119 Ga. 226, 4 S. E. 89. **Ill.**—Wanzer *v. Bright*, 52 Ill. 35. **Kan.**—Wurmser *v. Stone*, 1 Kan. App. 131, 40 Pac. 993. **Mich.**—Marlatte *v. Weickgenant*, 147 Mich. 266, 110 N. W. 1061. **Pa.**—Barnett *v. Reed*, 51 Pa. 190, 88 Am. Dec. 574. **Tex.**—Waugh *v. Dabney*, 12 Tex. Civ. App. 290, 33 S. W. 753.

[c] *Court may restrain use of an advantage* obtained by the wrongful use of process. *Fears v. State*, 102 Ga. 274, 29 S. E. 463; *Rosenthal v. Circuit Judge*, 98 Mich. 208, 57 N. W. 112, 39 Am. St. Rep. 535, 22 L. R. A. 693. See also *Leeman v. McGrath*, 116 Wis. 49, 92 N. W. 425.

Injunction against execution, see 16 STANDARD PROC. 450, et seq., 479.

86. 1 Cooley, Torts (3rd ed.) 354, and the following: **Ala.**—*Dickerson v. Schwabacher*, 177 Ala. 371, 58 So. 986. **Mass.**—Wood *v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95. **N. Y.**—Foy *v. Barry*, 87 App. Div. 291, 84 N. Y. Supp. 335. **N. C.**—*Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co.*, 143 N. C. 54, 55 S. E. 422; *Sneeden v. Harris*, 109 N. C. 349, 13 S. E. 920,

14 L. R. A. 389. **Utah.**—*Kool v. Lee*, 43 Utah 394, 134 Pac. 906.

See *Spear v. Pendill*, 164 Mich. 620, 130 N. W. 343; *Marlatte v. Weickgenant*, 147 Mich. 266, 110 N. W. 1061.

[a] *Under the code* an action may not lie for the malicious use or malicious abuse of criminal process. *Grist v. White*, 14 Ga. App. 147, 80 S. E. 519.

87. U. S.—*Whitten v. Bennett*, 86 Fed. 405, 30 C. C. A. 140. **Ill.**—*Jeffery v. Robbins*, 73 Ill. App. 353. **Pa.**—*Herman v. Brookerhoff*, 8 Watts 240. **Utah.**—*Kool v. Lee*, 43 Utah 394, 134 Pac. 906. **Wis.**—*Docter v. Riedel*, 96 Wis. 158, 71 N. W. 119, 65 Am. St. Rep. 40.

[a] "There is no little confusion (1) in the reported cases of actions for malicious prosecution and actions for abuse of process. The cases based upon an abuse of process are comparatively few, and a considerable proportion of those reported and cited as such are found, upon examination, to have been in fact actions for malicious prosecution." *Jeffery v. Robbins*, 73 Ill. App. 353. (2) The authorities are certainly in a state of confusion, and frequently the action seems to be confounded with malicious prosecution. *Docter v. Reidel*, 96 Wis. 158, 71 N. W. 119, 65 Am. St. Rep. 40.

[b] "There is a class of cases in which a party who has been injured by the use of legal process which is neither void nor invalid has a remedy by action upon the case, sometimes termed an 'action for abuse of process' and which is in effect an action for malicious prosecution. These are where the process is in an ex parte proceeding, and there can be no termination of the proceeding in favor of the plaintiff, as where the defendant maliciously obtains a search warrant, or demands sureties of the peace against the plaintiff. *Bump v. Betts*, 19 Wend. (N. Y.) 421; *Steward v. Gromett*, 7 C. B. (N. S.) 191; *Hyde v. Greuch*, 62 Md. 577; *Fortman v. Rottier*, 8 Ohio St. 548." *Whitten v. Bennett*, 86 Fed. 405, 30 C. C. A. 140.

are quite distinct.⁸⁸ The malicious use of process is simply a malicious prosecution,⁸⁹ wherein it is not contemplated that the process shall be used to perform other than its ordinary and proper functions,⁹⁰ but the wrong consists in maliciously causing process to issue without proper cause.⁹¹ On the other hand, abuse of process, at common law,⁹² and uninfluenced by code provisions,⁹³ contemplates a situation wherein the process is lawfully issued and in proper form,⁹⁴ but is

88. **Minn.**—*Pixley v. Reed*, 26 Minn. 80, 1 N. W. 800. **N. C.**—*Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228. **Pa.**—*Herman v. Brookerhoff*, 8 Watts 240. **R. I.**—*Lauzon v. Charroux*, 18 R. I. 467, 28 Atl. 975. **Vt.**—*Roberts v. Danforth*, 102 Atl. 335. **Wis.**—*Docter v. Riedel*, 96 Wis. 158, 161, 71 N. W. 119, 65 Am. St. Rep. 40.

[a] "The gist of the action, in the one case, is the origination of a malicious and groundless prosecution, which ipso facto put the party in peril; in the other, it is not the origination of an action, but an abuse of the process consequent on it." *Herman v. Brookerhoff*, 8 Watts (Pa.) 240.

89. **U. S.**—*Gonsouland v. Rosomano*, 176 Fed. 481, 100 C. C. A. 97. **Ga.**—*Mullins v. Matthews*, 122 Ga. 286, 50 S. E. 101; *Woodley v. Coker*, 119 Ga. 226, 46 S. E. 89. **Pa.**—*Mayer v. Walter*, 64 Pa. 283. **Vt.**—*Roberts v. Danforth*, 102 Atl. 335.

See the title "Malicious Prosecution."

[a] "The malicious use of process, either civil or criminal, is reached by an action for malicious prosecution." *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993.

90. **U. S.**—*Whitten v. Bennett*, 86 Fed. 405, 30 C. C. A. 140. **Ga.**—*Mullins v. Matthews*, 122 Ga. 286, 50 S. E. 101. **Kan.**—*Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993. **Pa.**—*Mayer v. Walter*, 64 Pa. 283. **Vt.**—*Roberts v. Danforth*, 102 Atl. 335.

91. **Ala.**—*Dickerson v. Schwabacher*, 177 Ala. 371, 58 So. 986. **Ga.**—*Brantley v. Rhodes-Haverty Furn. Co.*, 131 Ga. 276, 62 S. E. 222. **Mass.**—*Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95. **N. C.**—*Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co.*, 143 N. C. 54, 55 S. E. 422. **R. I.**—*Lauzon v. Charroux*, 18 R. I. 467, 28 Atl. 975.

92. **Me.**—*Page v. Cushing*, 38 Me. 523. **Mass.**—*Johnson v. Reed*, 136 Mass. 421. **N. Y.**—*Dishaw v. Wad-*

leigh, 15 App. Div. 205, 44 N. Y. Supp. 207, 4 N. Y. Ann. Cas. 170.

[a] "The common-law action for abusing legal process is confined to a use of process for the purpose of compelling the defendant to do some collateral thing, which he could not lawfully be compelled to do." *Johnson v. Reed*, 136 Mass. 421; *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207, 4 N. Y. Ann. Cas. 170.

93. *Woodley v. Coker*, 119 Ga. 226, 46 S. E. 89; *Georgia Loan & Trust Co. v. Johnston*, 116 Ga. 628, 42 S. E. 27.

[a] **Affected by Code.**—"In the text-books and encyclopaedias and in the opinions of the judges, including our own, it is frequently said that an action for malicious prosecution will lie for the malicious carrying on, without probable cause, of a civil suit. But accurately speaking, and especially under our code, there can be no such thing as an action for the malicious prosecution of a civil suit, but the action is for the malicious use of legal process." *Woodley v. Coker*, 119 Ga. 226, 46 S. E. 89.

94. **U. S.**—*Gonsouland v. Rosomano*, 176 Fed. 481, 100 C. C. A. 97. **Ala.**—*Dickerson v. Schwabacher*, 177 Ala. 371, 58 So. 986. **Ill.**—*Ruehl Bros. Brew. Co. v. Atlas Brew. Co.*, 187 Ill. App. 392. **Ia.**—*Nix v. Goodhill*, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434. **Me.**—*Page v. Cushing*, 38 Me. 523. **Mass.**—*Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95. **N. Y.**—*Assets Collecting Co. v. Myers*, 167 App. Div. 133, 152 N. Y. Supp. 930; *Foy v. Barry*, 87 App. Div. 291, 84 N. Y. Supp. 335. **N. C.**—*Jackson v. American Tel. & Tel. Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738. **S. D.**—*Just v. Martin Bros. Co.*, 37 S. D. 470, 159 N. W. 44; *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084. **Eng.**—*Grainger v. Hill*, 4 Bing. (N. C.) 212, 33 E. C. L. 675, 5 Scott 561, 7 L. J. C. P. 85, 132 Eng. Reprint 769.

[a] **Malicious Use and Malicious Abuse Distinguished.**—"There is a dis-

wilfully used for a purpose not justified by law.⁹⁵ In other words, the latter action is for the perverted use of process,⁹⁶ and it is entirely immaterial whether the proceeding itself was baseless or otherwise,⁹⁷

tion between the 'malicious abuse of process' and the 'malicious use of process.' If process is used maliciously, not for the ostensible purpose for which the law provides it, but for an ulterior purpose—for example, to intimidate, oppress or punish a person against whom it is sued out—it is 'malicious abuse of process.' If it is used in truth for its ostensible purpose—for example, to collect a debt by attachment, but so used unwarrantably and without probable cause—it is a 'malicious use of process.'" *Lerner v. Boraack*, 189 Ill. App. 603. See also *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993.

[b] "The distinctive nature of an action for malicious abuse of process, as compared with an action for malicious prosecution, is that it lies for the improper use of process after it has been issued, not for maliciously causing process to issue." *Assets Collecting Co. v. Myers*, 167 App. Div. 133, 152 N. Y. Supp. 930; *Foy v. Barry*, 87 App. Div. 291, 84 N. Y. Supp. 335.

95. *U. S.*—*Gonsouland v. Rosomano*, 176 Fed. 481, 100 C. C. A. 97. *Ga.* *Atlanta Ice & Coal Co. v. Reeves*, 136 Ga. 294, 71 S. E. 421, 36 L. R. A. (N. S.) 1112; *Brantley v. Rhodes-Haverty Furn. Co.*, 131 Ga. 276, 62 S. E. 222; *Grist v. White*, 14 Ga. App. 147, 80 S. E. 519. *Ill.*—*Bonney v. King*, 201 Ill. 47, 66 N. E. 377; *Lerner v. Boraack*, 189 Ill. App. 603; *Ruehl Bros. Brew. Co. v. Atlas Brew. Co.*, 187 Ill. App. 392. *Ind.*—*Whitsell v. Study*, 37 Ind. App. 429, 76 N. E. 1010. *Ia.*—*Bradshaw v. Frazier*, 113 Iowa 579, 85 N. W. 752, 86 Am. St. Rep. 394, 55 L. R. A. 258. *Kan.*—*McClenny v. Inverarity*, 80 Kan. 569, 103 Pac. 82, 24 L. R. A. (N. S.) 301; *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993. *Md.*—*Bartlett v. Christhif*, 69 Md. 219, 229, 14 Atl. 518. *Mass.*—*Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95; *Johnson v. Reed*, 136 Mass. 421. *Mich.*—*Spear v. Pendill*, 164 Mich. 620, 130 N. W. 343; *Marlatte v. Weickgenant*, 147 Mich. 266, 110 N. W. 1061. *N. Y.*—*Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702; *Foy v. Barry*, 87 App. Div. 291, 84 N. Y.

Supp. 335; *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207, 4 N. Y. Ann. Cas. 170. *N. C.*—*Carpenter, Baggott & Co. v. Hanes*, 167 N. C. 551, 83 S. E. 577; *Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228. *Pa.*—*Herman v. Brookerhoff*, 8 Watts 240. *S. D.*—*Ingalls v. Christopherson*, 21 S. D. 574, 114 N. W. 704. *Wis.* *Docter v. Riedel*, 96 Wis. 158, 71 N. W. 119, 65 Am. St. Rep. 40; *King v. Johnston*, 81 Wis. 578, 51 N. W. 1011. Compare *Kool v. Lee*, 43 Utah 394, 134 Pac. 906.

96. *Ia.*—*Nix v. Goodhill*, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434. *Md.*—*Bartlett v. Christhif*, 69 Md. 219, 229, 14 Atl. 518, 521. *N. Y.* *Assets Collecting Co. v. Myers*, 167 App. Div. 133, 152 N. Y. Supp. 930. *N. C.*—*Carpenter, Baggott & Co. v. Hanes*, 167 N. C. 551, 83 S. E. 577. *Pa.*—*Mayer v. Walter*, 64 Pa. 283; *Whelan v. Miller*, 49 Pa. Super. 91. *R. I.*—*Lauzon v. Charroux*, 18 R. I. 467, 28 Atl. 975.

[a] Abuse of process is the malicious perversion of a regularly issued process to accomplish some purpose whereby a result not lawfully nor properly attainable under it is secured. *Nix v. Goodhill*, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434.

97. *N. Y.*—*Paul v. Fargo*, 84 App. Div. 9, 82 N. Y. Supp. 369. *N. C.* *Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co.*, 143 N. C. 54, 55 S. E. 422; *Jackson v. American Tel. & Tel. Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; *Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co.*, 138 N. C. 174, 50 S. E. 571. *Pa.*—*Mayer v. Walter*, 64 Pa. 283.

[a] The merits or demerits of the original action cannot be tried in the action for abuse of the process, nor relief obtained which was properly obtainable there. *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993.

[b] "The existence of a cause of action is not a defense to a suit for an excessive use of the process." *Herman v. Brookerhoff*, 8 Watts (Pa.) 240.

[c] If criminal process is "executed without authority, it would only accentuate the abuse." *Foy v. Barry*,

and whether it has terminated or not.⁹⁸ Hence the action for abuse of process is not the proper one against a person who has wrongfully instituted an action or proceeding against another, on which process issued,⁹⁹ nor where all is done in accordance with the forms of law.¹

The principle involved in actions for the abuse of process is general, and has been enforced in a great variety of cases.² Thus, the action is proper where the process is used for the purpose of coercion,³ extortion of money,⁴ as a cover to get property into a party's possession,⁵ as a means of seizure and retention of property known to be exempt,⁶ or where process is executed in a rough or improper⁷ man-

87 App. Div. 291, 84 N. Y. Supp. 335.

98. **U. S.**—Gonsoulard *v.* Rosomano, 176 Fed. 481, 100 C. C. A. 97. **N. C.**—Pittsburg, J. E. & E. R. Co. *v.* Wakefield Hdw. Co., 143 N. C. 54, 55 S. E. 422. **R. I.**—Lauzon *v.* Charroux, 18 R. I. 467, 28 Atl. 975. **Utah.**—Kool *v.* Lee, 43 Utah 394, 134 Pac. 906.

99. **U. S.**—Whitten *v.* Bennett, 30 C. C. A. 140, 86 Fed. 405. **R. I.**—Lauzon *v.* Charroux, 18 R. I. 467, 28 Atl. 975. **Vt.**—Roberts *v.* Danforth, 102 Atl. 335.

1. **U. S.**—Whitten *v.* Bennett, 86 Fed. 405, 30 C. C. A. 140. **Ala.**—Dickerson *v.* Schwabacher, 177 Ala. 371, 58 So. 986. **Ga.**—See Mullins *v.* Matthews, 122 Ga. 286, 50 S. E. 101. **N. C.**—Wright *v.* Harris, 160 N. C. 542, 76 S. E. 489. **Pa.**—Reams *v.* Pancoast, 111 Pa. 42, 2 Atl. 205; Whelan *v.* Miller, 49 Pa. Super. 91. **Vt.**—Roberts *v.* Danforth, 102 Atl. 335.

2. Gonsoulard *v.* Rosomano, 176 Fed. 481, 100 C. C. A. 97.

3. **Ga.**—Brantley *v.* Rhodes-Haverty Furn. Co., 131 Ga. 276, 62 S. E. 222; Georgia Loan & Trust Co. *v.* Johnston, 116 Ga. 628, 42 S. E. 27. **Ill.**—Wanzer *v.* Bright, 52 Ill. 35. **Mass.**—White *v.* Apsley Rubber Co., 194 Mass. 97, 80 N. E. 500, 8 L. R. A. (N. S.) 484. **N. Y.**—Dishaw *v.* Wadleigh, 15 App. Div. 205, 44 N. Y. Supp. 207, 4 N. Y. Ann. Cas. 170. **Eng.**—Grainger *v.* Hill, 4 Bing. (N. C.) 212, 33 E. C. L. 675, 5 Scott 561, 7 L. J. C. P. 85, 132 Eng. Reprint 769.

4. **Kan.**—McClenny *v.* Inverarity, 80 Kan. 569, 103 Pac. 82, 24 L. R. A. (N. S.) 301. **Mich.**—Marlatte *v.* Weickgenant, 147 Mich. 266, 110 N. W. 1661. **N. H.**—Richardson *v.* Duncan, 3 N. H. 508. **N. Y.**—Holley *v.* Mix, 3 Wend. 350, 26 Am. Dec. 702; Foy *v.* Barry, 87 App. Div. 291, 84 N. Y. Supp. 335. **N. C.**—Sneed *v.* Harris, 109 N. C. 349, 13 S. E. 920, 14 L. R.

A. 389. **R. I.**—Lauzon *v.* Charroux, 18 R. I. 467, 28 Atl. 975.

5. White *v.* Apsley Rubber Co., 181 Mass. 339, 63 N. E. 885; Eaton *v.* Cooper, 29 Vt. 444.

6. **Ga.**—Coleman *v.* Ryan, 58 Ga. 132. **Ia.**—Nix *v.* Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434. **Minn.**—Rustad *v.* Bishop, 80 Minn. 497, 83 N. W. 449, 81 Am. St. Rep. 282, 50 L. R. A. 168. **Neb.**—Castile *v.* Ford, 53 Neb. 507, 73 N. W. 945. **N. C.**—Lockhart *v.* Bear, 117 N. C. 298, 23 S. E. 484.

But see Leeman *v.* McGrath, 116 Wis. 49, 92 N. W. 425.

[a] Garnishment of exempt wages, maliciously, and with intent to compel the defendant, in order to avoid a discharge, to use the exempt money against his will to pay a debt, is an abuse of process. Nix *v.* Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434.

[b] Procuring issuance of a subpoena with the purpose of coercing a party to pay a claim, rather than submit to the inconvenience and discomfort of attending court at a distance, held to be an abuse of process. Dishaw *v.* Wadleigh, 15 App. Div. 205, 44 N. Y. Supp. 207, 4 N. Y. Ann. Cas. 170.

7. **Cal.**—Foley *v.* Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123. **Ill.**—Snyder *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551. **Ia.**—Bradshaw *v.* Frazier, 113 Iowa 579, 85 N. W. 752, 86 Am. St. Rep. 394, 55 L. R. A. 258. **Kan.**—Wurmser *v.* Stone, 1 Kan. App. 131, 40 Pac. 993. **Neb.**—Murray *v.* Mace, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664. **N. H.**—Barrett *v.* White, 3 N. H. 210, 14 Am. Dec. 352. **N. Y.**—Rogers *v.* Brewster, 5 Johns. 125; People *v.* Hubbard, 24 Wend. 369, 35 Am. Dec. 628; McLaughry *v.* Porter, 86 Hun 316, 33 N. Y. Supp. 464. **Tex.**—Casey

ner, or there has been oppression after arrest.⁸ In some instances fraud in the procuring of execution has been held to furnish grounds for the action;⁹ so also, the procuring of execution for a larger amount than is awarded in the judgment.¹⁰ But for a mere erroneous procedure against property not subject to levy, the remedy is not an action for malicious abuse of process.¹¹ It has been said that actual detention of the person, or the unlawful taking of the property of the party, was necessary,¹² following a line of decisions in actions for malicious prosecution,¹³ but an abuse of process may consist of using it as a means of duress, by a mere exhibition of it, to give color and efficacy to a threat.¹⁴

(II.) **Elements.**—It has been said in a great many cases that not only must there have been an improper use of the process, but the existence of an ulterior purpose, as a second element, is necessary;¹⁵

v. Hanrick, 69 Tex. 44, 6 S. W. 405. **Wis.**—*Smith v. Weeks*, 60 Wis. 94, 110, 18 N. W. 778.

[a] **An excessive levy** under a distress warrant is an abuse of process. *Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co.*, 143 N. C. 54, 55 S. E. 422; *McKee v. Smith* (Tex. Civ. App.), 45 S. W. 37.

[b] **Abuse Must Be at Time of Taking the Property.**—"If there was no abuse of the process at the time of the taking, subsequent irregularities in the proceedings . . . could not affect the previous taking so as to make it a trespass." *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993.

8. **Mass.**—*Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95. **S. D.**—*Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084. **Wis.**—*Smith v. Weeks*, 60 Wis. 94, 18 N. W. 778.

[a] "For example, if after an arrest upon civil or criminal process the person arrested is subjected to unwarrantable insults and indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue hardship, he has a remedy by an action" for abuse of process. *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95.

9. **Mich.**—*Rosenthal v. Circuit Judge*, 98 Mich. 208, 57 N. W. 112, 39 Am. St. Rep. 535, 22 L. R. A. 693; *Anteliff v. June*, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621. **N. Y.**—*Brown v. Feeter*, 7 Wend. 301. **Pa.**—*Barnett v. Reed*, 51 Pa. 190, 88 Am. Dec. 574.

Compare: Md.—*Bartlett v. Christhilf*, 69 Md. 219, 14 Atl. 518. **R. I.**—*Lauzon v. Charroux*, 18 R. I. 467, 28 Atl. 975.

Vt.—*Roberts v. Danforth*, 102 Atl. 335.

10. **Pa.**—*Kramer v. Stock*, 10 Watts 115; *Sommer v. Wilt*, 4 Serg. & R. 19. **S. D.**—*Ingalls v. Christopherson*, 21 S. D. 574, 114 N. W. 704. **Eng.** *Churchill v. Siggers*, 3 El. & Bl. 929, 77 E. C. L. 929, 118 Eng. Reprint 1389.

Compare Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518; *Roberts v. Danforth* (Vt.), 102 Atl. 335.

11. *Mathews v. Baldwin*, 101 Ga. 318, 28 S. E. 1015. See *Hendricks v. Middlebrooks Co.*, 118 Ga. 131, 44 S. E. 835.

[a] "A man in good faith seeking to enforce a supposed right, should not be mulcted in damages, as would be just and proper in a case where his conduct was actually malicious." *Mathews v. Baldwin*, 101 Ga. 318, 28 S. E. 1015.

[b] "The mere institution of civil suits does not constitute a malicious abuse of process." *Bonney v. King*, 201 Ill. 47, 66 N. E. 377. See also *Hendricks v. Middlebrooks Co.*, 118 Ga. 131, 44 S. E. 835.

12. *Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co.*, 138 N. C. 174, 50 S. E. 571.

13. **N. J.**—*Bitz v. Meyer*, 40 N. J. L. 252, 29 Am. Rep. 233. **N. Y.**—*Willard v. Holmes*, 142 N. Y. 492, 37 N. E. 480; *Paul v. Fargo*, 84 App. Div. 9, 82 N. Y. Supp. 369. **Pa.** *Mayer v. Walter*, 64 Pa. 283.

See generally the title "Malicious Prosecution."

14. *Marlatte v. Weickgenant*, 147 Mich. 266, 110 N. W. 1061.

15. **Cal.**—*Crews v. Mayo*, 165 Cal. 493, 132 Pac. 1032. **Ill.**—*Bonney v. King*, 201 Ill. 47, 66 N. E. 377; *Ruehl*

and though there is some conflict,¹⁶ it is generally considered that there must have been a willful intent to make a wrongful use of the process,¹⁷ or such wantonness as would amount in law to malice,¹⁸ though actual malice generally need not be present.¹⁹ On the other

Bros. Brew. Co. v. Atlas Brew. Co., 187 Ill. App. 392; Jeffrey v. Robbins, 73 Ill. App. 353. **Mich.**—Spear v. Pendill, 164 Mich. 620, 130 N. W. 343. **N. C.**—Carpenter, Baggott & Co. v. Hanes, 167 N. C. 551, 83 S. E. 577; Ludwick v. Penny, 158 N. C. 104, 73 S. E. 228; Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co., 143 N. C. 54, 58, 55 S. E. 422. **S. D.**—Ingalls v. Christopher, 21 S. D. 574, 114 N. W. 704.

[a] Two elements are necessary to sustain an action for the malicious abuse of legal process: first, the existence of an ulterior purpose; and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. Ruehl Bros. Brew. Co. v. Atlas Brew. Co., 187 Ill. App. 392.

16. **Ia.**—See Nix v. Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434. **Mich.**—Spear v. Pendill, 164 Mich. 620, 130 N. W. 343. **Utah.**—Kool v. Lee, 43 Utah 394, 134 Pac. 906.

17. **Ga.**—Georgia Loan & Trust Co. v. Johnston, 116 Ga. 628, 42 S. E. 27. **Mich.**—Spear v. Pendill, 164 Mich. 620, 130 N. W. 343. **N. Y.**—McClerg v. Veele, 116 App. Div. 731, 102 N. Y. Supp. 45; Weeks v. Van Ness, 104 App. Div. 7, 93 N. Y. Supp. 337.

[a] "There must be the intent (1) to do something wrong, or to make a wilful misuse of the court or its process for the purpose of improperly accomplishing some ulterior or collateral purpose which could not be obtained by direct and straightforward methods." Petry v. Childs & Co., 43 Misc. 108, 88 N. Y. Supp. 286. (2) "Although this is not an action for a malicious prosecution, but for an abuse of process, nevertheless in all actions of this character to which my attention has been called there has existed the element of intentional wrongdoing, or a wanton attempt to pervert the processes of the law from their proper use and design." Petry v. Childs & Co., 43 Misc. 108, 88 N. Y. Supp. 286. (3) "The authorities are strong, if not quite uniform, that the unlawful use of the process must be malicious, and without probable cause;

the rule being akin, in that respect, to actions for malicious prosecution." Nix v. Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434.

[b] "Process is deemed to have been abused when it has been employed to accomplish some purpose which the process was not intended by law to effect, or where it has been used in the mode and manner designed by law, but with an ulterior purpose to effectuate some unlawful collateral end, the legal use of it being but ostensible, while the real design was to pervert its force and efficiency to the success of the unlawful collateral design." Phoenix Mut. Life Ins. Co. v. Arbuckle, 52 Ill. App. 33.

18. **Ill.**—Wanzer v. Bright, 52 Ill. 35; Jeffrey v. Robbins, 73 Ill. App. 353. **Me.**—Page v. Cushing, 38 Me. 523. **N. Y.**—Petry v. Childs & Co., 43 Misc. 108, 88 N. Y. Supp. 286.

[a] "The general motive may be upright and commendable, while the particular acts in reference to others, may be malicious, in the legal acceptance of the term. So that an act may be malicious in a legal sense, which is not prompted or characterized by malevolence or corrupt design." Page v. Cushing, 38 Me. 523.

19. Stewart v. Cole, 46 Ala. 646; Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co., 143 N. C. 54, 58, 55 S. E. 422.

[a] Malice in these cases means a wrongful act done intentionally without just cause or excuse, citing the famous definition of legal malice given in Bromoge v. Prosser, 12 E. C. L. 276, 6 D. & R. 296, 4 B. & C. 247, 1 Car. & P. 475, 3 L. J. (O. S.) K. B. 203, 28 R. R. 241, 107 Eng. Reprint 1051. See also Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co., 138 N. C. 174, 50 S. E. 571.

[b] "There is a malicious abuse of process where a party, under process legally and lawfully issued, employs it wrongfully and unlawfully, and not for the purpose it is intended by law to effect." Wurmser v. Stone, 1 Kan. App. 131, 40 Pac. 993.

[c] Malice is not important, except as it may tend to aggravate damages.

hand, there may be malice without an abuse of process,²⁰ provided the process is used only for a purpose intended by law.²¹ So, also, there may be a right of action for injury to property seized by wrongful use of process without regard to malice, or the motive which actuated the person at whose instance the process was used.²² The want of probable cause is not an essential element to the action for abuse of process.²³

b. *Against Whom Maintainable.*—The remedy is not only against the officer whose duty it is to act lawfully,²⁴ but against all who unite with him or direct him to inflict the injury.²⁵ A party to

It is enough that the process was willfully abused to accomplish some unlawful purpose. *Paul v. Fargo*, 84 App. Div. 9, 14, 82 N. Y. Supp. 369; *Petry v. Childs & Co.*, 43 Misc. 108, 88 N. Y. Supp. 286.

[d] It is not necessary to show malice, want of probable cause, nor that the proceeding has terminated. *Carpenter, Baggott & Co. v. Hanes*, 167 N. C. 551, 83 S. E. 577; *Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co.*, 143 N. C. 54, 58, 55 S. E. 422; *Mayer v. Walter*, 64 Pa. 283.

20. *Ga.*—*Georgia Loan & Trust Co. v. Johnston*, 116 Ga. 628, 42 S. E. 27. *Ill.*—*Bonney v. King*, 201 Ill. 47, 66 N. E. 377; *Jeffery v. Robbins*, 73 Ill. App. 353. *Ind.*—*Whitesell v. Study*, 37 Ind. App. 429, 76 N. E. 1010. *N. C.* *Tucker v. Davis*, 77 N. C. 330. *S. D.* *Ingalls v. Christopherson*, 21 S. D. 574, 114 N. W. 704.

[a] Evil-intentioned use of process, if regular, is not abuse thereof. *Crews v. Mayo*, 165 Cal. 493, 132 Pac. 1032; *Bonney v. King*, 201 Ill. 47, 51, 66 N. E. 377.

21. *Ill.*—*Jeffery v. Robbins*, 73 Ill. App. 353. *S. D.*—*Ingalls v. Christopherson*, 21 S. D. 574, 114 N. W. 704. *Wis.* *Docter v. Riedel*, 96 Wis. 158, 71 N. W. 119, 65 Am. St. Rep. 40.

[a] Secret motives cannot be punished, if a party uses process as he is legally authorized to use it. *Docter v. Riedel*, 96 Wis. 158, 71 N. W. 119, 65 Am. St. Rep. 40.

22. *Phoenix Mut. Life Ins. Co. v. Arbuckle*, 52 Ill. App. 33; *Farmer v. Crosby*, 43 Minn. 459, 45 N. W. 866.

[a] The Action Would Be in Trespass.—*Farmer v. Crosby*, 43 Minn. 459, 45 N. W. 866.

23. *Minn.*—*Grimestad v. Lofgren*, 105 Minn. 286, 117 N. W. 515, 127 Am. St. Rep. 566, 17 L. R. A. (N. S.) 990. *N. Y.*—*Paul v. Fargo*, 84 App.

Div. 9, 82 N. Y. Supp. 369. *Utah.* *Kool v. Lee*, 43 Utah 394, 134 Pac. 906. *Wis.*—*Luby v. Bennett*, 111 Wis. 613, 87 N. W. 804, 87 Am. St. Rep. 897, 56 L. R. A. 261.

24. *U. S.*—*Gonsouland v. Rosomano*, 176 Fed. 481, 100 C. C. A. 97. *Cal.* *Foley v. Martin*, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123. *Ill.*—*Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. *Kan.*—*Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993. *Me.*—*Ross v. Philbrick*, 39 Me. 29. *N. H.*—*Barrett v. White*, 3 N. H. 210, 14 Am. Dec. 352. *N. Y.*—*Jenner v. Joliffe*, 9 Johns. 381; *Rogers v. Brewster*, 5 Johns. 125; *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702.

25. *U. S.*—*Gonsouland v. Rosomano*, 176 Fed. 481, 100 C. C. A. 97. *Ill.* *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. *Kan.*—*Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993. *Mass.* *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95. *Minn.*—*Farmer v. Crosby*, 43 Minn. 459, 45 N. W. 866; *Bartlett v. Hawley*, 38 Minn. 308, 37 N. W. 580. *S. C.*—*James v. Graham*, 78 S. E. 82. *S. D.*—*Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084.

[a] The plaintiff must have "advised, directed or encouraged (1) the abuse of the process," by the officer, "or knowing of its abuse for his own benefit, ratified it," in order to be held liable therefor with the officer. *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551; *People's B. & L. Assn. v. McElroy*, 79 Ill. App. 266. (2) The mere delivery of the writ to the officer, with directions to execute, cannot be held, by any known rule of law, to render the plaintiff liable for the unauthorized and unapproved acts of the officer and his assistants. *Becker v. Dupree*, 75 Ill. 167.

[b] Injured Party May Elect. "Where the plaintiff, upon a process

an action who directs an officer to execute a lawful process in a lawful manner is not liable for the latter's abuse unless he authorized or encouraged it,²⁶ or subsequently ratifies the officer's act.²⁷

c. *Time When Maintainable*.—Suit may be instituted immediately upon commission of the act complained of,²⁸ without waiting for the termination of the suit in which the process issued,²⁹ and limitation begins to run immediately from the time the acts complained of are committed.³⁰

d. *Form of Action*.—The following common law forms of action for abuse of process have been held proper: *assumpsit*,³¹ *trespass*,³²

of attachment, causes an officer so to conduct himself as to misbehave in the execution of his office and produce the loss or destruction of goods in his custody, the party has his election either to sue the principal or the officer." *Jenner v. Joliffe*, 9 Johns. (N. Y.) 381, 385.

26. *Ill.*—*People's B. & L. Assn. v. McElroy*, 79 Ill. App. 266. *Kan.* *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993. *Mich.*—*Sutherland v. Ingalls*, 63 Mich. 620, 30 N. W. 342, 6 Am. St. Rep. 332. *Minn.*—*Farmer v. Crosby*, 43 Minn. 459, 45 N. W. 866. *Neb.* *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664. *N. Y.* *Adams v. Freeman*, 9 Johns. 117. *Tex.* *Wells, Fargo & Co. v. Waites* (Tex. Civ. App.), 60 S. W. 582. *Vt.*—*Hyde v. Cooper*, 26 Vt. 552.

[a] *Writ Delivered Without Any Direction*.—"One who merely delivers to an officer a valid writ, without direction as to the manner of its service, will not, in the absence of a ratification, be held liable for torts committed in the execution thereof." *Teel v. Miles*, 51 Neb. 542, 71 N. W. 296; *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664.

[b] *The participation of the party to the suit in the wrongful act of the officer is a question for the jury*. *McLaughry v. Porter*, 86 Hun 316, 33 N. Y. Supp. 464.

[c] "There is no legal presumption that one concurs in the unlawful act of another." *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993. See also *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551; *Hyde v. Cooper*, 26 Vt. 552.

[d] *On vacation of judgment after issuance of process, the party is bound at his peril to see that the execution is recalled, or proceedings stayed*. *Farmer v. Crosby*, 43 Minn. 459, 45 N. W. 866.

27. *Neb.*—*Teel v. Miles*, 51 Neb. 542, 71 N. W. 296; *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664. *Tex.*—*Casey v. Hanriek*, 69 Tex. 44, 6 S. W. 405. *Vt.*—*Hyde v. Cooper*, 26 Vt. 552.

[a] *Receiving the avails of the officer's unlawful act, does not necessarily amount to a ratification by the party even though he be aware of the course pursued by the officer*. *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993; *Hyde v. Cooper*, 26 Vt. 552.

28. *Montague v. Cummings*, 119 Ga. 139, 45 S. E. 979.

29. *Ga.*—*Mullins v. Matthews*, 122 Ga. 286, 50 S. E. 101; *Montague v. Cummings*, 119 Ga. 139, 45 S. E. 979. *Mass.*—*White v. Apsley Rubber Co.*, 181 Mass. 339, 60 N. E. 885; *Zinn v. Rice*, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288; *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95. *Minn.*—*Grimestad v. Lofgren*, 105 Minn. 286, 117 N. W. 515, 127 Am. St. Rep. 566, 17 L. R. A. (N. S.) 990. *N. Y.*—*Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207, 4 N. Y. Ann. Cas. 170. *N. C.*—*Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co.*, 138 N. C. 174, 50 S. E. 571; *Sneeden v. Harris*, 109 N. C. 349, 13 S. E. 920, 14 L. R. A. 389. *Wis.*—*King v. Johnston*, 81 Wis. 578, 51 N. W. 1011.

30. *Montague v. Cummings*, 119 Ga. 139, 45 S. E. 979.

31. *Marlatte v. Weickgenant*, 147 Mich. 266, 110 N. W. 1061.

32. *Ill.*—*Wanzer v. Bright*, 52 Ill. 35; *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. *N. Y.*—*Baldwin v. Weed*, 17 Wend. 224. *N. C.*—*Rogers v. Pitman*, 47 N. C. 56.

[a] *An "action for trespass lies against an officer for abuse of process, where he assumes to act under a process, which does not authorize the*

and action on the case.³³

e. *Pleadings*.—The facts themselves constituting the offense must be alleged,³⁴ and the unlawful use of the process must be specifically set out,³⁵ as well as the participation of each person joined as a party defendant.³⁶ An allegation of "wilfull misuse" of the process has been held necessary to negative the presumption that the defendant was proceeding honestly and in good faith as a public officer,³⁷ but no averment need be made that the process was taken out for an improper purpose.³⁸ It is not necessary to aver that the action pursuant to which the process was issued has terminated,³⁹ as it is in

acts done." *James v. Graham* (S. C.), 78 S. E. 82.

33. *Mich.*—*Marlatte v. Weickgenant*, 147 Mich. 266, 110 N. W. 1061. *N. Y.*—*Brown v. Feeter*, 7 Wend. 301; *Rogers v. Brewster*, 5 Johns. 125. *N. C.* *Allen v. Greenlee*, 13 N. C. 370.

34. *McClerg v. Vielee*, 116 App. Div. 731, 102 N. Y. Supp. 45.

[a] *Conclusions Not Sufficient*.—The mere statement that the arrest and legal proceedings constituted an abuse of process is not enough. *McClerg v. Vielee*, 116 App. Div. 731, 102 N. Y. Supp. 45.

35. *U. S.*—*Whitten v. Bennett*, 86 Fed. 405, 30 C. C. A. 140. *Ill.*—*Bonney v. King*, 201 Ill. 47, 66 N. E. 377. *S. D.*—*Just v. Martin Bros. Co.*, 37 S. D. 470, 159 N. W. 44.

[a] *Sufficiency of Pleading*.—"In the action for abuse of process the gravamen of the complaint is the using of the process for a purpose not justified by law, and to effect an object not within its proper scope; and in such action the facts may appear from which is fairly deducible the inference of wrongful and malicious use, and the pleading is sufficient if it aver facts out of which the inference arises." *Foy v. Barry*, 87 App. Div. 291, 84 N. Y. Supp. 335. See also *Assets Collecting Co. v. Myers*, 167 App. Div. 133, 152 N. Y. Supp. 930.

36. *Minn.*—*Bartlett v. Hawley*, 38 Minn. 308, 37 N. W. 580. *Neb.*—*Teel v. Miles*, 51 Neb. 542, 71 N. W. 296. *N. Y.*—*Foy v. Barry*, 87 App. Div. 291, 84 N. Y. Supp. 335.

[a] *It will be presumed that one joined as a party defendant, because he made an affidavit on which a warrant was issued, was acting lawfully, unless the contrary is shown by the pleadings.* *Foy v. Barry*, 87 App. Div. 291, 84 N. Y. Supp. 335.

37. *McClerg v. Vielee*, 116 App. Div. 731, 102 N. Y. Supp. 45.

[a] *Sufficiency of Averment*.—"If the declaration charges the act to have been wrongfully and wilfully done, . . . it is sufficient." *Brown v. Feeter*, 7 Wend. (N. Y.) 301; *Petry v. Childs & Co.*, 43 Misc. 108, 88 N. Y. Supp. 286.

[b] *A general traverse of the declaration raises the issue of ulterior motive.* *Jeffery v. Robbins*, 73 Ill. 353.

38. *The presumption of good faith on the part of officers making or causing an arrest, must be negated in the complaint.* *McClerg v. Vielee*, 116 App. Div. 731, 102 N. Y. Supp. 45.

39. *Foy v. Barry*, 87 App. Div. 291, 84 N. Y. Supp. 335.

39. *U. S.*—*Gonsouland v. Rosomano*, 176 Fed. 481, 100 C. C. A. 97. *Ga.* *Brantley v. Rhodes-Haverty Furn. Co.*, 131 Ga. 276, 62 S. E. 222; *Mullins v. Matthews*, 122 Ga. 286, 50 S. E. 101; *Davis v. Hall*, 20 Ga. App. 398, 93 S. E. 25. *Ill.*—*Bonney v. King*, 201 Ill. 47, 66 N. E. 377; *Rothschild v. Meyer*, 18 Ill. App. 284. *Me.*—*Page v. Cushing*, 38 Me. 523. *Mass.*—*Malone v. Belcher*, 216 Mass. 209, 103 N. E. 637, Ann. Cas. 1915A, 830, 49 L. R. A. (N. S.) 753; *Zinn v. Rice*, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288. *Mich.* *Anteliff v. Jones*, 81 Mich. 477, 45 N. W. 1019, 21 Am. St. Rep. 533, 10 L. R. A. 621. *N. Y.*—*Assets Collecting Co. v. Myers*, 167 App. Div. 133, 152 N. Y. Supp. 930; *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207, 4 N. Y. Ann. Cas. 170. *N. C.*—*Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co.*, 138 N. C. 174, 50 S. E. 571, 3 Ann. Cas. 720; *Sneeden v. Harris*, 109 N. C. 349, 13 S. E. 920, 14 L. R. A. 389. *Ohio.*—*Pope v. Pollock*, 46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608, 4 L. R. A. 255. *Ore.*—*Lane v.*

an action for malicious prosecution,⁴⁰ nor that the process was procured without probable cause,⁴¹ though the latter fact may be alleged as a matter of aggravation and ground for exemplary damages.⁴² A complaint may be insufficient to constitute an action for malicious abuse, but may sustain one for malicious prosecution.⁴³

Ball, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975.

But see *King v. Yarbray*, 136 Ga. 212, 71 S. E. 131; *Gordon v. West*, 129 Ga. 532, 59 S. E. 232, 13 L. R. A. (N. S.) 549.

[a] "Where process is used to compel a party to do a collateral thing, or to accomplish an ulterior purpose, an action for malicious abuse of process may be maintained, without alleging or proving that the process improperly employed is at an end." *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207; *Sneeden v. Harris*, 109 N. C. 349, 13 S. E. 920, 14 L. R. A. 389. See also *Johnson v. Reed*, 136 Mass. 421.

[b] **Distinctions.**—"In an action for the malicious use of process—malicious prosecution—the plaintiff must ordinarily aver in his petition that the defendant instituted the proceeding with malice and without probable cause, and that the case has terminated in his favor; and this he must prove to be entitled to a judgment for damages. *Wheeler v. Nesbitt*, 24 How. 544, 16 L. ed. 765; *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116. Where the action is predicated upon the abuse of process, such averment or proof is not required. *Grainger v. Hill*, 4 Bing. N. C. 212, 7 L. J. (C. P.) 85; *Railroad Co. v. Hardware Co.*, 143 N. C. 54, 55 S. E. 422; *Page v. Cushing*, 38 Me. 523, 527; *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551." *Gonsouland v. Rosomano*, 176 Fed. 481, 100 C. C. A. 97.

40. **Cal.**—*Crews v. Mayo*, 165 Cal. 493, 132 Pac. 1032. **Conn.**—*Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35. **Ga.**—*Davis v. Hall*, 20 Ga. App. 398, 93 S. E. 25. **Mass.**—*Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95. **Minn.**—*Grimestad v. Lofgren*,

105 Minn. 286, 117 N. W. 515, 127 Am. St. Rep. 566, 17 L. R. A. (N. S.) 990. **N. C.**—*Carpenter, Baggott & Co. v. Hanes*, 167 N. C. 551, 83 S. E. 577. **Ore.**—*Lane v. Ball*, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975; *Forster v. Orr*, 17 Ore. 447, 21 Pac. 440. **S. D.**—*Just v. Martin Bros. Co.*, 37 S. D. 470, 159 N. W. 44.

See the title "**Malicious Prosecution.**"

41. **U. S.**—*Gonsouland v. Rosomano*, 176 Fed. 481, 100 C. C. A. 97. **Ga.**—*Hendricks v. Middlebrooks Co.*, 118 Ga. 131, 44 S. E. 835; *Juchter v. Boehm, Bendheim & Co.*, 67 Ga. 534. **Me.**—*Page v. Cushing*, 37 Me. 523. **N. Y.**—*Hazard v. Harding*, 63 How. Pr. 326. **Pa.**—*Mayer v. Walter*, 64 Pa. 283.

Compare Nix v. Goodhill, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 434.

[a] **As a Defense.**—Probable cause cannot be pleaded as a defense, as there is no such thing as probable cause for wilfully committing an abuse of process. *Kool v. Lee*, 43 Utah 394, 134 Pac. 906. *Compare Georgia Loan & Trust Co. v. Johnston*, 116 Ga. 628, 42 S. E. 27.

42. *Woodley v. Coker*, 119 Ga. 226, 46 S. E. 89; *Pittsburg, J. E. & E. R. Co. v. Wakefield Hdw. Co.*, 138 N. C. 174, 50 S. E. 571.

43. **Ga.**—*Williams v. Brunswick*, 137 Ga. 178, 73 S. E. 255. **Ill.**—*Bonney v. King*, 201 Ill. 47, 66 N. E. 377. **N. C.**—*Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228. **S. D.**—*Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084.

[a] **There may be three counts, respectively, for malicious prosecution, false imprisonment and for abuse of process.** *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95; *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084.

PROCHEIN AMI. — See *Guardian ad Litem.*

PRO CONFESSO. — See *Default; Judgments.*

PRODUCTION OF BOOKS AND DOCUMENTS. — See *Discovery.*

PROFANITY

By the Editorial Staff.

I. INDICTMENT OR INFORMATION, 798

A. *At Common Law*, 798

B. *Under Statutes*, 799

II. TRIAL, 799

CROSS-REFERENCES:

Blasphemy

Disorderly Conduct;

Obscenity.

For forms, see 9 STANDARD PROC. 1006.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. INDICTMENT OR INFORMATION.—¹ A. AT COMMON LAW.—Since the use of profane language did not under the common law constitute an indictable offense per se, but only when so publicly indulged in and so long continued or often repeated as to become a nuisance to the community at large, an indictment under the common law for profane swearing must specifically set forth all the facts which tend to show that the use of the profane language charged was a public or common nuisance.² It should be charged that the profane language was uttered in the presence and within the hearing of other persons;³ an averment that it was done publicly is not sufficient.⁴ The

1. See the title "Indictment and Information."

2. Ala.—Goree v. State, 71 Ala. 7. N. C.—State v. Brewington, 84 N. C. 783. Pa.—Com. v. Linn, 158 Pa. 22, 27 Atl. 843, 22 L. R. A. 353. Tenn. Gaines v. State, 7 Lea 410, 40 Am. Rep. 64. See Young v. State, 10 Lea 165.

[a] A general allegation (1) that the profane swearing was to the common nuisance of all the citizens is not sufficient; the facts and circumstances necessary to make it a common nuisance must be averred. State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637; Com. v. Linn, 158 Pa. 22, 27 Atl. 843, 22 L. R. A. 353. See also State v.

Barham, 79 N. C. 646; State v. Jones, 31 N. C. 38. (2) Nor can the conclusion of an indictment to the effect that the act of the defendant was to the common nuisance of the people supply any defect in the main body of the indictment. State v. Powell, 70 N. C. 67.

3. State v. Barham, 79 N. C. 646; Com. v. Linn, 158 Pa. 22, 27 Atl. 843, 22 L. R. A. 353.

4. Goree v. State, 71 Ala. 7; State v. Powell, 70 N. C. 67.

[a] But "the averment that the words were uttered 'in a public place' to the common nuisance of the citizens, has been held sufficient. State v. Graham, 3 Sneed 134; State v. Steele, 3

profane words used must be set out in order that the court may determine their character.⁵ A charge in the precise words spoken is sufficiently specific without an averment that the words were used profanely.⁶

B. UNDER STATUTES.—An indictment or information under a statute denouncing the offense of using profane language, which charges the offense in the language of the statute or its equivalent is sufficient.⁷ Every element of the offense as defined by the statute must be charged, however.⁸

II. TRIAL.⁹—The general rule obtains in prosecutions for profanity that questions of fact are for the jury.¹⁰

Heis. 135; *Gaines v. State*, 7 Lea 410. So have the words: 'In public and in the hearing of divers citizens.' *Bell v. State*, 1 Swan 42." *Young v. State*, 10 Lea (Tenn.) 165.

5. *State v. Ratliff*, 10 Ark. 530; *State v. Barham*, 79 N. C. 646; *State v. Pepper*, 68 N. C. 259, 12 Am. Rep. 637.

[a] But it is not necessary to set out the whole conversation; only so much of it need be averred as is necessary to describe the language used by defendant. *State v. Steele*, 3 Heisk. (Tenn.) 135.

[b] An allegation that the defendant "did profanely curse" without a recital of the language used by him has been held sufficient after verdict. *State v. Freeman*, 63 Vt. 496, 22 Atl. 621.

6. *Johnson v. Barclay*, 16 N. J. L. .

7. *Bodenhamer v. State*, 60 Ark. 10, 28 S. W. 507; *Taney v. State*, 9 Ind. App. 46, 36 N. E. 295.

See generally 12 STANDARD PROC. 442, 447, et seq.

8. *Herbes v. State*, 79 Neb. 832, 113 N. W. 530.

[a] Where a statute makes it a crime to "profanely swear and curse in a public place" (1) the words spoken constitute the gist of the offense and must be set out in the indictment. *Walton v. State*, 64 Miss. 207, 8 So. 171. (2) And it has been held that an indictment should not only allege that defendant profanely cursed and swore in a public place but should also designate the particular public place. *State v. Shanks*, 88 Miss. 410, 40 So. 1005.

9. See generally the title "Trial," and the cross-references there found.

10. See generally the title "Province of Judge and Jury."

[a] Thus, whether a single oath, either by its terms, its tone or manner, or the circumstances under which it was uttered was a nuisance or not is a question for the jury under a proper charge. *Young v. State*, 10 Lea (Tenn.) 165.

PROFERT.—See **Oyer and Profert.**

PROHIBITION

By the Editorial Staff.

I. DEFINITIONS AND DISTINCTIONS, 801

II. GENERAL PRINCIPLES GOVERNING ISSUANCE OF THE WRIT, 802

- A. *Nature and Purpose of Remedy*, 802
- B. *Acts and Proceedings Subject to Writ*, 809
- C. *Against Whom and to What Courts Issued*, 811

III. DISCRETION OF COURT, 813

IV. JURISDICTION AND AUTHORITY TO ISSUE, 814

- A. *General Statement*, 814
- B. *In Vacation*, 815

V. PROCEEDINGS TO OBTAIN ISSUANCE, 815

- A. *General Statement*, 815
- B. *Objection in Original Proceedings*, 816
- C. *Time for Application*, 817
- D. *Parties*, 817
 - 1. *Relators*, 817
 - 2. *Respondents*, 818
- E. *Petition or Suggestion*, 819
 - 1. *General Requirements*, 819
 - 2. *Particular Allegations*, 819
 - 3. *The Prayer*, 820
 - 4. *Verification*, 820
- F. *Alternative Writ and Order To Show Cause*, 820
 - 1. *General Statement*, 820
 - 2. *Service*, 821
- G. *Demurrer or Answer to Petition*, 821
- H. *Motion To Quash Alternative Writ or Order To Show Cause*, 822
- I. *Mandamus To Compel Vacation*, 822
- J. *Return*, 822
- K. *Objections To Return or Answer*, 822

- L. *The Reply*, 823
- M. *The Hearing*, 823
- N. *Judgment and Scope of Relief*, 824

VI. THE WRIT, 824

- A. *General Requirements*, 824
- B. *Enforcement of*, 825
- C. *Operation and Effect*, 825

VII. APPEAL AND ERROR, 825

VIII. SECOND APPLICATION, 826

IX. COSTS, 826

CROSS-REFERENCES:

Injunctions; Mandamus;
Quo Warranto.

For forms, see 9 STANDARD PROC. 1007, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITIONS AND DISTINCTIONS. — The writ of prohibition is an extraordinary writ,¹ issued by a superior court to an inferior judicial tribunal to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from exceeding its legitimate powers in a matter of which it has jurisdiction.² Prohibition differs

1. **U. S.**—*Ex parte* Oklahoma, 220 U. S. 191, 31 Sup. Ct. 426, 55 L. ed. 431. **Ala.**—*Ex parte* Greene, 29 Ala. 52. **Cal.**—First Nat. Bank v. Superior Court, 12 Cal. App. 335, 107 Pac. 322. **Idaho.**—Olden v. Paxton, 27 Idaho 597, 150 Pac. 40. **Ill.**—People v. Circuit Court, 173 Ill. 272, 50 N. E. 928; People v. Circuit Court, 169 Ill. 201, 48 N. E. 717; People v. Hoglund, 93 Ill. App. 292. **Mich.**—Port Huron Sav. Bank v. St. Clair Circuit Judge, 147 Mich. 551, 111 N. W. 202. **Mo.**—State ex rel. Warde v. McQuillin, 262 Mo. 256, 171 S. W. 72. **Mont.**—State ex rel. Myersick v. District Court, 53 Mont. 450, 164 Pac. 546. **Mo.**—Walcott v. Wells, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59. **N. Y.**—People ex rel. Ballin v. Smith,

184 N. Y. 96, 76 N. E. 925. **N. C.** State v. Whitaker, 114 N. C. 818, 19 S. E. 376. **Okla.**—State ex rel. Mays v. Breckenridge, 43 Okla. 711, 142 Pac. 407; Hirsh v. Twyford, 40 Okla. 220, 139 Pac. 313; Morrison v. Brown, 26 Okla. 201, 109 Pac. 237. **Wash.**—State ex rel. Gunderson v. Superior Court, 13 Wash. 226, 43 Pac. 43. **W. Va.**—County Court v. Boreman, 34 W. Va. 362, 12 S. E. 490; McConiha v. Guthrie, 21 W. Va. 134.

2. State ex rel. Harvey v. Medler, 19 N. M. 252, 142 Pac. 376.

[a] For other similar definitions, see Cal.—Camron v. Kenfield, 57 Cal. 550. **Ill.**—People v. Circuit Court, 173 Ill. 272, 50 N. E. 928; People v. Circuit Court, 169 Ill. 201, 48 N. E. 717. **Ky.** Cullins v. Williams, 156 Ky. 57, 160

from certiorari in that the normal function of the latter remedy is to review action already completed at the time of the issuance of the writ,³ while the writ of prohibition will not lie where the act complained of has been fully performed.⁴ Certiorari, moreover, is a continuation of the original proceeding,⁵ while prohibition is separate and distinct therefrom.⁶ Prohibition is distinguished from mandamus⁷ and injunction⁸ elsewhere in this work.

II. GENERAL PRINCIPLES GOVERNING ISSUANCE OF THE WRIT.—A. NATURE AND PURPOSE OF REMEDY.—The purpose of the writ of prohibition, whether the proceeding complained of be civil or criminal,⁹ is to keep inferior courts and tribunals within the limits and bounds prescribed for them by law.¹⁰ It is, therefore, the proper

S. W. 733. **Me.**—Curtis *v.* Cornish, 109 Me. 384, 84 Atl. 799. **Mass.**—Tehan *v.* Justices of Municipal Court, 191 Mass. 92, 77 N. E. 313. **N. Y.**—Thomson *v.* Tracy, 60 N. Y. 31; People *ex rel.* Metz *v.* Dayton, 120 App. Div. 814, 105 N. Y. Supp. 809; People *ex rel.* James *v.* Shongo, 83 Misc. 325, 144 N. Y. Supp. 885. **N. C.**—State *v.* Whitaker, 114 N. C. 818, 19 S. E. 376. **Okla.**—Hirsh *v.* Twyford, 40 Okla. 220, 139 Pac. 313. **S. C.**—State *ex rel.* Gibbs *v.* Kirkland, 41 S. C. 29, 19 S. E. 215; State *v.* Commissioners of Roads, 1 Mill 55, 12 Am. Dec. 596. **Va.**—Shell *v.* Cousins, 77 Va. 328. **W. Va.**—Johnston *v.* Hunter, 50 W. Va. 52, 40 S. E. 448; Fleming *v.* Comrs., 31 W. Va. 608, 8 S. E. 267.

[b] "A prohibition is a writ issuing properly out of the court of the King's Bench, being the king's prerogative writ; . . . directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court." Blackstone, 3 Com. 111, quoted in State *ex rel.* Kellogg *v.* Gary, 33 Wis. 93, where the court say: "Changing only the name of the court from which the writ issues, these words define with exactness the nature and extent of the remedy as known and applied in the law of this country."

[c] The terms "superior" and "inferior" as here used, refer to the relative rank and authority of the two tribunals concerned rather than to their intrinsic quality, and a court is inferior to another, within the meaning of this rule, when placed under the supervisory or appellate control of

the latter. State *ex rel.* Harvey *v.* Medler, 19 N. M. 252, 142 Pac. 376.

3. 4 STANDARD PROC. 889, et seq.

4. See *infra*, II, B.

5. 4 STANDARD PROC. 887, et seq.

6. Mayo *v.* James, 12 Gratt. (53 Va.) 17.

7. See 19 STANDARD PROC. 119.

8. 12 STANDARD PROC. 1008.

9. Mayo *v.* James, 12 Gratt. (53 Va.) 17, where it is said that in either case the nature, object and incidents of the remedy are the same.

10. **U. S.**—*In re* Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232; *Ex parte* Gordon, 104 U. S. 515, 26 L. ed. 814. **Ala.**—Epperson *v.* Rice, 102 Ala. 668, 15 So. 434. **Ark.**—McClendon *v.* Wood, 125 Ark. 155, 188 S. W. 6; Jones *v.* Coffin, 96 Ark. 332,

131 S. W. 873; Russell *v.* Jacoway, 33 Ark. 191. **Cal.**—Hevren *v.* Reed, 126 Cal. 219, 58 Pac. 536; Patterson *v.* Police Judge's Court, 123 Cal. 453, 56 Pac. 105. **Colo.**—People *ex rel.* Dougan *v.* District Court, 6 Colo. 534. **Ill.** People *v.* Circuit Court, 173 Ill. 272, 50 N. E. 928; People *v.* Circuit Court, 169 Ill. 201, 48 N. E. 717. **Me.**—Curtis *v.* Cornish, 109 Me. 384, 84 Atl. 799.

Ne v.—Walcott *v.* Wells, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59. **N. Y.**—People *ex rel.* Livingston *v.* Wyatt, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159. **N. C.**—State *v.* Whitaker, 114 N. C. 818, 19 S. E. 376. **N. D.**—Zinn *v.* District Court, 17 N. D. 128, 114 N. W. 475. **Ohio.**—Kelley *v.* State *ex rel.* Gellner, 94 Ohio St. 331, 114 N. E. 255. **Okla.**—Hirsh *v.* Twyford, 40 Okla. 220, 139 Pac. 313.

Va.—Mayo *v.* James, 12 Gratt. (53 Va.) 17; Jackson *v.* Maxwell, 5 Rand. (26 Va.) 636. **W. Va.**—County Court *v.* Boreman, 34 W. Va. 362, 12 S. E. 490; Fleming *v.* Comrs., 31 W. Va.

remedy in case of an impending excess or usurpation of authority by an inferior tribunal.¹¹ It is a preventive rather than a corrective

608, 8 S. E. 267. **Wis.**—*State ex rel. Atty. Gen. v. Circuit Court for Eau Claire Co.*, 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L. R. A. 554. **Wyo.**—*State ex rel. Mau v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.

See also *supra*, I.

11. **U. S.**—*In re Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232; *Ex parte Phoenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. 25, 30 L. ed. 274; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814. **Ala.**—*Ex parte State ex rel. Martin*, 75 So. 327; *Goodwin v. McConnell*, 187 Ala. 431, 65 So. 788; *Ex parte State ex rel. Attorney Gen.*, 150 Ala. 489, 43 So. 490, 10 L. R. A. (N. S.) 1129, 124 Am. St. Rep. 79; *Ex parte Roundtree*, 51 Ala. 42; *Ex parte Peterson*, 33 Ala. 74. **Ark.** *Floyd v. Gilbreath*, 27 Ark. 675; *Ex parte Williams*, 4 Ark. 537, 38 Am. Dec. 46. **Cal.**—*Crittenden v. Superior Court*, 166 Cal. 340, 136 Pac. 287; *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020; *Anderson v. Superior Court*, 122 Cal. 216, 54 Pac. 829; *Havemeyer v. Superior Court*, 84 Cal. 327, 389, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627. **Colo.**—*People ex rel. Bonfils v. District Court*, 29 Colo. 83, 66 Pac. 1068. **Conn.**—*Toomey v. Conley*, 72 Conn. 458, 44 Atl. 741; *Sherwood v. New England Knitting Co.*, 68 Conn. 543, 37 Atl. 388. **Fla.**—*State ex rel. Burr v. Whitney*, 66 Fla. 24, 63 So. 299; *State ex rel. Tischler v. Phillips*, 64 Fla. 105, 59 So. 241; *State ex rel. Reynolds v. White*, 40 Fla. 297, 24 So. 160. **Haw.**—*Sumner v. Perry*, 11 Hawaii 372. **Idaho.**—*Gunderson v. District Court*, 14 Idaho 478, 94 Pac. 166. **Ill.**—*People v. Circuit Court*, 173 Ill. 272, 50 N. E. 928. **Ia.**—*Barry v. Black Hawk County Dist. Court*, 167 Iowa 306, 149 N. W. 449. **Ky.**—*Board of Prison Comrs. v. Crumbaugh*, 161 Ky. 540, 170 S. W. 1187; *Fitzpatrick v. Young*, 160 Ky. 5, 169 S. W. 530; *McCann v. Louisville*, 23 Ky. L. Rep. 558, 63 S. W. 446. **Mass.**—*Tehan v. Justices of Municipal Court*, 191 Mass. 92, 77 N. E. 313. **Mich.**—*Hudson v. Judge of Superior Court*, 42 Mich. 239, 3 N. W. 850, 913. **Minn.**—*State ex rel. Jarvis v. Craig*, 100 Minn. 352, 111 N. W. 3; *State ex rel. Jonason v.*

Crosby, 92 Minn. 176, 99 N. W. 636. **Mo.**—*State ex rel. Warde v. McQuillin*, 262 Mo. 256, 171 S. W. 72; *State ex rel. Fenn v. McQuillin*, 256 Mo. 693, 165 S. W. 713; *State ex rel. McNamee v. Stobie*, 194 Mo. 14, 92 S. W. 191; *State v. Calvird*, 195 Mo. App. 354, 191 S. W. 1079. **Mont.**—*State ex rel. Spalding v. Benton*, 12 Mont. 66, 29 Pac. 425. **Nev.**—*State ex rel. Thatcher v. District Court*, 38 Nev. 323, 149 Pac. 178; *Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59; *McComb v. Fourth District Court*, 36 Nev. 417, 136 Pac. 563; *Low v. Crown Pt. Min. Co.*, 2 Nev. 75. **N. M.**—*State ex rel. Mitchell v. Medler*, 17 N. M. 644, 131 Pac. 976, Ann. Cas. 1915B, 1141; *Lincoln, etc. Min. Co. v. District Court*, 7 N. M. 486, 38 Pac. 580. **N. Y.**—*People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159; *People ex rel. Woodbury v. Hendrick*, 168 App. Div. 553, 153 N. Y. Supp. 188; *People ex rel. Jones v. Sherman*, 66 App. Div. 231, 72 N. Y. Supp. 718, *affirmed*, 171 N. Y. 684, 64 N. E. 1124. **N. C.**—*Holly Shelter R. Co. v. Newton*, 133 N. C. 132, 136, 45 S. E. 549, 98 Am. St. Rep. 701; *State v. Whitaker*, 114 N. C. 818, 19 S. E. 376. **N. D.** *Zinn v. District Court*, 17 N. D. 128, 114 N. W. 475. **Okla.**—*Atchison, T. & S. F. Ry. Co. v. Love*, 29 Okla. 738, 119 Pac. 207; *State ex rel. Evans v. Shea*, 28 Okla. 821, 115 Pac. 862; *State ex rel. Haskell v. Huston*, 21 Okla. 782, 97 Pac. 982. **P. I.**—*Blanco v. Ambler*, 3 Phil. Isl. 735; *Yangeo v. Rohde*, 1 Phil. Isl. 404. **R. I.**—*Taylor v. Bliss*, 26 P. I. 16, 57 Atl. 939. **S. C.** *State ex rel. Franklin v. Raborn*, 60 S. C. 78, 38 S. E. 260; *State v. Commissioners of Roads*, 1 Mill 55, 12 Am. Dec. 596. **Tex.**—*State ex rel. Bergeron v. Travis Co. Court (Tex. Crim.)*, 174 S. W. 365. **Utah.**—*Board of Home Missions v. Maughan*, 35 Utah 516, 101 Pac. 581, 24 L. R. A. (N. S.) 874; *Ducheneau v. Ireland*, 5 Utah 108, 13 Pac. 87; *People v. Carrington*, 5 Utah 531, 17 Pac. 735; *People v. Spiers*, 4 Utah 385, 10 Pac. 609, 11 Pac. 509. **Vt.**—*Bullard v. Thorp*, 66 Vt. 599, 30 Atl. 36, 44 Am. St. Rep. 867, 25 L. R. A. 605. **Va.**—*Grief v. Kegley*, 115 Va. 552, 79 S. E. 1062; *Moss v. Bar-*

remedy,¹² which may not be made to supersede the ordinary functions of an appeal or writ of error.¹³ Accordingly, the erroneous or irregular exercise of acknowledged jurisdiction presents no ground for the issuance of a writ of prohibition,¹⁴ unless, it has been said, the error

ham, 94 Va. 12, 26 S. E. 388; Com. v. Latham, 85 Va. 632, 8 S. E. 488. Wash.—Federal Mill Co. v. Chehalis County, 86 Wash. 699, 150 Pac. 1168; State *ex rel.* Meyer v. Clifford, 78 Wash. 555, 139 Pac. 650; State *ex rel.* Grant Realty Co. v. Superior Court, 76 Wash. 376, 136 Pac. 144. **W. Va.**—Powhatan Coal & C. Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225; McConiha v. Guthrie, 21 W. Va. 134. Wis.—State *ex rel.* Atty. Gen. v. Circuit Court for Eau Claire Co., 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L. R. A. 554; State *ex rel.* Rogers v. Burton, 11 Wis. 50. **Eng.**—Toft v. Rayner, 5 M. G. & S. 162, 57 E. C. L. 160.

[a] **Meaning of Phrase "In Excess of Jurisdiction."**—Where a court has general jurisdiction of a cause but proposes to do some act beyond its power in connection with some collateral matter arising therein, this is an excess of jurisdiction which may be arrested by prohibition. Noll v. Dailey, 72 W. Va. 520, 79 S. E. 668, 47 L. R. A. (N. S.) 1207. These words, however, do not include error either of law or fact committed in the exercise of acknowledged jurisdiction. State *ex rel.* Meyer v. Clifford, 78 Wash. 555, 139 Pac. 650.

[b] **Where a court has jurisdiction of a cause but proposes to exceed its jurisdiction** as to some collateral matter arising therein, it may, as to this proposed excess of jurisdiction, be restrained by prohibition. Noll v. Dailey, 72 W. Va. 520, 79 S. E. 668, 47 L. R. A. (N. S.) 1207.

12. **Ala.**—*Ex parte* Roundtree, 51 Ala. 42. **Cal.**—Valentine v. Police Court, 141 Cal. 615, 75 Pac. 336; Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604; Havemeyer v. Superior Court, 84 Cal. 327, 389, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143. **Minn.**—State *ex rel.* Jonason v. Crosby, 92 Minn. 176, 99 N. W. 636. **Mo.** State v. Burkhardt, 87 Mo. 533. **N. Y.** Thomson v. Tracy, 60 N. Y. 31. **S. C.** State v. Stackhouse, 14 S. C. 417. **Utah.** Brooks v. Warren, 5 Utah 89, 12 Pac. 659.

13. **Ark.**—McClendon v. Wood, 125 Ark. 155, 188 S. W. 6. **Cal.**—Valentine v. Police Court, 141 Cal. 615, 75 Pac. 336; Grant v. Superior Court, 106 Cal. 324, 39 Pac. 604; Coker v. Superior Court, 58 Cal. 177; Hogan v. Superior Court, 16 Cal. App. 783, 117 Pac. 947; Conlan v. Superior Court, 12 Cal. App. 420, 107 Pac. 577. **Colo.**—People *ex rel.* Pratt v. Stevens, 33 Colo. 306, 79 Pac. 1018; People *ex rel.* Adams v. District Court, 29 Colo. 1, 66 Pac. 888; Tomboy Gold Mines Co. v. District Court, 23 Colo. 441, 48 Pac. 537. **Fla.** State *ex rel.* Floral City P. Co. v. Hoeker, 33 Fla. 283, 14 So. 586. **Haw.** Colburn v. Cornwell, 16 Hawaii 784.

14. **Ill.**—People v. Circuit Court, 173 Ill. 272, 50 N. E. 928; People v. Circuit Court, 169 Ill. 201, 48 N. E. 717. **La.** State *ex rel.* Louisiana Tr. & Sav. Bk. v. Board of Liquidation, 135 La. 571, 65 So. 745; *In re* Powers, 121 La. 190, 46 So. 206. **Me.**—Curtis v. Cornish, 109 Me. 384, 84 Atl. 799. **Mass.** Fairweather v. McKim, 168 Mass. 103, 46 N. E. 427. **Minn.**—State *ex rel.* Jarvis v. Craig, 100 Minn. 352, 111 N. W. 3; State *ex rel.* Jonason v. Crosby, 92 Minn. 176, 99 N. W. 636. **Mo.** State v. Duncan, 195 Mo. App. 541, 193 S. W. 950; State *ex rel.* Graham v. See horn, 246 Mo. 541, 151 S. W. 716; State *ex rel.* McNamee v. Stobie, 194 Mo. 14, 92 S. W. 191. **N. M.**—State *ex rel.* Mitchell v. Medler, 17 N. M. 644, 131 Pac. 976, Ann. Cas. 1915B, 1141. **N. Y.**—People *ex rel.* Livingston v. Wyatt, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159. **Ohio.** State *ex rel.* Faber v. Jones, 95 Ohio St. 357, 116 N. E. 456. **Okla.**—State *ex rel.* Atty. Gen. v. Huston, 27 Okla. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380. **S. D.**—Chicago & N. W. R. Co. v. Dougherty, 39 S. D. 147, 163 N. W. 715. **Va.**—Shell v. Cousins, 77 Va. 328. Wash.—Federal Mill Co. v. Chehalis County, 86 Wash. 699, 150 Pac. 1168. **W. Va.**—Johnston v. Hunter, 50 W. Va. 52, 40 S. E. 448; County Court v. Boreman, 34 W. Va. 362, 12 S. E. 490; McConiha v. Guthrie, 21 W. Va. 134.

14. **U. S.**—*In re* Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232; *Ex parte* Pennsylvania, 109 U. S. 174,

or irregularity involves the doing of something contrary to the gen-

- 3 Sup. Ct. 84, 27 L. ed. 894; *Ex parte* Gordon, 104 U. S. 515, 26 L. ed. 814; Pope Mfg. Co. v. Arnold, S. & Co., 208 Fed. 406, 125 C. C. A. 568. **Ala.** Epperson v. Rice, 102 Ala. 668, 15 So. 434; State v. Brooks, 51 Ala. 60; *Ex parte* Smith, 34 Ala. 455; *Ex parte* Greene, 29 Ala. 52. **Ark.**—Parker v. Frierson, 124 Ark. 238, 187 S. W. 162; *Ex parte* Blackburn, 5 Ark. 21; *Ex parte* Williams, 4 Ark. 537, 38 Am. Dec. 46. **Cal.**—Woodworth v. Superior Court, 153 Cal. 38, 94 Pac. 232; Reclamation Dist. v. Superior Ct., 151 Cal. 263, 90 Pac. 545; Bishop v. Superior Court, 87 Cal. 226, 25 Pac. 435; Cassidy v. Cannon, 18 Cal. App. 426, 123 Pac. 358, 359; Lightner Min. Co. v. Superior Court, 14 Cal. App. 642, 112 Pac. 909. **Colo.**—Leonard v. Bartels, 4 Colo. 95. **Ga.**—Hudson v. Preston, 134 Ga. 222, 67 S. E. 800. **Haw.**—Scott v. Stuart, 22 Hawaii 459. **Ill.**—People v. Circuit Court, 173 Ill. 272, 50 N. E. 928. **Ky.** Cohen v. Webb, 175 Ky. 1, 192 S. W. 828; Com. v. Weissinger, 143 Ky. 368, 136 S. W. 875; Scott v. Tully, 106 Ky. 69, 49 S. W. 1063; Hughes v. Holbrook, 32 Ky. L. Rep. 1210, 108 S. W. 225. **La.**—State v. District Court, 34 La. Ann. 611. **Me.**—Curtis v. Cornish, 109 Me. 384, 84 Atl. 799. **Mass.**—Hyde Park v. Wiggins, 157 Mass. 94, 31 N. E. 693. **Minn.**—State ex rel. Jarvis v. Craig, 100 Minn. 352, 111 N. W. 3; State ex rel. Jonason v. Crosby, 92 Minn. 176, 99 N. W. 636. **Miss.**—Clayton v. Heidelberg, 9 Smed. & M. 623. **Mo.**—State ex rel. Graham v. Seehorn, 246 Mo. 541, 151 S. W. 716; State ex rel. McNamee v. Stobie, 194 Mo. 14, 92 S. W. 191; State ex rel. Abel v. Gates, 190 Mo. 540, 89 S. W. 881, 2 L. R. A. (N. S.) 162; State ex rel. Brady v. Evans, 184 Mo. 632, 83 S. W. 447. **Mont.**—State ex rel. Cornue v. Lindsay, 24 Mont. 352, 61 Pac. 883. **Nev.**—Walcott v. Wells, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59; Low v. Crown Pt. Min. Co., 2 Nev. 75. **N. M.**—State ex rel. Mitchell v. Medler, 17 N. M. 644, 131 Pac. 976, Ann. Cas. 1915B, 1141; Tapia v. Martinez, 4 N. M. 165, 16 Pac. 272. **N. Y.**—People ex rel. Mayor v. Nichols, 79 N. Y. 582, 58 How. Pr. 200; Thomson v. Tracy, 60 N. Y. 31; People ex rel. Gould v. Commrs. of Excise, 61 How. Pr. 514; People ex rel. Woodbury v. Hendrick, 168 App. Div. 553, 153 N. Y. Supp. 188; People ex rel. Jones v. Sherman, 66 App. Div. 231, 72 N. Y. Supp. 718, affirmed, 171 N. Y. 684, 64 N. E. 1124. **N. D.**—Zinn v. District Court, 17 N. D. 128, 114 N. W. 475. **Ohio.**—Kelley v. State ex rel. Gellner, 94 Ohio St. 331, 114 N. E. 255. **Okla.**—Spradling v. Hudson, 45 Okla. 767, 146 Pac. 588; Pioneer Tel. & Tel. Co. v. Bartlesville, 27 Okla. 214, 111 Pac. 207; State ex rel. Smith v. Brown, 24 Okla. 433, 103 Pac. 762. **R. I.**—Haworth v. Sherman, 37 R. I. 249, 92 Atl. 209. **S. C.**—State ex rel. Franklin v. Raborn, 60 S. C. 78, 38 S. E. 260; State ex rel. Richland Co. v. Columbia, 17 S. C. 80. **S. D.**—Chicago & N. W. R. Co. v. Dougherty, 39 S. D. 147, 163 N. W. 715. **Utah.**—Board of Home Missions v. Maughan, 35 Utah 516, 101 Pac. 581, 24 L. R. A. (N. S.) 874; State ex rel. Brown v. Third Dist. Court, 27 Utah 336, 75 Pac. 739. **Vt.** Wilkins v. Stiles, 75 Vt. 42, 52 Atl. 1048, 98 Am. St. Rep. 804. **Va.**—Grief v. Keglev, 115 Va. 552, 79 S. E. 1062; Moss v. Barham, 94 Va. 12, 26 S. E. 388. **Wash.**—Federal Mill Co. v. Chelalis County, 86 Wash. 699, 150 Pac. 1168; State ex rel. Prentice v. Superior Court, 86 Wash. 90, 149 Pac. 321; State ex rel. Meyer v. Clifford, 78 Wash. 555, 139 Pac. 650; State ex rel. Grant Realty Co. v. Superior Court, 76 Wash. 376, 136 Pac. 144; State ex rel. Griffith v. Superior Court, 71 Wash. 386, 128 Pac. 644. **W. Va.**—Chesapeake & O. R. Co. v. Rogers, 75 W. Va. 556, 84 S. E. 248; King v. Doolittle, 51 W. Va. 91, 41 S. E. 145; Ward v. Evans, 49 W. Va. 184, 38 S. E. 524; County Court v. Boreman, 34 W. Va. 362, 12 S. E. 490; McConiha v. Guthrie, 21 W. Va. 134; Buskirk v. Circuit Court, 7 W. Va. 91. **Wyo.**—State ex rel. Mau v. Ausherman, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548; Dobson v. Westheimer, 5 Wyo. 34, 36 Pac. 626.
- [a] **Insufficiency of pleadings or proof** in the trial court will not justify resort to prohibition. Kelley v. State ex rel. Gellner, 94 Ohio St. 331, 114 N. E. 255.
- [b] **Power to issue prohibition for purpose of exercising "supervisory control"** cannot be construed to embrace power to correct mere errors of law in this proceeding. "It must, there-

eral law of the land,¹⁵ or violates some fundamental principle of justice.¹⁶ Where jurisdiction depends upon contested facts which the inferior tribunal is competent to determine, prohibition will not be granted, even though the court errs in its determination.¹⁷ Like other extraordinary remedies,¹⁸ prohibition is to be resorted to only in cases of extreme necessity,¹⁹ and never in a case which presents a mere abstract or hypothetical question,²⁰ nor where the excess of jurisdiction complained of cannot result in injury to the relator.²¹ Nor will the writ issue where the relator has another adequate remedy²² in

fore, be regarded as a power to do just what the word 'control' implies—that is, to keep all other courts in the state within the limits assigned to them, so that no one of them may be allowed to overstep the jurisdiction committed to it." *State ex rel. Richmond Co. v. Columbia*, 17 S. C. 80.

15. *People ex rel. Mayor v. Nichols*, 79 N. Y. 582, 58 How. Pr. 200; *State ex rel. Maib. v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.

16. *People ex rel. Mayor v. Nichols*, 79 N. Y. 582, 58 How. Pr. 200.

17. *La.—In re McClaskey*, 136 La. 739, 67 So. 813. *Mo.—State v. Duncan*, 195 Mo. App. 541, 193 S. W. 950; *State v. Calvird*, 195 Mo. App. 354, 191 S. W. 1079. *S. D.—Chicago & N. W. R. Co. v. Dougherty*, 39 S. D. 147, 163 N. W. 715. *Wash.—State ex rel. Neal v. Kauffman*, 86 Wash. 172, 149 Pac. 656; *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 143.

[a] **The reason** for this rule is that such a case presents "not usurpation, but error, to correct which the person aggrieved must seek a remedy other than by prohibition." *State v. Duncan*, 195 Mo. App. 541, 193 S. W. 950. To same effect, *State v. Calvird*, 195 Mo. App. 354, 191 S. W. 1079.

18. *Weaver v. Leatherman*, 66 Ark. 211, 49 S. W. 977; *Port Huron Sav. Bank v. St. Clair Circuit Judge*, 147 Mich. 551, 111 N. W. 202, where the court says, "This rule as to granting or denying these writs is the same as in mandamus cases."

19. *Ala.—Goodwin v. McConnell*, 187 Ala. 431, 65 So. 788; *Ex parte Greene*, 29 Ala. 52. *Colo.—People ex rel. Adams v. District Court*, 29 Colo. 1, 66 Pac. 888; *Leonard v. Bartels*, 4 Colo. 95. *Conn.—Sherwood v. New England Knitting Co.*, 68 Conn. 543, 37 Atl. 388. *Ill.—People v. Circuit Court*, 169 Ill. 201, 48 N. E. 717. *La. State ex rel. Trowbridge v. Mayer*, 52

La. Ann. 255, 26 So. 823; *State v. Falls*, 32 La. Ann. 553. **Me.—Curtis v. Cornish, 109 Me. 384, 84 Atl. 799; *Norton v. Emery*, 108 Me. 472, 81 Atl. 671. **Mont.—State ex rel. Boston, etc. Co. v. Second Judicial District Court, 22 Mont. 220, 56 Pac. 219. **Nev.** *State ex rel. Thatcher v. District Court*, 38 Nev. 323, 149 Pac. 178; *Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59. **N. Y.** *People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159; *People ex rel. Hummel v. Trial Term Court*, 184 N. Y. 30, 76 N. E. 732; *People ex rel. Ballin v. Smith*, 184 N. Y. 96, 76 N. E. 925; *People ex rel. Adams v. Westbrook*, 99 N. Y. 152. **N. C.—Holly Shelter R. Co. v. Newton, 133 N. C. 132, 136, 45 S. E. 549, 98 Am. St. Rep. 701; *State v. Whitaker*, 114 N. C. 818, 19 S. E. 376. **N. D.—Zinn v. District Court, 17 N. D. 128, 114 N. W. 475. **W. Va.** *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448; *County Court v. Boreman*, 34 W. Va. 362, 12 S. E. 490. **Wis.** *In re Schumaker*, 90 Wis. 488, 63 N. W. 1050.********

20. *People v. District Court*, 7 Colo. 462, 4 Pac. 745; *Brown v. West*, 28 Okla. 648, 115 Pac. 796.

21. *Gibson v. Superior Court*, 139 Cal. 4, 72 Pac. 348; *Toomey v. Comley*, 72 Conn. 458, 44 Atl. 741, under §1299, Gen. St.

22. **U. S.—Ex parte Oklahoma**, 220 U. S. 191, 31 Sup. Ct. 426, 55 L. ed. 431. **Ala.—Ex parte Atlantic Coast Line R. Co.**, 73 So. 418; *Goodwin v. McConnell*, 187 Ala. 431, 65 So. 788; *Ex parte Montgomery L. & T. Co.*, 187 Ala. 376, 65 So. 403; *Ex parte Greene*, 29 Ala. 52. **Ark.—McClendon v. Wood**, 125 Ark. 155, 188 S. W. 6; *Jones v. Coffin*, 96 Ark. 332, 131 S. W. 873; *Finley v. Moose*, 74 Ark. 217, 85 S. W. 238, 109 Am. St. Rep. 79; *Weaver v. Leatherman*, 66 Ark. 211, 49 S. W.

- 977; *Russell v. Jacoway*, 33 Ark. 191. **Cal.**—*San Bruno v. Superior Court*, 171 Cal. 272, 152 Pac. 731; *Simpson v. Police Court*, 160 Cal. 530, 117 Pac. 553; *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020; *Valentine v. Police Court*, 141 Cal. 615, 75 Pac. 336; *White v. Superior Court*, 110 Cal. 54, 42 Pac. 471; *Murphy v. Superior Court*, 84 Cal. 592, 24 Pac. 310; *Havemeyer v. Superior Court*, 84 Cal. 327, 389, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; *Lange v. Superior Court*, 11 Cal. App. 1, 103 Pac. 908; *Holt v. James*, 10 Cal. App. 360, 101 Pac. 1065. **Colo.**—*People ex rel. Benbow v. District Court*, 37 Colo. 440, 86 Pac. 322; *People ex rel. Pratt v. Stevens*, 33 Colo. 306, 79 Pac. 1018; *People ex rel. Adams v. District Court*, 29 Colo. 1, 66 Pac. 888; *People ex rel. Bonfils v. District Court*, 29 Colo. 83, 66 Pac. 1068; *Leonard v. Bartels*, 4 Colo. 95. **Conn.**—*Toomey v. Comley*, 72 Conn. 458, 44 Atl. 741; *Sherwood v. New England Knitting Co.*, 68 Conn. 543, 37 Atl. 388. **Ga.**—*Cunningham v. Rachaeels*, 146 Ga. 682, 92 S. E. 208; *Heaton v. Hooper*, 134 Ga. 577, 68 S. E. 297. **Haw.**—*Union Feed Co. v. Kaaihue*, 21 Hawaii 345; *Harh Hak Sae v. Lindsay*, 18 Hawaii 666. **Idaho.** *Olden v. Paxton*, 27 Idaho 597, 150 Pac. 40. **Ill.**—*People v. Circuit Court*, 169 Ill. 201, 48 N. E. 717. **Ind.**—*Jasper County v. Spitler*, 13 Ind. 235. **Kan.**—*Mason v. Grubel*, 64 Kan. 835, 68 Pac. 660. **Ky.**—*Morgan v. Clements*, 153 Ky. 33, 154 S. W. 370; *Fish v. Benton*, 138 Ky. 644, 128 S. W. 1067; *Dupoyster v. Clarke*, 121 Ky. 694, 90 S. W. 1. **La.**—*State ex rel. Louisiana Tr. & Sav. Bk. v. Board of Liquidation*, 135 La. 571, 65 So. 745. **Me.**—*Curtis v. Cornish*, 109 Me. 384, 84 Atl. 799. **Mass.**—*Kilty v. Railroad Commrs.*, 184 Mass. 310, 68 N. E. 236; *Jaquith v. Fuller*, 167 Mass. 123, 45 N. E. 54. **Mich.**—*Triangle Land Co. v. Auditor General*, 172 Mich. 289, 137 N. W. 683; *Port Huron Sav. Bank v. St. Clair Circuit Judge*, 147 Mich. 551, 111 N. W. 202. **Mo.**—*State ex rel. Warde v. McQuillin*, 262 Mo. 256, 171 S. W. 72; *State ex rel. McNamee v. Stobie*, 194 Mo. 14, 92 S. W. 191. **Mont.**—*State ex rel. Myersick v. District Court*, 53 Mont. 450, 164 Pac. 546; *State ex rel. Spalding v. Benton*, 12 Mont. 66, 29 Pac. 425. **Nev.**—*State ex rel. Thatcher v. District Court*, 38 Nev. 323, 149 Pac. 178; *Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59; *Low v. Crown Pt. Min. Co.*, 2 Nev. 75. **N. M.**—*Tapia v. Martinez*, 4 N. M. 165, 16 Pac. 272. **N. Y.** *People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159; *People ex rel. Hummel v. Trial Term Court*, 184 N. Y. 30, 76 N. E. 732; *People ex rel. Adams v. Westbrook*, 89 N. Y. 152; *People ex rel. Smith v. Russell*, 29 How. Pr. 176, 19 Abb. Pr. 136. **N. C.**—*Holly Shelter R. Co. v. Newton*, 133 N. C. 132, 136, 45 S. E. 549, 98 Am. St. Rep. 701; *State v. Whitaker*, 114 N. C. 818, 19 S. E. 376. **N. D.**—*Selzer v. Bagley*, 19 N. D. 697, 124 N. W. 426. **Okla.**—*State v. District Court of Marshall County*, 46 Okla. 654, 149 Pac. 240; *State ex rel. Baumle v. District Court*, 145 Pac. 563; *Pendley v. Allen*, 45 Okla. 510, 145 Pac. 1157; *State ex rel. Mays v. Breckenridge*, 43 Okla. 711, 142 Pac. 407; *Herndon v. Hammond*, 28 Okla. 616, 115 Pac. 775; *Morrisbn v. Brown*, 26 Okla. 201, 109 Pac. 237. **P. I.** *Yango v. Rohde*, 1 Phil. Isl. 404. **S. D.** *Chicago & N. W. R. Co. v. Dougherty*, 39 S. D. 147, 163 N. W. 715. **Utah.** *State ex rel. Robinson v. Durand*, 36 Utah 93, 104 Pac. 760; *Board of Home Missions v. Maughan*, 35 Utah 516, 101 Pac. 581, 24 L. R. A. (N. S.) 874; *Ducheneau v. Ireland*, 5 Utah 108, 13 Pac. 87. **Wash.**—*State ex rel. Robertson v. Superior Ct. of Spokane Co.*, 95 Wash. 447, 164 Pac. 63; *State ex rel. Meyer v. Clifford*, 78 Wash. 555, 139 Pac. 650; *State ex rel. Stetson & Post Mill Co. v. Superior Court*, 32 Wash. 498, 73 Pac. 479. **Wis.**—*State ex rel. Tewalt v. Pollard*, 112 Wis. 232, 87 N. W. 1107; *State ex rel. Atty. Gen. v. Circuit Court for Eau Claire Co.*, 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L. R. A. 554; *In re Schumaker*, 90 Wis. 488, 63 N. W. 1050; *State ex rel. Kellog v. Gary*, 33 Wis. 93; *State ex rel. Rogers v. Burton*, 11 Wis. 50. **Wyo.**—*State ex rel. Mau v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.
- [a] In West Virginia statutes have changed this rule and it was decided in *Norfolk & W. R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414, that under section 1, c. 110, series sec. 4518, Code 1913 (this section enacted in 1882), which makes prohibition a writ of right, that the presence or absence of other remedies is immaterial in cases coming within the section. But see *County*

the ordinary course of the law, or in equity.²³ Remedies which are inadequate, however, present no impediment to the issuance of the writ of prohibition;²⁴ indeed, it has been said that the writ may issue, irrespective of the question of jurisdiction of the inferior court, where

Court *v.* Boreman, 34 W. Va. 362, 12 S. E. 490.

[b] "But the fact that there is no appeal is never, alone, sufficient to authorize the issuance of the writ, except in cases where there is no other adequate remedy." State *ex rel.* Lewis *v.* Hogg, 22 Wash. 646, 62 Pac. 143.

23. Ind.—Bluffton *v.* Silver, 63 Ind. 262. Me.—Curtis *v.* Cornish, 109 Me. 384, 84 Atl. 799. Mass.—Kilty *v.* Railroad Commrs., 184 Mass. 310, 68 N. E. 236; Jaquith *v.* Fuller, 167 Mass. 123, 45 N. E. 54. N. Y.—People *ex rel.* Livingston *v.* Wyatt, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159; People *ex rel.* Hummel *v.* Trial Term Court, 184 N. Y. 30, 76 N. E. 732. Wis.—*In re* Schumaker, 90 Wis. 488, 63 N. W. 1050.

[a] Compare City of Gretna *v.* Bailey, 140 La. 363, 72 So. 996 (where, in speaking of prohibition and certiorari, the court say: "As a general rule these writs do not issue in appealable cases. An exception to that rule is recognized, however, in cases where the trial court is without jurisdiction."); and State *ex rel.* Wood *v.* Superior Court, 76 Wash. 27, 135 Pac. 494, where the court would not consider the contention that an appeal provided a remedy for the wrong complained of, saying that when "the court is proceeding with a case without first having acquired jurisdiction, it presents a proper case for the invocation of the writ of prohibition."

[b] Ordinary remedies lost through laches of relator nevertheless bar the issuance of prohibition. People *ex rel.* Smith *v.* District Court, 21 Colo. 251, 40 Pac. 460.

24. Cal. — Anderson *v.* Superior Court, 122 Cal. 216, 54 Pac. 829; Havemeyer *v.* Superior Court, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; North Bloomfield Gravel Min. Co. *v.* Keyser, 58 Cal. 315. Colo. Tomboy Gold Min. Co. *v.* District Court, 23 Colo. 441, 48 Pac. 537. Haw. Oyama *v.* Stuart, 22 Hawaii 693; Union

Feed Co. *v.* Kaaihue, 21 Hawaii 345. Idaho.—Cronan *v.* District Court, 15 Idaho 184, 96 Pac. 768. Me.—Curtis *v.* Cornish, 109 Me. 384, 84 Atl. 799. Mass.—Connecticut River R. Co. *v.* Franklin, 127 Mass. 50, 34 Am. Rep. 338. Mont.—State *ex rel.* Marshall *v.* District Court, 50 Mont. 289, 146 Pac. 743, Ann. Cas. 1917B, 1270. N. M. Jackman *v.* Atchison, T. & S. F. Ry. Co., 22 N. M. 422, 163 Pac. 1084. N. D. State *ex rel.* Dorgan *v.* Fisk, 15 N. D. 219, 107 N. W. 191. Okla.—Atchison, T. & S. F. Ry. Co. *v.* Love, 29 Okla. 738, 119 Pac. 207. P. I.—Yangeo *v.* Rohde, 1 Phil. Isl. 404. Utah.—People *v.* Carrington, 5 Utah 531, 17 Pac. 735. Wash.—State *ex rel.* Rochford *v.* Superior Court, 4 Wash. 30, 29 Pac. 764. W. Va.—Swinburn *v.* Smith, 15 W. Va. 483. Wis.—State *ex rel.* Atty. Gen. *v.* Circuit Court for Eau Claire Co., 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L. R. A. 554. Wyo.—Keefe *v.* District Court, 16 Wyo. 381, 94 Pac. 459.

[a] The test of the adequacy of a remedy is not to be made with reference to the convenience or inconvenience of the parties to a particular case. Olden *v.* Paxton, 27 Idaho 597, 150 Pac. 40.

[b] In Criminal Cases.—(1) In some jurisdictions remedies by appeal, habeas corpus and certiorari are considered inadequate where imprisonment threatens. Herndon *v.* Hammond, 28 Okla. 616, 115 Pac. 775. (2) Compare obiter in Cassidy *v.* Cannon, 18 Cal. App. 426, 123 Pac. 358, 359, where, in such a case, the court said that the petitioner has "ample relief through a writ of habeas corpus in the event the justice should find him guilty," and in Keith *v.* Recorder's Court, 9 Cal. App. 380, language to the same effect.

[c] That more time must be consumed in the pursuit of another remedy than prohibition does not, in itself, make such other remedy inadequate. Agassiz *v.* Superior Court, 90 Cal. 101, 27 Pac. 49; Lightner Min. Co. *v.* Superior Court, 14 Cal. App. 642, 112 Pac. 909.

there is an entire absence or inadequacy of any other remedy.²⁵ Other courts have said that the inadequacy of, or delay in, other remedies, fills but a subsidiary office in guiding the court's discretion as to the issuance of this writ.²⁶ Inconvenience and expense involved in a hearing before the inferior court is not a sufficient ground for granting the writ.²⁷

B. ACTS AND PROCEEDINGS SUBJECT TO WRIT.—Without regard to the intrinsic character of the act or proceeding involved, it is a general rule that prohibition only operates to restrain a pending action or proceeding;²⁸ that it will not issue to prevent the institution of an action,²⁹ nor in a case where the act complained of has already been performed.³⁰ But where the proceedings have not been entirely disposed of, *i. e.*, where anything remains to be done by the court or the parties, prohibition will lie.³¹ When considering the inherent

25. *Board of Prison Comrs. v. Crumbaugh*, 161 Ky. 540, 170 S. W. 1187; *Cullins v. Williams*, 156 Ky. 57, 160 S. W. 733; *Rush v. Denhardt*, 138 Ky. 238, 127 S. W. 785, Ann. Cas. 1912A, 1199; *Jenkins v. Berry*, 119 Ky. 350, 83 S. W. 594. But see *Powhatan Coal & C. Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225. Compare 4 STANDARD PROC. 894, 899.

26. *State ex rel. Bernero v. McQuillin*, 246 Mo. 517, 152 S. W. 347.

Exercise of discretion, see *infra*, III.

27. **Cal.**—*Lindley v. Superior Court*, 141 Cal. 220, 74 Pac. 765. **Okl.**—*State v. District Court of Marshall County*, 46 Okla. 654, 149 Pac. 240. **Idaho.** *Olden v. Paxton*, 27 Idaho 597, 150 Pac. 40. **Mo.**—*State ex rel. Bernero v. McQuillin*, 246 Mo. 517, 152 S. W. 347. **S. D.**—*Chicago & N. W. R. Co. v. Dougherty*, 39 S. D. 147, 163 N. W. 715. **Wash.**—*Federal Mill Co. v. Chehalis County*, 86 Wash. 699, 150 Pac. 1168.

28. **Ga.**—*Mealing v. Augusta*, Dud. 221. **La.**—*Foster v. Mayor and City Council*, 136 La. 1087, 68 So. 134. **W. Va.**—*Darnell v. Vandine*, 64 W. Va. 53, 60 S. E. 996; *Haldeman v. Davis*, 28 W. Va. 324.

29. *Darnell v. Vandine*, 64 W. Va. 53, 60 S. E. 996; *Haldeman v. Davis*, 28 W. Va. 324.

30. **U. S.**—*Ex parte Joins*, 191 U. S. 93, 24 Sup. Ct. 27, 48 L. ed. 110; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814; *United States v. Hoffman*, 4 Wall. 158, 18 L. ed. 354. **Ariz.**—*Sanford v. District Court*, 8 Ariz. 256, 71 Pac. 906. **Cal.**—*Kato v. Busiek*, 174 Cal. 118, 162 Pac. 108; *Chinette v. Conklin*, 105 Cal. 465, 38 Pac. 1107;

Coker v. Superior Court, 58 Cal. 177; *Kaye v. Superior Court of Kern Co.*, 33 Cal. App. 269, 164 Pac. 912. **Ga.** *Pope v. Colbert*, 95 Ga. 791, 22 S. E. 702. **Idaho.**—*Bellevue Water Co. v. Stockslager*, 4 Idaho 636, 43 Pac. 568. **Ind.**—*Bluffton v. Silver*, 63 Ind. 262. **La.**—*In re Fain*, 140 La. 39, 72 So. 801; *Colonial Homes R. & I. Co. v. Sample*, 136 La. 195, 66 So. 788. **Minn.** *Dayton v. Paine*, 13 Minn. 493. **Mo.** *State ex rel. Haughey v. Ryan*, 180 Mo. 32, 79 S. W. 429; *Klingelhoef v. Smith*, 171 Mo. 455, 71 S. W. 1008. **N. M.**—*In re Roe Chung*, 9 N. M. 130, 49 Pac. 952. **N. Y.**—*People ex rel. Gould v. Excise Comms.*, 61 How. Pr. 514. **S. C.**—*State v. Stackhouse*, 14 S. C. 417. **Utah.**—*Martineau v. Crabbe*, 46 Utah 327, 150 Pac. 301; *Brooks v. Warren*, 5 Utah 89, 12 Pac. 659. **W. Va.** *Williamson v. Mingo County Court*, 56 W. Va. 38, 48 S. E. 835; *Town of Hawk's Nest v. County Court*, 55 W. Va. 689, 48 S. E. 205. **Wyo.**—*State ex rel. Mau v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548. **Eng.**—*Denton v. Marshall*, 1 H. & C. 654, 9 Jur. N. S. 337, 32 L. J. Exch. 89, 7 L. T. N. S. 689, 11 Wkly. Rep. 268.

31. **Cal.**—*Cosby v. Superior Court*, 110 Cal. 45, 42 Pac. 460; *Havemeyer v. Superior Court*, 84 Cal. 327, 394, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627. **Colo.**—*People ex rel. Daniels v. District Court*, 33 Colo. 293, 80 Pac. 908. **La.**—*State v. Lee*, 106 La. 400, 31 So. 14. **Mo.**—*State ex rel. Ellis v. Elkin*, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; *State ex rel. Rogers v. Rombauer*, 105 Mo. 103, 16 S. W. 695. **W. Va.**—*Ingersoll v. Buchanan*, 1 W. Va. 181.

nature of the act itself, the general rule is that prohibition will only go to restrain judicial,³² or, at most, quasi-judicial³³ action. It will not lie where the acts or proceedings complained of are ministerial or executive.³⁴ In practice, however, the writ has gone somewhat further

As to the extent of the relief awarded in such a case, see *infra*, V, IN.

32. **Ala.**—*Ex parte* Montgomery L. & T. Co., 187 Ala. 376, 65 So. 403; *Ex parte* State, 89 Ala. 177, 8 So. 74; *Atkins v. Siddons*, 66 Ala. 453. **Cal.** *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020; *Hevren v. Reed*, 126 Cal. 219, 58 Pac. 536; *Hobart v. Tillson*, 66 Cal. 210, 5 Pac. 83; *McKamy v. Bd. of Trustees of Bakersfield*, 26 Cal. App. 315, 146 Pac. 910. **Ill.**—*People v. Circuit Court*, 169 Ill. 201, 48 N. E. 717. **Mo.**—*State ex rel. McAnally v. Goodier*, 195 Mo. 551, 93 S. W. 928. **Mont.**—*State ex rel. Myersick v. District Court*, 53 Mont. 450, 164 Pac. 546. **Nev.**—*Low v. Crown Pt. Min. Co.*, 2 Nev. 75. **Wash.**—*Federal Mill Co. v. Chehalis Co.*, 86 Wash. 699, 150 Pac. 1168; *State ex rel. Pelton v. Ross*, 39 Wash. 399, 81 Pac. 865. **W. Va.** *Baker v. O'Brien*, 78 W. Va. 692, 90 S. E. 541; *Kump v. McDonald*, 64 W. Va. 323, 61 S. E. 909; *Virginia Poca-hontas Coal Co. v. County Court*, 58 W. Va. 86, 51 S. E. 1; *McWhorter v. Dorr*, 57 W. Va. 608, 50 S. E. 838, 110 Am. St. Rep. 815. **Wis.**—*State ex rel. Atty. Gen. v. Circuit Court for Eau Claire Co.*, 97 Wis. 1, 72 N. W. 193, 65 Am. St. Rep. 90, 38 L. R. A. 554; *State ex rel. Kellog v. Gary*, 33 Wis. 93. **Wyo.**—*Dobson v. Westheimer*, 5 Wyo. 34, 36 Pac. 626.

See also *infra*, II, C, note 40.

[a] Under statutes (1) which confer power to forbid, by prohibition, the exercise of "any jurisdiction or authority . . . not conferred by law," the operation of this writ is still restricted to judicial acts. *Baker v. O'Brien*, 78 W. Va. 692, 90 S. E. 541. (2) Also, statutes which declare prohibition to be the "counterpart of mandamus," do not enlarge the scope of the writ in this respect. *Maurer v. Mitchell*, 53 Cal. 289.

[b] That the act to be restrained is performed by a judge does not change the inherent nature of the act; it may yet be ministerial. *Ex parte* State, 89 Ala. 177, 8 So. 74.

[c] In California an amendment to §1102, Code of Civil Procedure, pro-

viding for the issuance of this writ whether the court below was "exercising functions judicial or ministerial," has been held unconstitutional. *Hobart v. Tillson*, 66 Cal. 210, 5 Pac. 83.

33. **Ala.**—*Ex parte* Montgomery L. & T. Co., 187 Ala. 376, 65 So. 403. **Mich.**—*Triangle Land Co. v. Auditor General*, 172 Mich. 289, 137 N. W. 683. **N. Y.**—*People ex rel. Wheeler v. Cooper*, 57 How. Pr. 416. **Wash.**—*State ex rel. Pelton v. Ross*, 39 Wash. 399, 81 Pac. 865. **W. Va.**—*Baker v. O'Brien*, 79 W. Va. 101, 90 S. E. 543; *Campbell v. Doolittle*, 58 W. Va. 317, 52 S. E. 260; *Moore v. Holt*, 55 W. Va. 507, 47 S. E. 251. **Wyo.**—*Dobson v. Westheimer*, 5 Wyo. 34, 36 Pac. 626.

[a] An exercise of discretion involved in the performance of an act does not make that act judicial. Thus, prohibition will not go to restrain a council from removing policemen even though in so doing they exercise a discretion. *Campbell v. Doolittle*, 58 W. Va. 317, 52 S. E. 260. See also **Mo.** *State ex rel. McAnally v. Goodier*, 195 Mo. 551, 93 S. W. 928. **S. C.**—*State ex rel. Richland Co. v. Columbia*, 17 S. C. 80. **Va.**—*Burch v. Hardwicke*, 23 Gratt. (64 Va.) 51.

34. **Ala.**—*Washington County Comrs. Court v. State ex rel. Bowling*, 151 Ala. 561, 44 So. 465; *Ex parte* State, 89 Ala. 177, 8 So. 74; *Atkins v. Siddons*, 66 Ala. 453. **Ark.**—*Dunbar v. Bourland*, 88 Ark. 153, 114 S. W. 467; *Reese v. Steel*, 73 Ark. 66, 83 S. W. 335, 1136. **Cal.**—*McKamy v. Trustees of Bakersfield*, 26 Cal. App. 315, 146 Pac. 910; *Harris v. Recorder's Court*, 15 Cal. App. 103, 113 Pac. 687. **Idaho.**—*Stein v. Morrison*, 9 Idaho 426, 75 Pac. 246. **Mich.**—*Triangle Land Co. v. Auditor General*, 172 Mich. 289, 137 N. W. 683. **Mo.**—*State ex rel. McAnally v. Goodier*, 195 Mo. 551, 93 S. W. 928; *Kalbfell v. Wood*, 193 Mo. 675, 92 S. W. 230; *State ex rel. West v. Clark Co. Ct.*, 41 Mo. 44. **Mont.**—*State ex rel. Myersick v. District Court*, 53 Mont. 450, 164 Pac. 546. **N. Y.**—*Thomson v. Tracy*, 60 N. Y. 31. **N. C.**—*State v. Whitaker*, 114 N. C. 818, 19 S. E. 376. **Okla.** *State ex rel. Caldwell v. Vaughn*, 33

than this and has been used to restrain public functionaries and officials charged with the performance of duties not wholly judicial, nor even strongly marked with a judicial character.³⁵

C. AGAINST WHOM AND TO WHAT COURTS ISSUED. — Whether or not a court is subject to the writ of prohibition must be primarily determined by reference to the constitution and statutes under which such court operates.³⁶ It is, however, a well established general rule that the writ of prohibition may be directed to any court or tribunal which is of inferior rank to the court issuing the writ,³⁷ and to the parties to the proceeding complained of.³⁸ Courts of equal rank with the one issuing the writ are not subject to its restraint.³⁹ This inferior tribunal must, moreover, be exercising judicial,⁴⁰ or quasi judicial,⁴¹ functions. The writ will not issue against private individuals,⁴² nor against boards or bodies exercising merely administra-

Okla. 384, 125 Pac. 899. Wash.—State *ex rel.* White *v.* State Land Comrs., 23 Wash. 700, 63 Pac. 532. W. Va.—Bloxton *v.* McWhorter, 46 W. Va. 32, 32 S. E. 1004; Fleming *v.* Comrs., 31 W. Va. 608, 8 S. E. 267. Wis.—State *ex rel.* Kellog *v.* Gary, 33 Wis. 93. Wyo. Dobson *v.* Westheimer, 5 Wyo. 34, 36 Pac. 626.

See also *infra*, II, C.

[a] Acts of a sheriff in making a levy are ministerial and therefore not to be restrained by prohibition. State *ex rel.* Myersiek *v.* District Court, 53 Mont. 450, 164 Pac. 546.

[b] Issuance of an execution, being a ministerial act, will not be restrained by prohibition. Dobson *v.* Westheimer, 5 Wyo. 34, 36 Pac. 626.

[c] Excess of authority, if in performance of a non-judicial act, is no ground for issuance of writ of prohibition. Virginia Pocahontas Coal Co. *v.* County Court, 58 W. Va. 86, 51 S. E. 1.

35. State *ex rel.* Gibbes *v.* Kirkland, 41 S. C. 29, 19 S. E. 215; State *v.* Comrs. of Roads, 1 Mill 55, 12 Am. Dec. 596; State *ex rel.* Pryor *v.* Oxness, 31 S. D. 125, 139 N. W. 791.

36. See generally the constitutions and statutes of the various states.

[a] The district court for Alaska, although not considered one of the courts mentioned in art. III of the constitution, is, when acting as a district court of the United States and proceeding in admiralty, subject to a prohibition issuing from the supreme court. *In re* Cooper, 143 U. S. 472. To same effect, Lincoln-Lucky & L. Min. Co. *v.* District Court, 7 N. M. 486, 38 Pac. 580.

[b] In New York the supreme court is without jurisdiction to issue a writ of prohibition against the peacemaker's court of the Cattaraugus Indian reservation for the reason the two tribunals do not sustain to each other the relation of superior and inferior courts. The peacemaker's court exercises an entirely independent jurisdiction. People *ex rel.* Jameson *v.* Shongo, 83 Misc. 325, 144 N. Y. Supp. 885.

[c] In Virginia the supreme court of appeals has no authority to award a writ of prohibition against a county court. Gresham *v.* Ewell, 84 Va. 784, 6 S. E. 134.

37. Ind.—Jasper County *v.* Spitler, 13 Ind. 235. Mo.—State *ex rel.* Merriam *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534. N. M.—Lincoln-Lucky & L. Min. Co. *v.* District Court, 7 N. M. 486, 38 Pac. 580. Va.—Burch *v.* Hardwicke, 23 Gratt. (64 Va.) 51. W. Va.—Moore *v.* Holt, 55 W. Va. 507, 47 S. E. 251.

For the meaning of the term "inferior" as used here, see *supra*, I.

38. Jasper County *v.* Spitler, 13 Ind. 235; Moore *v.* Holt, 55 W. Va. 507, 47 S. E. 251.

39. Seele *v.* State *ex rel.* Roether, J Tex. Civ. App. 495, 20 S. W. 946.

40. Morgan *v.* Clements, 153 Ky. 33, 154 S. W. 370; Moore *v.* Holt, 55 W. Va. 507, 47 S. E. 251. See *supra*, II, B.

41. Reese *v.* Steele, 72 Ark. 66, 83 S. W. 335.

42. Cal.—Hevren *v.* Reed, 126 Cal 219, 58 Pac. 536; Carmon *v.* Kenfield, 57 Cal. 550. Idaho.—Williams *v.* Lewis, 6 Idaho 184, 54 Pac. 619. Minn. Home Ins. Co. *v.* Flint, 13 Minn. 244.

tive or executive,⁴³ or legislative⁴⁴ functions. But it may, in an otherwise proper case, be directed against such public bodies or functionaries as possess and are exercising judicial functions,⁴⁵ or where they are usurping judicial functions which are not lawfully theirs.⁴⁶ It issues as well against courts of chancery as against courts of law.⁴⁷

Courts Martial.—Although not well established, the general rule seems to be that a civil court may, in a proper case, issue a prohibition

W. Va.—*Moore v. Holt*, 55 W. Va. 507, 47 S. E. 251.

[a] The reason is that a contrary rule would permit the use of the writ of prohibition to determine conflicting claims generally, to compel the performance of a duty, and to protect rights and redress wrongs, all of which is beyond the scope and purpose of the remedy by prohibition, such matters being left to the protection of the ordinary remedies provided by law. *Moore v. Holt*, 55 W. Va. 507, 47 S. E. 251.

43. Cal.—*Havemeyer v. Superior Court*, 84 Cal. 327, 389, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627. **Conn.**—*Laeroix v. Fairfield Co. Comrs.*, 49 Conn. 591. **Ky.**—*Morgan v. Clements*, 153 Ky. 33, 154 S. W. 370. **Mich.**—*Triangle Land Co. v. Auditor General*, 172 Mich. 289, 137 N. W. 683. **Mo.**—*State ex rel. McAnally v. Goodier*, 195 Mo. 551, 93 S. W. 928; *Kalbfell v. Wood*, 193 Mo. 675, 92 S. W. 230. **N. Y.**—*People ex rel. Bender v. Milliken*, 185 N. Y. 35, 77 N. E. 872. **Okla.**—*Jamieson v. Bd. of Medical Exams.*, 35 Okla. 685, 130 Pac. 923; *State ex rel. Caldwell v. Vaughn*, 33 Okla. 384, 125 Pac. 899. **W. Va.**—*Board of Education v. Holt*, 54 W. Va. 167, 46 S. E. 134.

See also *supra*, II, B, note 34.

[a] Statutes providing for issuance of prohibition against a tribunal, corporation, board or person do not broaden the rule in this respect. Even here the act to be prohibited must be of a judicial character. *State ex rel. Scharnikow v. Hogan*, 24 Mont. 379, 62 Pac. 493, 51 L. R. A. 958; *Winsor v. Bridges*, 24 Wash. 540, 64 Pac. 780.

[b] A receiver is but an instrument of the court and may be restrained by prohibition in a proper case. *Havemeyer v. Superior Court*, 84 Cal. 327, 390, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

44. Spring Valley Water Wks. v.

Bartlett, 63 Cal. 245; *Patton v. Stephens*, 14 Bush (Ky.) 324.

45. Ky.—*Superintendent of Schools of Daviess Co. v. Taylor*, 105 Ky. 387, 49 S. W. 38. **Mass.**—*Connecticut River R. Co. v. Franklin*, 127 Mass. 50, 34 Am. Rep. 338; *Day v. Bd. of Aldermen*, 102 Mass. 310. **Mich.**—*Speed v. Detroit*, 98 Mich. 360, 57 N. W. 406, 39 Am. St. Rep. 555, 22 L. R. A. 842. **Minn.**—*State v. Young*, 29 Minn. 474, 523, 9 N. W. 737. **Mo.**—*State ex rel. McAnally v. Goodier*, 195 Mo. 551, 93 S. W. 928. **N. Y.**—*People ex rel. Twp. of Knox v. Suprvs. of Albany Co.*, 63 How. Pr. 411. **S. C.**—*State v. Commissioners of Roads*, 1 Mill 55, 12 Am. Dec. 596. **W. Va.**—*Brazie v. Fayette*, 25 W. Va. 213.

That board exercises discretion does not necessarily make its action judicial. See *supra*, II, B, note 33, [a].

46. Triangle Land Co. v. Auditor General, 172 Mich. 289, 137 N. W. 683; *Fleming v. Comrs.*, 31 W. Va. 608, 8 S. E. 267; *Brazie v. Fayette*, 25 W. Va. 213, 219.

[a] An Illustration.—Election commissioners sitting to canvass the votes of an election undertook to receive and pass upon evidence as to the legality of certain votes cast. This was a judicial power which the commissioners did not possess and from the exercise of which they might be restrained by prohibition. *Brazie v. Fayette*, 25 W. Va. 213, 219.

47. Ala.—*Ex parte Lyon*, 60 Ala. 650. **Cal.**—*Fischer v. Superior Court*, 110 Cal. 129, 42 Pac. 561; *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627. **La.**—*State ex rel. Sweeney v. Voorhies*, 40 La. Ann. 1, 3 So. 460. **Mo.**—*St. Louis, K. & S. Ry. Co. v. Wear*, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341. **Wash.**—*State v. Superior Court*, 12 Wash. 677, 42 Pac. 123. **W. Va.**—*Swinburn v. Smith*, 15 W. Va. 483.

to a court martial.⁴⁸

III. DISCRETION OF COURT.—Except where it is made so by statute,⁴⁹ prohibition is not a writ of right.⁵⁰ It is, instead, a discretionary writ⁵¹ which will be granted or withheld according to the facts and circumstances of the individual case.⁵² Some authorities limit this rule and say that where the tribunal whose action is complained of is clearly without jurisdiction and the relator has no other remedy, the issuance of this writ ceases to be discretionary and becomes a matter of right.⁵³ According to these authorities the writ is only discretionary where the question of jurisdiction of the inferior tribunal is doubtful,⁵⁴ or depends upon facts which are not a part of the record,⁵⁵ or where the application is made by a stranger.⁵⁶

48. See 6 STANDARD PROC. 131.

49. See generally the statutes, and *Weil v. Black*, 76 W. Va. 685, 86 S. E. 666; *Coger v. Coger*, 48 W. Va. 135, 35 S. E. 823; *Norfolk & W. R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414.

50. *Ark.*—*Weaver v. Leatherman*, 66 Ark. 211, 49 S. W. 977. *Colo.*—*People v. District Court*, 54 Colo. 576, 131 Pac. 424; *People ex rel. Adams v. District Court*, 29 Colo. 1, 66 Pac. 888; *People ex rel. L'Abbe v. District Court*, 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850. *Idaho.*—*Olden v. Paxton*, 27 Idaho 597, 150 Pac. 40. *Mont.*—*State ex rel. Myersick v. District Court*, 53 Mont. 450, 164 Pac. 546. *Nev.*—*Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59.

51. *U. S.*—*Ex parte Oklahoma*, 220 U. S. 191, 31 Sup. Ct. 426, 55 L. ed. 431. *Colo.*—*People v. District Court*, 54 Colo. 576, 131 Pac. 424; *People ex rel. Adams v. District Court*, 29 Colo. 1, 66 Pac. 888. *Idaho.*—*Olden v. Paxton*, 27 Idaho 597, 150 Pac. 40. *Ky.*—*Rush v. Denhart*, 138 Ky. 238, 127 S. W. 785. *Mo.*—*State ex rel. McAnally v. Goodier*, 195 Mo. 551, 93 S. W. 928. *Mont.*—*State ex rel. Myersick v. District Court*, 53 Mont. 450, 164 Pac. 546. *Nev.*—*Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59. *N. Y.*—*People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159; *People ex rel. Adams v. Westbrook*, 89 N. Y. 152. *N. C.*—*Holly Shelter R. Co. v. Newton*, 133 N. C. 132, 136, 45 S. E. 549, 98 Am. St. Rep. 701; *State v. Whitaker*, 114 N. C. 818, 19 S. E. 376. *N. D.*—*Zinn v. District Court*, 17 N. D. 128, 114 N. W. 475. *R. I.*—*Haworth v. Sherman*, 37 R. I.

249, 92 Atl. 209. *Wash.*—*Clifford v. Parker*, 13 Wash. 518, 43 Pac. 717.

52. *Colo.*—*People v. Elbert District Court*, 46 Colo. 1, 101 Pac. 777. *Nev.*—*Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59. *Wash.*—*Clifford v. Parker*, 13 Wash. 518, 43 Pac. 717.

53. *U. S.*—*Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601, quoted with approval in *Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232. *Ariz.*—*Crowned King Min. Co. v. District Court*, 7 Ariz. 263, 64 Pac. 439. *Me.*—*Curtis v. Cornish*, 109 Me. 384, 84 Atl. 799. *Mont.*—*State ex rel. Spalding v. Benton*, 12 Mont. 66, 29 Pac. 425.

54. *U. S.*—*In re Rice*, 155 U. S. 396, 15 Sup. Ct. 149, 39 L. ed. 198; *Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232; *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601. *Ariz.*—*Crowned King Min. Co. v. District Court*, 7 Ariz. 263, 64 Pac. 439. *Mont.*—*State ex rel. Spalding v. Benton*, 12 Mont. 66, 29 Pac. 425.

55. *U. S.*—*In re Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232; *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601. *Ariz.*—*Crowned King Min. Co. v. District Court*, 7 Ariz. 263, 64 Pac. 439. *Mont.*—*State ex rel. Spalding v. Benton*, 12 Mont. 66, 29 Pac. 425.

56. *U. S.*—*In re Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232; *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601. *Ariz.*—*Crowned King Min. Co. v. District Court*, 7 Ariz. 263, 64 Pac. 439. *Mass.*—*Kilty v. Railroad Commrs.*, 184 Mass. 310, 68 N. E. 236. *Mont.*—*State ex rel. Spalding v. Benton*, 12 Mont. 66, 29 Pac. 425.

[a] Compare *De Haber v. Portugal*,

IV. JURISDICTION AND AUTHORITY TO ISSUE. — **A. GENERAL STATEMENT.** — The jurisdiction and authority of a court to issue writs of prohibition depends, primarily, upon the organic law and legislative enactments under which that court functions.⁵⁷ In the absence of express provision to the contrary, however, any court of general common law jurisdiction may, in a proper case, issue a writ of prohibition to any inferior court or tribunal.⁵⁸ Accordingly, a constitutional grant of a general superintending control over inferior courts carries with it the power to issue writs of prohibition in proper cases,⁵⁹ such power being considered a necessary adjunct to the exercise of the superintending control expressly delegated.⁶⁰ It is upon this superior or supervisory character of the court that power to issue the writ depends,⁶¹ and so, it may not issue from one court to another of equal rank.⁶²

Courts of equity do not issue writs of prohibition.⁶³

17 Q. B. 171, 117 Eng. Reprint 1246, holding that if the inferior court is proceeding without jurisdiction the higher court must, even at the instance of a stranger, interpose its writ of prohibition.

57. See generally the constitutions and statutes.

[a] In California when an application for writ of prohibition is made to the superior court and there denied the district court of appeals will take appellate jurisdiction of the proceeding but will not exercise, although it possesses, original jurisdiction of a proceeding in prohibition involving the same facts. *In re Burt*, 17 Cal. App. 309, 119 Pac. 674.

[b] In North Carolina the writ of prohibition issues only from the supreme court. *Holly Shelter R. Co. v. Newton*, 133 N. C. 132, 136, 45 S. E. 549, 98 Am. St. Rep. 701; *State v. Whitaker*, 114 N. C. 818, 19 S. E. 376.

[c] In the Philippines a judge of the court of first instance cannot issue a prohibition into a district other than his own against a justice of the peace. *Castano v. Lobingier*, 7 Phil. Isl. 91.

[d] The supreme court has no original jurisdiction of prohibition proceedings in Tennessee. *Memphis v. Halsey*, 12 Heisk. (Tenn.) 210. The same is true in Nebraska (*State ex rel. King v. Hall*, 47 Neb. 579, 66 N. W. 642), and in South Carolina. *State ex rel. Richland Co. v. Columbia*, 16 S. C. 412.

58. Ala.—*Ex parte Ray*, 45 Ala. 15. Miss.—*Planters' Ins. Co. v. Cramer*, 47

Miss. 200. Va.—*Jackson v. Maxwell*, 5 Rand. (26 Va.) 636. W. Va.—*McConiha v. Guthrie*, 21 W. Va. 134.

As to the meaning of the term "inferior" as used here, see *supra*, I.

59. *State ex rel. Tewalt v. Pollard*, 112 Wis. 232, 87 N. W. 1107; *State ex rel. Mau v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.

[a] A constitutional grant of general supervisory control over inferior courts vests in the court to which such power is thus given, authority to restrain inferior tribunals from exceeding their jurisdiction and such power is not restricted to cases in which it is invoked as an aid to the court's appellate jurisdiction. *State ex rel. Mau v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.

60. *State ex rel. Fourth Nat. Bank of Philadelphia v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33.

61. Miss.—*Planters' Ins. Co. v. Cramer*, 47 Miss. 200. N. M.—*Lincoln-Lucky & L. Min. Co. v. District Court*, 7 N. M. 486, 38 Pac. 580. W. Va. *McConiha v. Guthrie*, 21 W. Va. 134.

See also *United States v. Peters*, 3 Dall (U. S.) 121, 123, 1 L. ed. 535.

62. *Seele v. State ex rel. Roether*, 1 Tex. Civ. App. 495, 20 S. W. 946.

63. *Smith v. Whitney*, 116 U. S. 167. 6 Sup. Ct. 570, 29 L. ed. 601, where the court says: "In England, from long before the Declaration of Independence, writs of prohibition have usually issued from the courts of common law, and do not appear to have issued from a court of chancery in any case in which a court of law might issue them, except during vacation,

In the Federal Courts.⁶⁴ — The supreme court of the United States has no jurisdiction to issue writs of prohibition in cases where there is no appellate power given by law,⁶⁵ and in no case may it issue such a writ to a district court except when the latter are proceeding as courts of admiralty and maritime jurisdiction.⁶⁶

B. IN VACATION. — Except where statutes so provide,⁶⁷ a writ of prohibition may not ordinarily be issued in vacation.⁶⁸

V. PROCEEDINGS TO OBTAIN ISSUANCE. — A. GENERAL STATEMENT. — In the absence of statutory regulation, the method of procedure in prohibition rests entirely upon the common law practice.⁶⁹ Statutes may regulate in whole or in part the practice or

when the courts of common law were not open. And in this country, so far as we are informed, these writs have never been issued but by a court of common law jurisdiction." See *Planters' Ins. Co. v. Cramer*, 47 Miss. 200.

64. See generally the title "**United States Courts.**"

65. *Ex parte Gordon*, 1 Black (U. S.) 503, 17 L. ed. 134.

66. *In re Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232; *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. 25, 30 L. ed. 274; *Ex parte Gordon*, 1 Black (U. S.) 503, 17 L. ed. 134.

67. *State ex rel. American Lead & B. Co. v. Dearing*, 184 Mo. 647, 84 S. W. 21; *Brazie v. Fayette*, 25 W. Va. 213. See 16 STANDARD PROC. 630.

68. Ala.—*Ex parte Boothe*, 64 Ala. 312; *Ex parte Ray*, 45 Ala. 15, where the court say that they "do not understand that judges at the common law issued writs of prohibition in vacation." Colo.—*People ex rel. Adams v. District Court*, 28 Colo. 485, 69 Pac. 1066. Ga.—*Doughty, Pearson & Co. v. Walker*, 54 Ga. 595.

See 16 STANDARD PROC. 630.

[a] A rule to show cause may be issued in vacation, returnable to the next term of court. *Ex parte Boothe*, 64 Ala. 312; *Ex parte Ray*, 45 Ala. 15; *Doughty, Pearsons & Co. v. Walker*, 54 Ga. 595. See 16 STANDARD PROC. 630. That this rule will act as a prohibition until further order of court, see *infra*. V, F, 1.

69. *Dobson v. Westheimer*, 5 Wyo. 34, 36 Pac. 626.

[a] **Early Common Law Practice.** "The plaintiff, in prohibition at common law, in a seriously contested case, did not pray in his declaration that a writ of prohibition might be awarded

him; but his complaint was based entirely on the fiction that such writ had already issued, and that the defendant was in contempt for proceeding with his suit regardless of the writ; when, in point of fact, no such writ had ever issued; and the prayer of the declaration was, not that a writ of prohibition should issue, but for damages against the defendant, for disregarding the writ assumed as aforesaid to have been issued. See 1 Wms. Saunders, p. 136, etc., where the declaration is given in full. The fact thus assumed was not traversable; and the issuing pro forma of the writ, or the fiction that it had issued, being at common law the foundation of the proceeding, the original award of the writ, if in fact made, was regarded a preliminary order not to be appealed from." *Burch v. Hardwicke*, 23 Gratt (64 Va.) 51. To same effect see *Arnold v. Shields*, 5 Dana (Ky.) 18, 30 Am. Dec. 669.

[b] "But the modern practice has been to dispense with the original writ of prohibition, and, in lieu of it, to file, in the first instance, in a common law court, a suggestion of facts, with a prayer for prohibition; and thereupon obtain a rule to show cause why a prohibition should not be issued; upon the return of which, either the court or the party cited may require a declaration. And, in such a proceeding, it is evident that, prior to the filing of the declaration, there can have been no contempt in fact, for which damages could be recovered; and therefore, in such a case, the suggestion of contempt, and the qui tam form of declaring, are mere fictions which are intraversable. . . . And consequently, a failure to aver that a writ of prohibition has been delivered, is no cause of demurrer." *Arnold v.*

procedure to be followed in prohibition cases,⁷⁰ sometimes providing that they shall conform as far as practicable to the code of civil practice.⁷¹

B. OBJECTION IN ORIGINAL PROCEEDING. — It is generally required that the applicant for a writ of prohibition shall have first presented to the inferior tribunal his objection to its jurisdiction of the proceeding complained of.⁷² By a number of authorities this is considered a rule of practice and judicial courtesy rather than of jurisdiction, the enforcement of which rests in the discretion of the court to which application for the writ is made;⁷³ and it is generally agreed that such an objection need not be made where it clearly appears that it

Shields, 5 Dana (Ky.) 18, 30 Am. Dec. 669.

70. See generally the statutes.

71. State *ex rel.* Fenn v. McQuillin, 256 Mo. 693, 165 S. W. 713, court may regulate the practice in so far as not otherwise provided for.

72. Ala.—Hill v. Tarver, 130 Ala. 592, 30 So. 499; *Ex parte* Edwards, 123 Ala. 102, 26 So. 643; *Ex parte* Hamilton, 51 Ala. 62; *Ex parte* Greene, 29 Ala. 52. Ark.—Reese v. Steele, 73 Ark. 66, 83 S. W. 335; Butler v. Williams, 48 Ark. 227, 2 S. W. 843; *Ex parte* Little Rock, 26 Ark. 52; *Ex parte* Meechen, 12 Ark. 70; *Ex parte* Williams, 4 Ark. 537, 38 Am. Dec. 46. Cal. McNeny v. Superior Court, 150 Cal. 6, 87 Pac. 1020; Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; Baughman v. Superior Court, 72 Cal. 572, 14 Pac. 207; Lewis v. Superior Court, 11 Cal. App. 483, 105 Pac. 763; Burge v. Justice's Court, 11 Cal. App. 213, 104 Pac. 581. Colo.—Adams County Court v. People, 48 Colo. 539, 111 Pac. 86; People *ex rel.* Lindsley v. District Court, 30 Colo. 488, 71 Pac. 388; Callbreath v. District Court, 30 Colo. 486, 71 Pac. 387. Haw.—Union Feed Co. v. Kaaihue, 21 Hawaii 345. La. Fireman's Ins. Co. v. Hava, 141 La. 347, 75 So. 76; State *ex rel.* Louisiana Tr. & Sav. Bank v. Board of Liquidation, 135 La. 571, 65 So. 745. Mich. Hudson v. Judge of Superior Court, 42 Mich. 239, 3 N. W. 850, 913. Mo. Forsee v. Gates, 89 Mo. App. 577. Mont.—State *ex rel.* Scollard v. District Court, 47 Mont. 284, 132 Pac. 21; State *ex rel.* Mackel v. District Court, 44 Mont. 178, 119 Pac. 476. Nev. Walcott v. Wells, 21 Nev. 47, 24 Pac. 367, 37 Am. St. Rep. 478, 9 L. R. A. 59. N. M.—Tapia v. Martinez, 4 N. M. 165, 16 Pac. 272. Okla.—State *ex rel.* Mays

v. Breckenridge, 43 Okla. 711, 142 Pac. 407. P. I.—Yanco v. Rohde, 1 Phil. Isl. 404. Tex.—State *ex rel.* Bergeron v. Travis Co. Court (Tex. Crim.), 174 S. W. 365. Utah.—People v. Carrington, 5 Utah 531, 17 Pac. 735. Wash. State *ex rel.* Gunderson v. Superior Court, 13 Wash. 226, 43 Pac. 43; Harris v. Brooker, 8 Wash. 138, 35 Pac. 599. W. Va.—Jennings v. Bennett, 56 W. Va. 146, 49 S. E. 23; Knight v. Zahnhiser, 53 W. Va. 370, 44 S. E. 778; Jelly v. Dils, 27 W. Va. 267. Wyo. State *ex rel.* Mau v. Ausherman, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.

[a] Pleading a good defense, which does not amount to a bar to jurisdiction, as *res judicata*, does not meet the requirements of this rule. State *ex rel.* Mau v. Ausherman, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.

73. Cal.—Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627. Haw.—Union Feed Co. v. Kaaihue, 21 Hawaii 345. W. Va.—Weil v. Black, 76 W. Va. 685, 86 S. E. 666 (where the court adds that, in view of a statute making the issuance of prohibition a matter of right [§1, c. 110, series sec. 4518, Code 1913], there is no foundation for the rule in this state); Charleston v. Littlepage, 73 W. Va. 156, 80 S. E. 131, 51 L. R. A. (N. S.) 353; Bice v. Boothsville Tel. Co., 62 W. Va. 521, 59 S. E. 501, 125 Am. St. Rep. 986; Jennings v. Bennett, 56 W. Va. 146, 49 S. E. 23.

[a] The purpose of the rule, is, by these authorities, considered to be only to give the court below "an opportunity to correct its act in excess of its jurisdiction, due to misapprehension or oversight or some other adventitious circumstance," not "to require the question of jurisdiction to be there litigated and decided for review here."

would be unavailing,⁷⁴ or where the want of jurisdiction of the inferior tribunal appears on the face of the proceedings.⁷⁵

C. TIME FOR APPLICATION. — **General Statement.** — In any case the relator must not be guilty of laches, for the court may, in the exercise of its discretion,⁷⁶ deny an application on this ground alone.⁷⁷ On the other hand, an application for prohibition may be premature,⁷⁸ as, for example, where an appropriate objection to the jurisdiction of the inferior court has been made to that court and remains pending and undetermined,⁷⁹ or when made before the proceedings complained of have actually been commenced.⁸⁰

After Judgment and Sentence. — Application for the writ may be made after judgment,⁸¹ but will not be entertained after the judgment has been executed.⁸² Prohibition will not issue after sentence in a criminal case unless want of jurisdiction appears on the face of the proceedings.⁸³

D. PARTIES. — 1. **Relators.**⁸⁴ — Statutes in some jurisdictions

Charleston v. Littlepage, 73 W. Va. 156, 80 S. E. 131, 51 L. R. A. (N. S.) 353.

74. **P. I.**—Yango v. Rohde, 1 Phil. Isl. 404. **S. D.**—South Dakota Children's Home Soc. v. Kelley, 32 S. D. 526, 143 N. W. 953. **Utah.**—People v. Carrington, 5 Utah 531 17 Pac. 735. **W. Va.**—Charleston v. Littlepage, 73 W. Va. 156, 80 S. E. 131, 51 L. R. A. (N. S.) 353.

75. **Ala.**—Hill v. Tarver, 130 Ala. 592, 30 So. 499. **Cal.**—Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627. **Colo.**—People ex rel. Alexander v. District Court, 29 Colo. 182, 68 Pac. 242. **Fla.**—State v. White, 40 Fla. 297, 24 So. 160. **Mo.**—State ex rel. American Lead & B. Co. v. Dearing, 184 Mo. 647, 84 S. W. 21; State ex rel. Anheuser-Busch B. Assn. v. Eby, 170 Mo. 497, 71 S. W. 52; St. Louis, K. & S. Ry. Co. v. Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341. **P. I.**—Yango v. Rohde, 1 Phil. Isl. 404. **S. C.**—State v. Scott, 1 Bailey 294. **S. D.**—South Dakota Children's Home Soc. v. Kelley, 32 S. D. 526, 143 N. W. 953. **W. Va.**—Weil v. Black, 76 W. Va. 685, 86 S. E. 666; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178; Swinburn v. Smith, 15 W. Va. 483, 499.

76. That this writ issues in the discretion of the court, see *supra*, III.

77. People v. District Court, 54 Colo. 576, 131 Pac. 424.

[a] Ordinary remedies lost through laches will yet prevent the issuance

of writ of prohibition. People ex rel. Smith v. District Court, 21 Colo. 251, 40 Pac. 460.

78. Chester v. Colby, 52 Cal. 516.

79. Ex parte City of Little Rock, 26 Ark. 52; Ex parte McMeechen, 12 Ark. 70; Ex parte Williams, 4 Ark. 537, 540, 38 Am. Dec. 46; Chester v. Colby, 52 Cal. 516.

80. State ex rel. Haughey v. Ryan, 180 Mo. 32, 79 S. W. 429; Darnell v. Vandine, 64 W. Va. 53, 60 S. E. 999. See *supra*, II, B.

81. **La.**—State v. Lee, 106 La. 400. **Mo.**—State ex rel. Ellis v. Elkin, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037. **W. Va.**—Bodley v. Archibald, 33 W. Va. 229, 10 S. E. 392 (if the inferior court is entirely without jurisdiction of any part of the case and there is no appearance by the debt, then, even after judgment he may have the aid of this writ); Ensign Mfg. Co. v. Carroll, 30 W. Va. 532, 4 S. E. 782.

82. Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275, 104 Am. St. Rep. 1004, 65 L. R. A. 616.

[a] The reason for this requirement lies in the rule that prohibition will not lie to restrain an act already done. Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275, 104 Am. St. Rep. 1004, 65 L. R. A. 616.

83. **U. S.**—In re Cooper, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232. **S. C.**—State v. Whyte, 2 Nott & McC. 174. **Eng.**—Paxton v. Knight, 1 Burr. 314. 97 Eng. Reprint 328.

84. Who may make the application, see *infra*, V, D.

specify the parties at whose instance the writ of prohibition may issue.⁸⁵ In the absence of some provision to the contrary, however, the writ may issue upon the application of either of the parties.⁸⁶ A stranger to the record may also be a proper petitioner for the writ,⁸⁷ especially where it appears that he is substantially interested in the proceeding which he seeks to have restrained.⁸⁸ A writ of prohibition is properly sued out in the name of the state,⁸⁹ but the state is not a necessary party.⁹⁰

Public officials are proper applicants for this writ when the proceedings complained of involve public business or affairs for the proper management of which they are responsible.⁹¹ But where an official acts under the direction of a commission which is responsible for the management of such public affairs, the commission and not the county attorney is the proper petitioner for this writ.⁹²

2. Respondents.—The officer or judge whose proceedings it is sought to restrain is a necessary party to this proceeding.⁹³ All persons whose interests would be adversely affected by the issuance of the writ should be made parties,⁹⁴ and the adverse parties in the pro-

85. See generally the statutes.

[a] Party libeled is not "a person beneficially interested" in a criminal libel proceeding instituted by a third party, within the meaning of a statute providing for the issuance of the writ of prohibition upon the application of such a party. *Gage v. Fritz*, 137 Cal. 108, 69 Pac. 854.

86. *Walton v. Greenwood*, 60 Me. 356.

87. *Me.*—*Walton v. Greenwood*, 60 Me. 356. *Mass.*—See *Kilty v. Railroad Comrs.*, 184 Mass. 310, 68 N. E. 236, where the court says: "If we assume, in accordance with the law in England and in some of the American states, that a writ of prohibition may some times be granted upon the petition of a stranger," its issuance would be discretionary. *Va.*—*Mayo v. James*, 12 Gratt. (53 Va.) 17. *Eng.*—See *De Haber v. Portugal*, 17 Q. B. 171, 11th Eng. Reprint 1246.

[a] Compare *State ex rel. Hackshaw v. District Court*, 48 Mont. 477, 138 Pac. 1100, where the court refused to entertain an application of a county board for a prohibition against an appeal taken to the district court from the board's decision on an application for a liquor license, on the ground that the board had no personal interest in the question.

Discretion where application by stranger, see *supra*, III.

88. *Cronan v. District Court*, 15 Idaho 184, 96 Pac. 768; *State v. Superior Court*, 4 Wash. 30, 29 Pac. 764, where it is said that although prohibition is regarded as the counterpart of mandamus "the same degree of strictness as to parties is not maintained." And in *Cronan v. District Court*, 15 Idaho 184, 96 Pac. 768, the same language appears.

89. *U. S.*—*Smith v. Whitney*, 115 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601. *Mass.*—*Connecticut River R. Co. v. Franklin*, 127 Mass. 50, 34 Am. Rep. 338. *Mo.*—*State v. Burekhartt*, 87 Mo. 533; *State v. Seay*, 23 Mo. App. 623. *W. Va.*—*Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413.

90. *Trainer v. Porter*, 45 Mo. 336; *Thomas v. Mead*, 36 Mo. 232.

91. *State ex rel. Rochford v. Superior Court*, 4 Wash. 30, 29 Pac. 764.

92. *Walton v. Greenwood*, 60 Me. 356.

93. *Cal.*—*McKamy v. Trustees of Bakersfield*, 26 Cal. App. 315, 146 Pac. 910. *Mass.*—*Connecticut R. R. Co. v. Franklin*, 127 Mass. 50, 34 Am. Rep. 338. *N. D.*—*Northern Pac. R. Co. v. Jurgenson*, 25 N. D. 14, 141 N. W. 70. *W. Va.*—*Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413.

94. *Cal.*—*McKamy v. Trustees of Bakersfield*, 26 Cal. App. 315, 146 Pac. 910. *Me.*—*Walton v. Greenwood*, 60 Me. 356. *W. Va.*—*Armstrong v. County Court*, 15 W. Va. 190.

ceeding complained of are proper, though not necessary parties,⁹⁵ unless made so by statute.⁹⁶ The court may, should the case require, order such a party to be served and brought into the prohibition proceeding.⁹⁷

E. PETITION OR SUGGESTION. — 1. General Requirements. — The petition should disclose the nature of case,⁹⁸ the proceedings had in the court below,⁹⁹ and, by affirmative allegations,¹ and in a clear and definite manner,² all the facts necessary to entitle the relator to relief by prohibition.³

2. Particular Allegations. — It must appear from the petition that in the proceeding complained of something remains to be done, *i. e.*, that it is not a finished proceeding;⁴ that the inferior court is about to proceed in a matter over which it has no jurisdiction;⁵ that an application to it for a decision that it has no jurisdiction has been refused,⁶ except in those cases in which such an application is unnecessary;⁷ that the relator will be injured if the proceedings com-

95. **N. M.**—Lincoln-Lucky & L. Min. Co. v. District Court, 7 N. M. 486, 38 Pac. 580. **N. D.**—Northern Pac. R. Co. v. Jurgenson, 25 N. D. 14, 141 N. W. 70. **Okla.**—Hirsh v. Twyford, 40 Okla. 220, 139 Pac. 313.

[a] When the proceeding complained of is one instituted by the government the court alone is the respondent. *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601.

96. Northern Pac. R. Co. v. Jurgenson, 25 N. D. 14, 141 N. W. 70.

97. Northern Pac. R. Co. v. Jurgenson, 25 N. D. 14, 141 N. W. 70.

98. *Ex parte Williams*, 4 Ark. 537, 38 Am. Dec. 46.

99. **Ark.**—*Ex parte Williams*, 4 Ark. 537, 38 Am. Dec. 46. **Me.**—*Walton v. Greenwood*, 60 Me. 356. **Wash.**—*Harris v. Brooker*, 8 Wash. 138, 35 Pac. 599.

1. *Bowyer v. Green*, 63 W. Va. 498, 60 S. E. 492; *Haldeman v. Davis*, 28 W. Va. 324.

[a] **An Illustration.**—In a proceeding in which notice to certain parties was required, a writ of prohibition was sought because no notice was ordered. The court here say that the "plaintiff cannot assert abuse of power by merely showing . . . the fact that the county court did not direct notice." The allegation should have been that they "intending to proceed, or were proceeding without notice to the parties." *Bowyer v. Green*, 63 W. Va. 498, 60 S. E. 492.

2. *Bowyer v. Green*, 63 W. Va. 498,

60 S. E. 492; *Haldeman v. Davis*, 28 W. Va. 324.

[a] No presumptions in aid of the petition will be indulged in by the court. *Bowyer v. Green*, 63 W. Va. 498, 60 S. E. 492.

3. **Cal.**—*Dakan v. Superior Court*, 2 Cal. App. 52, 82 Pac. 1129. **Idaho.** *In re Francis*, 7 Idaho 98, 60 Pac. 561. **La.**—*State v. District Court*, 32 La. Ann. 814. **Wash.**—*Clifford v. Parker*, 13 Wash. 518, 43 Pac. 717; *Harris v. Brooker*, 8 Wash. 138, 35 Pac. 599. **W. Va.**—*Haldeman v. Davis*, 28 W. Va. 324.

4. *State ex rel. Rochford v. Superior Court*, 4 Wash. 30, 29 Pac. 764; *Haldeman v. Davis*, 28 W. Va. 324.

That prohibition issues only in a pending proceeding and never to restrain an act already performed, see *supra*, II, B.

5. **P. I.**—*Yango v. Rohde*, 1 Phil. Isl. 404, where the court say the averment should be in some proper form in order to make the want of jurisdiction appear. **Wash.**—*State ex rel. Rochford v. Superior Court*, 4 Wash. 30, 29 Pac. 764. **W. Va.**—*Bowyer v. Green*, 63 W. Va. 498, 60 S. E. 492; *Haldeman v. Davis*, 28 W. Va. 324.

6. **Ark.**—*Ex parte McMeechen*, 12 Ark. 70. **La.**—*State ex rel. Shaw v. Judge of District Court*, 47 La. Ann. 1602, 18 So. 636. **Wash.**—*State ex rel. Rochford v. Superior Court*, 4 Wash. 30, 29 Pac. 764.

7. *Arnold v. Shields*, 5 Dana (Ky.) 18, 30 Am. Dec. 669.

As to when such an application is necessary, see *supra*, V, B.

plained of are allowed to continue,⁸ and that he has no other adequate remedy.⁹

3. The Prayer.—The petition should conclude with a prayer for prohibition.¹⁰

4. Verification.—It is not necessary to verify the petition when it is based upon facts which appear in the record,¹¹ but where the facts do not so appear, it must be verified by affidavit.¹² The affidavit may be made by the petitioner's attorney where the facts are within his knowledge and unknown to the petitioner.¹³

F. ALTERNATIVE WRIT AND ORDER TO SHOW CAUSE.¹⁴—**1. General Statement.**—Upon the presentation of a petition for a writ of prohibition the court to which it is presented may be of the opinion that in the instant case it is clear that the writ should not issue, in which event it will be at once denied.¹⁵ Otherwise a rule should be made upon the inferior court and the adverse party to show cause why the writ should not issue.¹⁶

There is a difference in the practice where an alternative writ issues, and where an order to show cause is obtained. The writ is issued by the court through the clerk; orders to show cause are signed and issued by the judge.¹⁷ Also, upon an order to show cause, the questions arising upon the application are brought before the court and discussed upon affidavits, while in the case of the alternative writ they come before the court upon the writ itself,¹⁸ which sets forth the facts upon which the writ is issued,¹⁹ and the respondent's return thereto.²⁰

The rule to show cause is in the nature of a preliminary notice²¹

8. *Hevren v. Reed*, 126 Cal. 219, 58 Pac. 536; *Harris v. Brooker*, 8 Wash. 138, 35 Pac. 599.

9. *State ex rel. Rochford v. Superior Court*, 4 Wash. 30, 29 Pac. 764.

[a] The bare allegation that the relator has no other adequate remedy is but a conclusion and of no value whatever; this must appear from the facts alleged. *State ex rel. Shaw v. Judge of District Court*, 47 La. Ann. 1602, 19 So. 636.

10. *Ex parte Williams*, 4 Ark. 537, 38 Am. Dec. 46; *Burch v. Hardwicke*, 23 Gratt. (64 Va.) 51.

11. *Ex parte Williams*, 4 Ark. 537, 38 Am. Dec. 46.

12. **Ark.**—*Ex parte Williams*, 4 Ark. 537, 38 Am. Dec. 46. **Cal.**—See *Cariaga v. Dryden*, 30 Cal. 244, knowledge or information as well as belief must be stated. **N. C.**—*State v. Allen*, 24 N. C. 183. **S. C.**—*State v. Hudnall*, 2 Nott. & McC. 419. **Va.**—*Mayo v. James*, 12 Gratt. (53 Va.) 17. **W. Va.**—*Bodley v. Archibald*, 35 W. Va. 229, 10 S. E. 392; *Jelly v. Dils*, 27 W. Va. 267. **Eng.** *Buggin v. Bennett*, 4 Burr. 2035, 98 Eng. Reprint 60; *Burdett v. Newell*, 2 Ld. Raym. 1211, 92 Eng. Reprint 299.

Can.—*Miron v. McCabe*, 4 Ont. Pr. 171, entitled in the court to which the petition is addressed.

13. *State ex rel. Alladio v. Superior Court*, 17 Wash. 54, 48 Pac. 733.

14. As to quashal and setting aside of alternative writs of prohibition, see *infra*, V, H.

15. *Jelly v. Dils*, 27 W. Va. 267.

16. **Me.**—*Walton v. Greenwood*, 60 Me. 356. **N. C.**—*State v. Whitaker*, 114 N. C. 818, 19 S. E. 376. **Va.**—*Mayo v. James*, 12 Gratt. (53 Va.) 17. **W. Va.** *Jelly v. Dils*, 27 W. Va. 267.

17. *Northern Pac. R. Co. v. Jurgenson*, 25 N. D. 14, 141 N. W. 70.

18. *Northern Pac. R. Co. v. Jurgenson*, 25 N. D. 14, 141 N. W. 70.

19. *Northern Pac. R. Co. v. Jurgenson*, 25 N. D. 14, 141 N. W. 70.

[a] Compare *People ex rel. Deal v. Williams*, 51 App. Div. 102, 64 N. Y. Supp. 457, where it is said that it is probably not necessary that the grounds upon which the alternative writ or order to show cause is issued should appear therein.

20. *Northern Pac. R. Co. v. Jurgenson*, 25 N. D. 14, 141 N. W. 70.

21. *Northern Pac. R. Co. v. Jurgenson*.

to which, in some proper form, the persons adversely interested are generally entitled.²² It operates, also, as a prohibition until further action of the court,²³ but expires automatically when the court makes a final order disallowing the writ prayed for.²⁴ In the absence of statutory regulation, the fixing of the return day is a matter to be determined in the discretion of the court.²⁵ The order to show cause need not run in the name of the state.²⁶

2. Service.²⁷—In jurisdictions where the adverse party is not a necessary party,²⁸ he need not be served with an order to show cause.²⁹ Service on the court below is made by serving the judge presiding.³⁰

G. DEMURRER OR ANSWER TO PETITION.—To the petition the adverse party may demur or answer.³¹

son, 25 N. D. 14, 141 N. W. 70; Williamson v. Mingo County Court, 56 W. Va. 38, 48 S. E. 835; Brazie v. Fayette, 25 W. Va. 213.

22. La.—Saucier v. Saucier, 135 La. 973, 66 So. 317. **Me.**—Walton v. Greenwood, 60 Me. 356. **N. C.**—State v. Allen, 24 N. C. 183. **Va.**—Mayo v. James, 12 Gratt. (53 Va.) 17. **W. Va.**—Jelly v. Dils, 27 W. Va. 267; Brazie v. Fayette, 25 W. Va. 213.

[a] **How Required Notice Given.** Such notice may be given by a single notice signed by counsel, or in effect, through the agency of an order to show cause, a combined notice and motion. Northern Pac. R. Co. v. Jurgenson, 25 N. D. 14, 141 N. W. 70.

23. Ala.—*Ex parte* Ray, 45 Ala. 45. **Cal.**—Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627. **Va.**—Mayo v. James, 12 Gratt. (53 Va.) 17. **W. Va.**—Jelly v. Dils, 27 W. Va. 267.

24. Carter v. Gear, 16 Hawaii 289; Gibbs v. Louisville, 95 Ky. 471, 26 S. W. 186.

That it cannot be revived or kept in force by a supersedeas, see *infra*. VII.

25. People *ex rel.* Jones v. House, 4 Utah 382, 10 Pac. 843.

26. Northern Pac. R. Co. v. Jurgenson, 25 N. D. 14, 141 N. W. 70; Williamson v. Mingo County Court, 56 W. Va. 38, 48 S. E. 835.

[a] **Statutes which require that "process"** (Northern Pac. R. Co. v. Jurgenson, 25 N. D. 14, 141 N. W. 70), and "writs" (Williamson v. Mingo County Court, 56 W. Va. 38, 48 S. E. 835) should run in name of state do not alter this rule, for the reason that such an order is not a writ. Williamson v. Mingo County Court, 56 W. Va. 38, 48 S. E. 835.

27. See generally the title "Service of Process and Papers."

28. See *supra*, V, D.

29. Northern Pac. R. Co. v. Jurgenson, 25 N. D. 14, 141 N. W. 70.

[a] **Substituted service** on adverse party provided for by statute. People *ex rel.* Jones v. House, 4 Utah 382, 10 Pac. 843.

30. Lewis v. Superior Court, 11 Cal. App. 483, 105 Pac. 763.

31. Ark.—*Ex parte* Williams, 4 Ark. 537, 38 Am. Dec. 46. **Mo.**—State *ex rel.* Boyer v. Huck, 260 Mo. 140, 168 S. W. 762. **Va.**—Mayo v. James, 12 Gratt. (53 Va.) 17.

[a] **In New York** "the Code of Civil Procedure fails to provide for a demurrer to an alternative writ of prohibition, but does provide (§2097) that an objection to the 'legal sufficiency of the papers upon which the writ was granted may be taken in the return,' and that a motion to set aside the alternative writ, for any matter not involving the merits, must be made at a term where the writ might have been granted. These provisions justify the inference that an objection to the sufficiency of the paper may be taken in the return, or presented at a Special Term of the court before the return day." People *ex rel.* West Shore Traction Co. v. Bauer, 103 N. Y. Supp. 1081.

[b] **Both Demurrer and Answer.** But the demurrer and answer will not lie at one and the same time. Hence a pleading which combines an answer and a demurrer is improper. State *ex rel.* Fenn v. McQuillin, 256 Mo. 693, 165 S. W. 713.

[c] **If not objected to the court may, ex gratia, consider the same, and determine such issues as may be thus**

Upon the hearing of the demurrer the primary inquiry is whether the facts set forth in the petition disclose a want of jurisdiction in tribunal whose acts are complained of.³² The facts alleged in the petition are, in accordance with the general rule in that regard,³³ assumed to be true.³⁴

H. MOTION TO QUASH ALTERNATIVE WRIT OR ORDER TO SHOW CAUSE.—The respondent may, at any time before final judgment,³⁵ move to quash the alternative writ or order to show cause,³⁶ and this right is not waived because no motion to quash was interposed before trial of the issues taken by the return.³⁷

I. MANDAMUS TO COMPEL VACATION.—A superior tribunal may, where a writ of prohibition has been improvidently³⁸ or irregularly³⁹ issued, award a writ in the nature of a mandamus, to compel the vacation of the writ of prohibition thus issued.⁴⁰

J. RETURN.—If the writ has issued to an officer he is required to make a return thereto, upon which issue is joined;⁴¹ when issued to the court and the prosecuting party, a return is made by the court.⁴² The party, as such, is not required or permitted to make a return,⁴³ but he may adopt the return of the court.⁴⁴

K. OBJECTIONS TO RETURN OR ANSWER.—The granting or denying of the writ is commonly determined upon a demurrer to the return,⁴⁵ or upon a motion for the final writ,⁴⁶ which motion is practically the equivalent of a motion for judgment upon the return.⁴⁷ The motion to quash the return to an alternative writ is in the nature

presented. *State ex rel. Fenn v. McQuillin*, 256 Mo. 693, 165 S. W. 713.

[d] **Grounds of Demurrer.**—The demurrer will lie for defects as to parties (*Armstrong v. County Court*, 15 W. Va. 190), and for failure of the petition to state facts sufficient to justify the issuance of the writ. *State ex rel. Mau v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.

32. *State ex rel. Mau v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548.

33. 6 STANDARD PROC. 981.

34. **Cal.**—*Hevren v. Reed*, 126 Cal. 219, 58 Pac. 536. **Mo.**—*State ex rel. Fenn v. McQuillin*, 256 Mo. 693, 165 S. W. 713. **S. C.**—*State ex rel. Gibbes v. Kirkland*, 41 S. C. 29, 19 S. E. 215. **S. D.**—*Gates v. McGee*, 15 S. D. 247, 88 N. W. 115.

[a] **Exhibits** attached to the petition cannot be considered. *State ex rel. Fenn v. McQuillin*, 256 Mo. 693, 165 S. W. 713. But see the title "**Exhibits.**"

35. *State ex rel. Kellog v. Gary*, 33 Wis. 93.

[a] **After verdict taken and recorded** a motion to quash is still

proper where prohibition is not the proper remedy. *State ex rel. Kellog v. Gary*, 33 Wis. 93.

[b] **In New York**, "a motion to set aside the alternative writ, for any matter not involving the merits, must be made at a term where the writ might have been granted." Such an objection may be presented at a special term before the return day of the writ. *People ex rel. West Shore Trac. Co. v. Bauer*, 103 N. Y. Supp. 1081.

36. *State ex rel. Boyer v. Huck*, 260 Mo. 140, 168 S. W. 762.

37. *State ex rel. Kellog v. Gary*, 33 Wis. 93.

38. *Ex parte Boothe*, 64 Ala. 312.

39. *Ex parte Ray*, 45 Ala. 15.

40. **As to procedendo**, see 19 STANDARD PROC. 121.

41. *Dayton v. Paine*, 13 Minn. 493.

42. *Dayton v. Paine*, 13 Minn. 493.

43. *Dayton v. Paine*, 13 Minn. 493.

44. *Dayton v. Paine*, 13 Minn. 493.

45. *State ex rel. Boyer v. Huck*, 260 Mo. 140, 168 S. W. 762; *State ex rel. Dilworth v. Braun*, 31 Wis. 600.

46. *State ex rel. Boyer v. Huck*, 260 Mo. 140, 168 S. W. 762.

47. *State ex rel. Boyer v. Huck*, 260 Mo. 140, 168 S. W. 762.

of a demurrer thereto.⁴⁸ Upon a demurrer to the return or answer the allegations in the return or answer, following the general rule in that regard,⁴⁹ must be accepted as true,⁵⁰ and the same is true upon a motion for an absolute writ based upon the return.⁵¹ A motion for judgment on the pleadings is, in effect, a challenge to the legal sufficiency of the return.⁵²

L. THE REPLY. — The reply to the respondent's return admits such allegations in the return as are not expressly denied.⁵³

M. THE HEARING. — Upon the hearing of the application for prohibition the only proper inquiries are whether or not the inferior court is proceeding in a matter over which it has no jurisdiction, or is exceeding its legitimate powers,⁵⁴ and, if so, whether the ordinary remedies are not adequate to afford relief.⁵⁵ Errors or irregularities occurring in the progress of the cause are not within the purview of this proceeding.⁵⁶ The propriety of the remedy by prohibition in the instant case need not be passed upon where its issuance is not contested on that ground.⁵⁷

48. *State ex rel. Dilworth v. Braun*, 31 Wis. 600.

[a] The alternative writ may be quashed upon a motion to quash the return thereto for the reason that the motion to quash being in the nature of a demurrer, "reaches back to the first defective pleading. If, therefore, the relation does not state a cause for issuing a writ of prohibition, it may be quashed on this motion." *State ex rel. Dilworth v. Braun*, 31 Wis. 600.

49. 6 STANDARD PROC. 981.

50. *State ex rel. Dakota Trust Co. v. Stutsman*, 24 N. D. 68, 139 N. W. 83, Ann. Cas. 1914D, 776.

51. *State ex rel. Warde v. McQuillin*, 262 Mo. 256, 171 S. W. 72; *State ex rel. Letcher v. Dearing*, 253 Mo. 604, 162 S. W. 618; *People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159.

52. *State ex rel. Warde v. McQuillin*, 262 Mo. 256, 171 S. W. 72.

53. *State ex rel. Brady v. Evans*, 184 Mo. 632, 83 S. W. 447; *People ex rel. Livingston v. Wyatt*, 113 App. Div. 111, 99 N. Y. Supp. 114, *affirmed*, 186 N. Y. 383, 79 N. E. 330.

54. U. S.—*In re Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232. Ala.—*Goodwin v. McConnell*, 187 Ala. 431, 65 So. 788; *Ex parte Greene*, 29 Ala. 52. Ark.—*McClendon v. Wood*, 125 Ark. 155, 188 S. W. 6. Cal.—*Murphy v. Superior Court*, 84 Cal. 592, 24 Pac. 310; *Hogan v. Superior Court*, 16 Cal. App. 783, 117 Pac. 917; *Conlan v. Superior Court*, 12 Cal. App. 420,

107 Pac. 577. Colo.—*People ex rel. Daniels v. District Court*, 33 Colo. 293, 80 Pac. 908; *People ex rel. Smith v. District Court*, 21 Colo. 251, 40 Pac. 460; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516. La.—*State ex rel. Patton v. Houston*, 40 La. Ann. 393, 4 So. 50, 8 Am. St. Rep. 532. Mo. *State ex rel. Brady v. Evans*, 184 Mo. 632, 83 S. W. 447. N. Y.—*People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159; *People ex rel. Mayor v. Nichols*, 79 N. Y. 582, 58 How. Pr. 200; *Thomson v. Tracy*, 60 N. Y. 31; *People ex rel. Jones v. Sherman*, 66 App. Div. 231, 72 N. Y. Supp. 718, *affirmed*, 171 N. Y. 684, 64 N. E. 1124; *People ex rel. Smith v. Russell*, 29 How. Pr. 176, 19 Abb. Pr. 136. Ohio.—*Kelley v. State ex rel. Gellner*, 94 Ohio St. 331, 114 N. E. 255. Okla.—*Hirsh v. Twyford*, 40 Okla. 220, 139 Pac. 313.

55. *State ex rel. Thatcher v. District Court*, 38 Nev. 323, 149 Pac. 178.

56. Ala.—*Epperson v. Rice*, 102 Ala. 668, 15 So. 434. Colo.—*People v. District Court*, 54 Colo. 237, 130 Pac. 324. Fla.—*State ex rel. Floral City P. Co. v. Hoeker*, 33 Fla. 283, 14 So. 586; *State v. Smith*, 32 Fla. 476, 14 So. 43. Haw.—*In re Hobron*, 6 Hawaii 407. N. Y.—*People ex rel. Mayor v. Nichols*, 79 N. Y. 582, 58 How. Pr. 200. Ohio. *Kelley v. State ex rel. Gellner*, 94 Ohio St. 331, 114 N. E. 255.

57. *McLean v. District Court*, 24 Idaho 441, 134 Pac. 536, Ann. Cas. 1915D, 542.

If the pleading by which the proceeding complained of was instituted, shows a case over which the inferior court has jurisdiction, the court above will not consider matter set up in the answer in an attempt to oust the court below of jurisdiction.⁵⁸

N. JUDGMENT AND SCOPE OF RELIEF.⁵⁹—The judgment should be that the writ do or do not issue, as justice and the law may require,⁶⁰ and should also award costs to the party entitled thereto.⁶¹ But no provision as to costs shall be incorporated therein unless the court, in disposing of the application, so ordered.⁶² The writ may be allowed as to part of the proceedings below and denied as to others.⁶³ In addition to directing the issuance of a writ of prohibition, the judgment may provide for such other and incidental relief as may be necessary to make the relator's remedy complete.⁶⁴ Thus, it may not only prevent what remains to be done but may, where it is necessary to give complete relief, undo that which has already been done.⁶⁵

VI. THE WRIT. — A. GENERAL REQUIREMENTS. — The writ should be directed to the inferior tribunal and the adverse party to the proceeding being therein prosecuted,⁶⁶ and should command the court

58. *People ex rel. Vigil v. District Court*, 33 Colo. 66, 79 Pac. 1024.

59. *As to nature and purpose of the writ*, see *supra*, II, A.

60. *Mayo v. James*, 12 Gratt. (53 Va.) 17.

61. *Mayo v. James*, 12 Gratt. (53 Va.) 17.

As to who entitled to costs, see *infra*, VIII.

62. *Chesapeake & O. R. Co. v. Harmon*, 159 Ky. 59, 166 S. W. 786, Ann. Cas. 1915D, 562.

63. *State ex rel. Burr v. Whitney*, 66 Fla. 24, 63 So. 299; *Dole v. Gear*, 14 Hawaii 554.

[a] *Compare Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601, where the court says: "There may indeed be cases in which two matters before the inferior court are so distinct that a writ of prohibition may go as to the one and not as to the other. But when the leading charge is within its jurisdiction, and the other charge, though varying in form, is for the same or similar acts, like a second count in an indictment, and the same sentence may be awarded on the first charge as upon both, a writ of prohibition should not issue."

64. Ala.—*Ex parte Peterson*, 33 Ala. 74; *Ex parte Smith*, 23 Ala. 94. Cal. *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627. Colo.—*People ex rel. Daniels v. District Court*, 33 Colo. 293, 80 Pac. 908; *People ex rel. Long v.*

District Court, 28 Colo. 161, 63 Pac. 321.

[a] *The reason for such a rule is that under a contrary one the court below, "by proceeding expeditiously and arbitrarily, could defeat the remedy."* *Havemeyer v. Superior Court*, 84 Cal. 327, 391, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

65. *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; *People ex rel. Long v. District Court*, 28 Colo. 161, 63 Pac. 321.

[a] *"The Principle Is That Which Prevails in Equity.*—When there is jurisdiction, the court will afford complete relief. A party will not be compelled to resort to more than one proceeding or more than one court for redress of one injury." *Havemeyer v. Superior Court*, 84 Cal. 327, 394, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

[b] *Where relief from an order already made in the proceedings complained of is incidental the court may issue the writ of prohibition and direct that such order be set aside.* *People ex rel. Long v. District Court*, 28 Colo. 161, 63 Pac. 321, order granting new trial.

66. Ark.—*Ex parte Williams*, 4 Ark. 537, 38 Am. Dec. 46. N. Y.—*Norton v. Dowling*, 46 How. Pr. 7. Va.—*Mayo v. James*, 12 Gratt. (53 Va.) 17. W. Va. *Kump v. McDonald*, 64 W. Va. 323, 61 S. E. 909.

not to entertain,⁶⁷ and the adverse party not to urge or prosecute⁶⁸ the proceeding complained of.

B. ENFORCEMENT OF.—The writ is enforced by punishing violations of its orders as a contempt of court.⁶⁹

C. OPERATION AND EFFECT.—Generally the writ of prohibition operates upon the court rather than the parties proceeding therein,⁷⁰ though in some jurisdictions it may be directed to the party.⁷¹ It will have no force against a person not a party to the record or in privity with such a party.⁷² It may not be disregarded by the officer or inferior tribunal to which it is addressed, even though, in the instant case, it may have been improvidently awarded.⁷³

VII. APPEAL AND ERROR.—Appeal in prohibition cases is largely a matter of statutory regulation.⁷⁴ At common law an appeal does not lie from an order denying an application for prohibition.⁷⁵

67. Ark.—*Ex parte Williams*, 4 Ark. 537, 38 Am. Dec. 46. Va.—*Mayo v. James*, 12 Gratt. (53 Va.) 17. W. Va. *Kump v. McDonald*, 64 W. Va. 323, 61 S. E. 909.

68. Ark.—*Ex parte Williams*, 4 Ark. 537, 38 Am. Dec. 46. Va.—*Mayo v. James*, 12 Gratt. (53 Va.) 17. W. Va. *Kump v. McDonald*, 64 W. Va. 323, 61 S. E. 909.

But see *infra*, VI, C.

69. Cal.—*Havemeyer v. Superior Court*, 87 Cal. 267, 25 Pac. 433, 10 L. R. A. 650. Ill.—*People v. Circuit Court*, 169 Ill. 201, 48 N. E. 717. La. *State ex rel. Saizan v. Judge of District Court*, 48 La. Ann. 1501, 21 So. 94. Mo.—*State ex rel. Merriam v. Ross*, 136 Mo. 259, 41 S. W. 1041; *Howard v. Pierce*, 38 Mo. 296. Wis.—*State ex rel. Cushing v. Hungerford*, 8 Wis. 345.

As to punishment for contempt, see 5 STANDARD PROC. 363.

70. Ill.—*People v. Circuit Court*, 169 Ill. 201, 48 N. E. 717. N. Y.—*People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 394, 79 N. E. 330, 10 L. R. A. (N. S.) 159. N. C.—*State v. Whitaker*, 114 N. C. 818, 19 S. E. 376.

[a] Under early common law it also operated upon the prosecuting party, commanding him "not to follow the plea." *Ex parte Williams*, 4 Ark. 537, 38 Am. Dec. 46.

71. See *supra*, VI, A.

72. *State ex rel. Wolf v. Moore*, 16 Wash. 350, 47 Pac. 757.

73. *Ex parte Boothe*, 64 Ala. 312; *Ex parte Ray*, 45 Ala. 15.

74. See generally the statutes and *Mayo v. James*, 12 Gratt. (53 Va.) 17.

[a] Under statutes providing for

appeals from "judgments . . . on application for writ of certiorari, mandamus, and other remedial writs . . ." an appeal will lie from a judgment granting a writ of prohibition. *Ex parte Campbell*, 130 Ala. 171, 30 So. 385.

[b] In Georgia (1) under the Act of 1870 (now in Civil Code, §5540) making certain writs of error "fast" writs, a writ of error sued out from verdict and judgment returned and had upon a final hearing on the questions of fact raised by the petition and return, is not a "fast" writ of error. *Bacon v. Jones*, 116 Ga. 136, 42 S. E. 401. (2) But a judgment rendered at chambers denying a motion to revoke a writ of prohibition may be taken up as a "fast" writ of error. *Mayor of Savannah v. Grayson*, 104 Ga. 105, 30 S. E. 693.

75. *State ex rel. Griffith v. Bowerman*, 40 Mo. App. 576.

[a] "The remedy of the party aggrieved, . . . would then be to apply to this court or to the supreme court for a new writ of prohibition, by analogy to the proceeding in cases of habeas corpus." *State ex rel. Griffith v. Bowerman*, 40 Mo. App. 576. Compare *In re Burt*, 17 Cal. App. 309, 119 Pac. 674, holding that where an application is made to the superior court for a prohibition and there denied, the district court of appeals will not exercise, although it possesses, original jurisdiction of a second application.

[b] Statutes giving an appeal to "the party aggrieved" do not alter this rule. But, under such a statute, an appeal may be taken from a final judgment granting the writ. *State ex*

The right of appeal is usually given when costs have been awarded.⁷⁶ Where appeals are granted from final judgments or orders an appeal will lie in prohibition whether the judgment was one denying or granting the application.⁷⁷ Where it appears from the record that a writ of prohibition should not have issued, and the defect is not amendable, the judgment awarding the writ will be reversed with directions to dismiss the application.⁷⁸

Supersedeas.—Where on a hearing the writ is denied, a supersedeas bond on appeal does not revive the previous preliminary prohibitory order.⁷⁹

VIII. SECOND APPLICATION.—When an application for a writ of prohibition is denied, the applicant may apply to any other court having power to grant the same.⁸⁰

IX. COSTS.—The general rule is that the prevailing party shall recover his costs,⁸¹ but the judgment may not provide for costs unless the court, in disposing of the proceeding, so orders.⁸² Costs may not be taxed against the judge of the inferior court,⁸³ nor against persons who were not parties to the prohibition proceeding.⁸⁴

rel. Griffith v. Bowerman, 40 Mo. App. 576.

76. *People ex rel. Deal v. Williams*, 51 App. Div. 102, 64 N. Y. Supp. 457.

77. *Conn.*—*Fayerweather v. Monson*, 61 Conn. 431, 23 Atl. 878. *Okla.* *Healy v. Loofburrow*, 2 Okla. 458, 37 Pac. 823. *Va.*—*Burch v. Hardwicke*, 23 Gratt. (64 Va.) 51.

78. *Adams County Court v. People*, 48 Colo. 539, 111 Pac. 86.

79. *Carter v. Gear*, 16 Hawaii 289; *Gibbs v. Louisville*, 95 Ky. 471, 26 S. W. 186, refusing to apply the analogous rule in case of a temporary injunction.

[a] The supersedeas will be effective as to the costs only in such a case. *Gibbs v. Louisville*, 95 Ky. 471, 26 S. W. 186.

80. *State ex rel. Griffith v. Bowerman*, 40 Mo. App. 576; *Lindo v. Rodney*, 2 Doug. 620, 99 Eng. Reprint 392.

[a] In California the district court of appeals will not exercise, although

it possesses, original jurisdiction of an application for a prohibition where the superior court had previously denied a similar application made on the same facts. *In re Burt*, 17 Cal. App. 309, 119 Pac. 674.

81. *State ex rel. Streit v. Justice Court*, 45 Mont. 375, 123 Pac. 405, 48 L. R. A. (N. S.) 156; *Mayo v. James*, 12 Gratt. (53 Va.) 17.

[a] Assessment of damages in favor of plaintiff not necessary to entitle him to costs. *Mayo v. James*, 12 Gratt. (53 Va.) 17.

82. See *supra*, V, N.

83. *Ky.*—*Chesapeake & O. R. Co. v. Harmon*, 159 Ky. 59, 166 S. W. 786, Ann. Cas. 1915D, 562. *Mo.*—*State ex rel. Federal Lead Co. v. Reynolds*, 245 Mo. 698, 151 S. W. 85. *S. C.*—*State v. Jervev*, 4 Strobb. 304. *W. Va.* *Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413.

84. *Chesapeake & O. R. Co. v. Harmon*, 159 Ky. 59, 166 S. W. 786, Ann. Cas. 1915D, 562.

PROPERTY.—See **Due Process of Law**; **Embezzlement**; **Injuries to Persons and Property**; **Lands and Land Transfers**; **Larceny**; **Obtaining Property by False Pretenses**; **Personal Property**; **Proceedings in Rem**; **Title**.

PROSECUTING ATTORNEY.—See **Grand Jury**; **Indictment and Information**; **Officers**.

PROSTITUTION

By the Editorial Staff.

I. INDICTMENT OR INFORMATION, 827

- A. *Generally*, 827
- B. *For Placing Wife in House of Prostitution*, 828
- C. *For Accepting Earnings of Prostitute*, 828
- D. *Under White Slave Traffic or Mann Act*, 829
- E. *Joinder and Duplicity*, 829

II. TRIAL, 830

CROSS-REFERENCES:

Disorderly House; Lewdness;
Vagrancy.

For forms, see 9 STANDARD PROC. 1009, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. INDICTMENT OR INFORMATION.¹ — A. GENERALLY. — An indictment or information under a statute defining acts which constitute a female prostitute and fixing a punishment therefor must set forth, with a reasonable degree of certainty, the acts constituting the crime.² In accordance with the general rule, however, it is sufficient to charge the offense in the language of the statute,³ as it is also in a prosecution for enticing a virtuous female to a house of ill fame,⁴ or in charging the offense of resorting to or becoming an inmate of a house of ill fame.⁵ The place where the house was situated should be stated with particularity in an information for the latter offense.⁶

1. See generally the title "Indictment and Information."

2. *Delano v. State*, 66 Ind. 348 (not sufficient to simply charge that defendant was "then and there a female prostitute"); *People ex rel. Kingsley v. Pratt*, 22 Hun (N. Y.) 300, complaint charging merely upon information and belief that defendant was a "common prostitute," held insufficient. See also *Toney v. State*, 60 Ala. 97; *State v. Bryant*, 90 Wash. 20, 155 Pac. 420.

3. *Stanton v. State*, 27 Ind. App. 105, 60 N. E. 999, charging in the language of the statute, that the defend-

ant committed "fornication for hire" sufficient. See generally 12 STANDARD PROC. 442, 447, et seq.

4. *State v. Dickerhoff*, 127 Iowa 404,
103 N. W. 350.

5. See *State v. Richards*, 76 Wis. 354, 44 N. W. 1104, although it does not charge that the defendant had knowledge of the character of the house.

6. See *State v. Richards*, 76 Wis. 354, 44 N. W. 1104, alleging it to have been in the town of V. in the county of A. was sufficient.

That the place was a house of ill-fame need not be alleged in terms where the facts set forth show it to be such.⁷

The offense of living with a common prostitute is a continuing one and may be charged as such between certain dates;⁸ but it does not follow that it may not be charged upon a particular day.⁹

The offense of nightwalking is sufficiently charged by employing such term, without setting forth the particular acts constituting the same.¹⁰

B. FOR PLACING WIFE IN HOUSE OF PROSTITUTION. — The indictment or information in a prosecution against a husband for placing or allowing his wife to remain in a house of prostitution need not aver that defendant left his wife in such a house with the intention that she should act as a prostitute,¹¹ nor that the wife followed the practice of prostitution after becoming an inmate of the house.¹² Defendant's knowledge of the character of the house need not be alleged in terms where it is a legitimate inference from the other allegations.¹³

C. FOR ACCEPTING EARNINGS OF PROSTITUTE. — While an indictment or information in charging the offense of accepting, without consideration, the proceeds of the earnings of any woman engaged in prostitution, should employ the words of the statute,¹⁴ it is not essential that it do so if equivalent words are used and all the elements of the crime are set forth.¹⁵ In such indictment, the use of the word prostitution, as used in the statute, is sufficient without words of limitation or description.¹⁶ The specific earnings accepted need not be stated.¹⁷ Nor need it be charged that the earnings given were unlawful earnings accepted for an unlawful purpose.¹⁸ Neither is

7. *State v. Russell*, 95 Iowa 406, 64 N. W. 281, allegation that defendant resorted to, used and occupied the place, which was in his possession and control, for purposes of prostitution and lewdness.

8. *State v. Thuna*, 59 Wash. 689, 109 Pac. 331, 111 Pac. 768.

9. *State v. Thuna*, 59 Wash. 689, 109 Pac. 331, 111 Pac. 768, since so living for one day with intent to continue the relation constitutes the offense.

10. *State v. Dowers*, 45 N. H. 543; *State v. Russell*, 14 R. I. 506, defendant requiring more definite information than afforded by the charge may demand a bill of particulars. Compare *Thomas v. State*, 55 Ala. 260, holding that in the absence of a statute an indictment charging defendant with being a nightwalker without allegations showing the unlawful intent is insufficient.

11. *People v. Conness*, 150 Cal. 114, 88 Pac. 821, such an intent not an element of offense. See also *People v. Mead*, 145 Cal. 500, 78 Pac. 1047, holding objection to sufficiency of information on this ground could not be

taken by motion in arrest of judgment.

12. *People v. Conness*, 150 Cal. 114, 88 Pac. 821.

13. *State v. Barker*, 43 Wash. 69, 86 Pac. 387.

14. *State v. Cavalluzzi*, 113 Me. 41, 92 Atl. 937.

[a] **Such an Information Is Sufficient.**—*State v. Schuman*, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633; *State v. Crane*, 88 Wash. 210, 152 Pac. 989; *State v. Columbus*, 74 Wash. 290, 133 Pac. 455.

15. *State v. Cavalluzzi*, 113 Me. 41, 92 Atl. 937. Compare 12 STANDARD PROC. 442, et seq.

[a] **Failure to use word "woman"** as used in statute held not fatal, it appearing otherwise that defendant accepted earnings from a woman. *State v. Cavalluzzi*, 113 Me. 41, 92 Atl. 937.

16. *State v. Cavalluzzi*, 113 Me. 41, 92 Atl. 937.

17. *State v. Schuman*, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633; *State v. Crane*, 88 Wash. 210, 152 Pac. 989.

18. *State v. Crane*, 88 Wash. 210, 152 Pac. 989.

it necessary to aver that the defendant knew that the earnings accepted were the proceeds of prostitution, where he is charged with "wilfully, unlawfully and feloniously" accepting the earnings of a common prostitute.¹⁹ The time may be charged in accordance with general rules elsewhere treated.²⁰

D. UNDER WHITE SLAVE TRAFFIC OR MANN ACT. — An indictment founded upon the act of congress of June 25, 1910, known as the white slave act, which follows the language of the statute,²¹ or which is in language substantially equivalent thereto,²² is sufficient. It is not necessary in an indictment for a violation of this statute to go beyond the language or purpose of the statute.²³ Though the transportation was effected by automobile, it is not necessary to aver that such automobiles were common carriers.²⁴

Under the statute prohibiting the importation of alien women for the purpose of prostitution or "for any other immoral purpose," an indictment charging that the defendant imported an alien woman that she should live with him as his concubine is sufficient.²⁵ A charge of harboring an alien woman in violation of the white slave act must show that she was from a country covered by the act.²⁶

E. JOINDER AND DUPLICITY. — The general rules as to joinder and duplicity in criminal pleadings apply to prosecutions concerned with prostitution.²⁷ Thus under proper circumstances several acts mentioned in the act disjunctively may be charged disjunctively in a single count.²⁸ An information is not duplicitous which charges two persons with accepting the earnings of a common prostitute.²⁹ An indictment under the Mann act charging the transporting of two women at the same time and for the same purpose is not bad for duplicity.³⁰

19. *State v. Schuman*, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633. See also *State v. Zenner*, 35 Wash. 249, 77 Pac. 191.

20. See 12 STANDARD PROC. 411.

[a] It is not improper to charge that the offense was committed "during the three months next preceding the finding of this indictment." *Com. v. Peretz*, 212 Mass. 253, 98 N. E. 1054, Ann. Cas. 1913D, 484.

21. *Weddell v. United States*, 213 Fed. 208, 129 C. C. A. 552 (wherein defendant was first charged in the language of the statute itself, with its violation, and then to make it more specific the way and manner of its violation was specifically pointed out); *United States v. Flaspoller*, 205 Fed. 1000.

22. *Kalen v. United States*, 196 Fed. 888, 116 C. C. A. 450; *United States v. Brand*, 229 Fed. 847.

23. *United States v. Brand*, 229 Fed. 847, "act does not require the government's pleading to charge that the woman or girl, transported in viola-

tion of this law, was actually subjected to debauchery, or that she did actually engage in prostitution."

24. *United States v. Burch*, 226 Fed. 974.

25. *United States v. Bitty*, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. ed. 543.

26. *United States v. Davin*, 189 Fed. 244.

27. See generally 12 STANDARD PROC. 499, et seq.

28. *State v. Stout*, 112 Ind. 245, 13 N. E. 715; *Fahnestock v. State*, 102 Ind. 156, 1 N. E. 372. See 12 STANDARD PROC. 507.

[a] Thus an information charging that the defendant consented to the placing of his wife in a house of prostitution and also that he allowed her to remain in such house is not bad for duplicity as the several acts constitute but one offense. *State v. Ilomaki*, 40 Wash. 629, 82 Pac. 873.

29. *State v. Columbus*, 74 Wash. 290, 133 Pac. 455, it charges both with a single crime.

30. *United States v. Westman*, 182

The offense of keeping a bawdy house, punishable at common law, and the statutory offense of being a common prostitute may be joined in one indictment in separate counts.³¹

II. TRIAL.³²—The general rules governing variance obtain in prosecutions for the offense of prostitution.³³ So also, the general rule obtains that questions of fact are for the jury.³⁴

Instructions in such prosecutions are governed by the general rules.³⁵

Fed. 1017, because the charge is of a single act. See also *Bennett v. United States*, 194 Fed. 630, 114 C. C. A. 402.

31. *Wooster v. State*, 55 Ala. 217.

32. See generally the title "Trial."

33. See *infra*, this note, and generally the title "Variance and Failure of Proof."

[a] There is no fatal variance (1) where the indictment charges the transportation of a person by one name and the evidence shows the transportation of a person of an entirely different name. *Bennett v. United States*, 194 Fed. 630, 114 C. C. A. 402. (2) Nor is there a fatal variance between a charge of transporting two persons for the purpose stated and proof that only one of such persons was transported. *Bennett v. United States*, 194 Fed. 630, 114

C. C. A. 402, violation of statute is complete if one person is transported.

34. See *infra*, this note, and generally the title "Province of Judge and Jury."

[a] Whether or not a house was a house of prostitution is a question of fact to be determined by the jury from the evidence in the case. *Fahnestock v. State*, 102 Ind. 156, 1 N. E. 372.

35. See generally 13 STANDARD PROC. 698, et seq.

[a] **Must Not Invade Province of Jury.**—*Fahnestock v. State*, 102 Ind. 156, 1 N. E. 372.

[b] **Instruction singling out a particular fact in evidence and giving it undue prominence properly refused.** *Williams v. State*, 98 Ala. 52, 13 So. 333.

PROSECUTORS.—See **Indictment and Information.**

PROTHONOTARY.—See **Officers.**

PROVINCE OF JUDGE AND JURY

By the Editorial Staff.

- I. GENERAL STATEMENT, 832
- II. MIXED QUESTIONS OF LAW AND FACT, 834
- III. STATUTORY PROVISIONS MAKING JURY JUDGES OF
LAW AND FACT, 834
- IV. PARTICULAR QUESTIONS, 835
 - A. *Art, Science and Natural Philosophy*, 835
 - B. *Nature, Quality and Condition of Things*, 835
 - C. *Physical Capacity and Condition*, 837
 - D. *Mental Condition and Operations*, 837
 - 1. *Generally*, 837
 - 2. *Of Children*, 838
 - 3. *Intent and Belief*, 838
 - 4. *Notice and Knowledge*, 839
 - 5. *Ratification*, 841
 - 6. *Good Faith*, 841
 - 7. *Insanity*, 842
 - 8. *Election*, 842
 - E. *Ownership and Title*, 842
 - F. *Possession and Occupancy*, 843
 - G. *Matters Relating to Written Instruments*, 843
 - 1. *Construction of*, 843
 - 2. *Execution and Genuineness*, 844
 - 3. *Delivery*, 844
 - 4. *Consideration*, 844
 - H. *As to the Pleadings*, 845
 - I. *Foreign Laws*, 845
 - J. *Necessity for Act*, 846
 - K. *Reasonableness*, 847
 - 1. *Generally*, 847
 - 2. *Reasonable Time*, 847
 - 3. *Of Attorney's Fees*, 849
 - L. *Identity of Persons and Property*, 849
 - M. *Relation Between Persons*, 849
 - N. *Time and Place*, 850
 - O. *Performance*, 850

- P. *In Criminal Prosecutions*, 851
1. *Generally*, 851
 2. *Motive*, 851
 3. *Corpus Delicti*, 851
 4. *Reasonable Doubt*, 851
 5. *False Imprisonment*, 852
 6. *Former Jeopardy*, 852
 7. *Knowledge and Intent*, 853
 8. *Degree of Crime*, 854
 9. *Miscellaneous Questions*, 854
- Q. *Matters as to Evidence*, 855
1. *Weight and Sufficiency of*, 855
 2. *Admissibility of*, 859
 3. *Credibility of Witnesses*, 859

CROSS-REFERENCES:

Instructions;	Justices of the Peace;
Juries and Jurors;	Special Interrogatories to Juries;
Verdict.	

Province of judge and jury in particular actions or proceedings, see the specific titles.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. GENERAL STATEMENT.—In the determination of questions of law and fact the judge and the jury are respectively independent and neither is permitted to invade the province of the other,¹ except, perhaps, where the constitution or statutes make the jury, in some cases, judges of both the law and the facts.² The province of the

1. *Mawich v. Elsey*, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57.

[a] The respective provinces of the judge and jury have been stated as follows: "The line between the duties of a court and jury, in the trial of causes at law, both civil and criminal, is perfectly well defined; and the rigid observance of it is of the last importance to the administration of systematic justice. Whilst, on the one hand, the jury are the sole ultimate judges of the facts, they are, on the other, to receive the law applicable to the case before them, solely from the publicly given instructions of the court. In this way court and jury are made responsible, each in its appropriate department, for the part taken by each in the trial and decision of causes, and in this way alone can errors of fact

and errors of law be traced, for the purpose of correction, to their proper sources." *State v. Smith*, 6 R. I. 33.

[b] "Logically considered, the trial of a criminal case is an effort to complete a final syllogism, having, for one premise, matter of law; for the other, matter of fact; and for the conclusion, the resulting proposition of guilty or not guilty. It is the duty of the judge to supply the jury with material for the major premise of this syllogism; and it is the duty of the jury to collect from the evidence the minor premise, compare the two, draw the conclusion, and declare it in their verdict." *Habersham v. State*, 56 Ga. 61.

Instructions as to facts or evidence, see 13 STANDARD PROC. 829, et seq.

2. See *infra*, III, and 13 STANDARD PROC. 712, 983.

judge is to determine questions of law arising during the trial of a cause,³ and to instruct the jury as to the law for their guidance in arriving at a verdict.⁴ The province of the jury is to determine the questions of fact in the case and reach a verdict in accordance with law given them by the judge in his charge.⁵ It is, therefore, error to instruct the jury that they are the judges of the law of the case,⁶ to submit to the jury for their determination a question of law,⁷ or to withdraw from the jury the consideration of a material question of fact.⁸ Generally, however, if there is no dispute as to the facts

3. **U. S.**—Steele's Lessee *v.* Spencer, 1 Pet. 552, 7 L. ed. 259. **Ala.**—Birmingham Ry., L. & P. Co. *v.* Long, 59 So. 382; Tobler *v.* Pioneer Min. & Mfg. Co., 166 Ala. 482, 52 So. 86; Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159. **Cal.**—Eastin *v.* Stockton Bank, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77. **D. C.** District of Columbia *v.* Johnson, 3 Mackey 120. **Ill.**—People *v.* Alton, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95; Wright *v.* Hildreth, 69 Ill. App. 588. **Ind.**—Plummer *v.* Indianapolis Union R. Co., 56 Ind. App. 615, 104 N. E. 601. **Mass.**—Peirce *v.* Butler, 14 Mass. 303. **Mont.**—Conway *v.* Monidah Trust, 52 Mont. 244, 157 Pac. 178; Golden *v.* Northern Pacific Ry. Co., 39 Mont. 435, 104 Pac. 549, 34 L. R. A. (N. S.) 1154, 18 Ann. Cas. 886. **Tex.** Colgrove *v.* Falfurrias State Bank (Tex. Civ. App.), 192 S. W. 580. **Vt.**—State *v.* Croteau, 23 Vt. 14, 54 Am. Dec. 90.

4. See the title "Instructions."

5. **Cal.**—People *v.* English, 30 Cal. 214. **Ga.**—Jones *v.* Dannenberg Co., 115 Ga. 769, 42 S. E. 65. **Ind.**—Grimes *v.* Alsop, 7 Blackf. 269. **Me.**—Bigelow *v.* Bigelow, 95 Me. 17, 49 Atl. 49. **Mass.** McCarthy *v.* Peach, 186 Mass. 67, 70 N. E. 1029; Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595. **Mich.**—Williams *v.* Sheldon, 61 Mich. 311, 28 N. W. 115. **N. H.** First Nat. Bank *v.* Hunton, 69 N. H. 509, 45 Atl. 351.

[a] "Necessarily, in the application of the law as expounded by the court, the jury must exercise some degree of judgment." Livingston *v.* Taylor, 132 Ga. 1, 63 S. E. 694.

6. Livingston *v.* Taylor, 132 Ga. 1, 63 S. E. 694. Compare 13 STANDARD PROC. 714.

7. **U. S.**—What Cheer Coal Co. *v.* Johnson, 56 Fed. 810, 6 C. C. A. 148. **Ala.**—Whitsett *v.* Belue, 172 Ala. 256, 54 So. 677; Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; Cafe *v.* Walsh

(Ala. App.), 74 So. 82. **Cal.**—People *v.* Ivey, 49 Cal. 56. **Ill.**—Doggett *v.* Greene, 254 Ill. 134, 98 N. E. 219; Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246; Cope *v.* Brentz, 190 Ill. App. 504; Taylor *v.* Crowe, 122 Ill. App. 518. **Ky.**—Minor *v.* Clarkson, 1 Ky. Op. 389. **Md.** Caledonian Ins. Co. *v.* Traub, 80 Md. 214, 30 Atl. 904. **Mich.**—Roby Lumber Co. *v.* Gray, 73 Mich. 356, 41 N. W. 420. **Mo.**—Brisece *v.* Laughlin, 161 Mo. App. 76, 143 S. W. 65; White *v.* Reitz, 129 Mo. App. 307, 108 S. W. 601. **N. Y.** Outhouse *v.* Baird, 121 App. Div. 556, 116 N. Y. Supp. 246. **Okla.**—Midland Val. R. Co. *v.* Bailey, 124 Pac. 987. **Tenn.**—Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. 341. **Tex.**—Stark *v.* Burckett (Tex. Civ. App.), 120 S. W. 939.

8. **Ala.**—Louisville & N. R. Co. *v.* Holland, 173 Ala. 675, 55 So. 1001. **Ark.** Beckley *v.* Miller, 96 Ark. 379, 131 S. W. 876. **Ga.**—Stewart *v.* Mynatt, 135 Ga. 637, 70 S. E. 325; Mooney *v.* Tarver, 103 Ga. 573, 30 S. E. 257; Hickman *v.* Bell, 10 Ga. App. 319, 73 S. E. 596. **Ind.**—Rump *v.* Woods, 50 Ind. App. 347, 98 N. E. 369. **Ky.** Castleman *v.* Rustenholtz, 145 Ky. 146, 140 S. W. 170. **Md.**—National Bank of Bristol *v.* Baltimore & O. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321. **Mich.**—Williams *v.* Sheldon, 61 Mich. 311, 28 N. W. 115. **Neb.**—Oleson *v.* Oleson, 90 Neb. 738, 134 N. W. 648. **Okla.**—Sovereign Camp *v.* Welch, 16 Okla. 188, 83 Pac. 547; Farmers' State Bank *v.* Spencer, 12 Okla. 597, 73 Pac. 297. **Pa.**—Pfeiffer *v.* Safe Deposit & Trust Co., 183 Pa. 197, 38 Atl. 622. **Tex.**—Summerhill *v.* Wilkes, 63 Tex. Civ. App. 456, 133 S. W. 492. **Wash.** McDermott *v.* McLellan Co., 65 Wash. 693, 118 Pac. 884. **Wis.**—Jeffers *v.* Green Bay, etc. R. Co., 148 Wis. 315, 134 N. W. 900.

Invading province of jury, see the title "Instructions."

and but one conclusion can reasonably be drawn therefrom, the court will not submit the case to the jury.⁹

If the trial be without a jury the judge will determine the issues of fact as well as those of law, the court's findings being in the nature of a special verdict.¹⁰

II. MIXED QUESTIONS OF LAW AND FACT.—A question is often said to be a mixed question of law and fact; by this is simply meant that the question is to be determined by the jury under the instructions of the court as to the law applicable thereto,¹¹ or, as it is often expressed, the jury is to find the facts and then apply to them the rules of law given by the court and thus determine the ultimate question at issue.¹² It is generally error to leave a mixed question of law and fact to the jury without the proper instructions as to the principles of law involved.¹³

III. STATUTORY PROVISIONS MAKING JURY JUDGES OF LAW AND FACT.—Sometimes statutes or constitutions provide that juries shall be the judges of both law and fact in certain classes of cases.¹⁴ The effect of such a provision is to place the final de-

9. See *infra*, IV, Q.

10. **Ark.**—Woodruff *v.* McDonald, 33 Ark. 97. **Mo.**—Bass *v.* Walsh, 39 Mo. 192; International Text-Book Co. *v.* Yount, 129 Mo. App. 247, 108 S. W. 124. **Tex.**—Bell *v.* State, 18 Tex. App. 53, 51 Am. Rep. 293. **Utah.**—Kahn *v.* Central Smelting Co., 2 Utah 371, *reversed*, 102 U. S. 641, 26 L. ed. 266.

11. McKibbin *v.* Martin, 64 Pa. 352, 3 Am. Rep. 588. See the following: **U. S.**—McNamee *v.* Hunt, 87 Fed. 298, 30 C. C. A. 653. **Ga.**—New *v.* Potts, 55 Ga. 420. **Kan.**—McCarty *v.* Bauer, 3 Kan. 237. **Me.**—Bixler *v.* Wright, 116 Me. 133, 100 Atl. 467 (fraud); Dunn *v.* Hayes, 21 Me. 76. **Mass.**—Porter *v.* Blood, 5 Pick. 54. **Mo.**—Kansas City *v.* Ferd Heim Brewing Co., 98 Mo. App. 590, 73 S. W. 302. **N. Y.**—Clarke *v.* Cummings, 5 Barb. 339. **N. C.**—Sugg *v.* Town of Greenville, 169 N. C. 606, 86 S. E. 695. **Ohio.**—Davis *v.* Herrick, 6 Ohio 55. **Pa.**—Little *v.* Greek, 233 Pa. 534, 82 Atl. 955; Poorman *v.* Smith's Exrs., 2 Serg. & R. 464; Hygienic Fleeced Underwear Co. *v.* Way, 35 Pa. Super. 229. **S. C.**—Connor *v.* Johnson, 59 S. C. 115, 37 S. E. 240. **Tex.**—Chicago, etc. R. Co. *v.* Neil P. Anderson & Co. (Tex. Civ. App.), 130 S. W. 182. **Wis.**—Patten *v.* Chicago & N. W. Ry. Co., 32 Wis. 524.

12. **Md.**—Baltimore & O. R. Co. *v.* Breinig, 25 Md. 378, 90 Am. Dec. 49. **Mo.**—Macklot *v.* Dubreuil, 9 Mo. 477, 43 Am. Dec. 550. **Tenn.**—Bamberger *v.* Citizens' St. R. Co., 95 Tenn. 18, 31

S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486. **Va.**—Dun *v.* Seaboard & R. R. Co., 78 Va. 645, 49 Am. Rep. 388.

See Colley *v.* Westbrook, 57 Me. 181, 2 Am. Rep. 30.

[a] **Illustrations.**—(1) What constitutes adverse possession is a question of law, but whether the necessary facts exist in a particular case, there being a dispute, is for the jury. Macklot *v.* Dubreuil, 9 Mo. 477, 43 Am. Dec. 550. (2) So too whether a person is negligent is usually a question of fact for the jury, but just what duty rested on a party, a breach of which amounts to negligence is a question of law. Baltimore & O. R. Co. *v.* Breinig, 25 Md. 378, 90 Am. Dec. 49. (3) Whether "due diligence" was used is a mixed question of law and fact. Davis *v.* Herrick, 6 Ohio 55. (4) So is the question of probable cause. Humphries *v.* Parker, 52 Me. 502.

13. **Ill.**—White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 100; Electric Vehicle Co. *v.* Price, 138 Ill. App. 594; Thomas Brass & Iron Works *v.* Leonard, 91 Ill. App. 599. **Md.**—Northern Cent. R. Co. *v.* State, 31 Md. 357, 100 Am. Dec. 69; Plater *v.* Scott, 6 Gill & J. 116. **Miss.**—Greenwade *v.* Mills, 31 Miss. 464. **Mo.**—Jordan *v.* Hannibal, 87 Mo. 673. **N. H.**—Kent *v.* Tyson, 20 N. H. 121.

14. See the constitutions and statutes, and 13 STANDARD PROC. 712, 984; 18 STANDARD PROC. 952, 971.

termination of questions of law in the province of the jury, but the court still instructs them as to the principles of law applicable to the case,¹⁵ but, in some jurisdictions at least, the instructions are advisory only and they may be disregarded by the jury,¹⁶ though the jury should weigh and consider the court's instructions and not disregard them arbitrarily and without reason.¹⁷

IV. PARTICULAR QUESTIONS.—A. ART, SCIENCE, AND NATURAL PHILOSOPHY.¹⁸—Questions of science,¹⁹ art,²⁰ and natural philosophy or physics,²¹ are generally pure questions of fact to be determined by the jury and the court will not instruct in regard to them.

B. NATURE, QUALITY, AND CONDITION OF THINGS.—The nature, quality, or condition of things considered without regard to any requirements of law, are generally questions of fact for the jury,²² as

15. *People v. Seeley*, 139 Cal. 118, 72 Pac. 834; *State v. Syphrett*, 27 S. C. 29, 2 S. E. 624, 13 Am. St. Rep. 616. See 13 STANDARD PROC. 714, 984; 18 STANDARD PROC. 971, et seq.

16. *People v. Seeley*, 139 Cal. 118, 72 Pac. 834. See 18 STANDARD PROC. 971, et seq.; 13 STANDARD PROC. 714, 984, et seq.

17. *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077; *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; *State v. Ford*, 37 La. Ann. 443. See 13 STANDARD PROC. 985, et seq.

See generally the particular titles, and the index to this work.

18. **Judicial knowledge** as to such matters, see 7 ENCY. OF EV. 869, 902.

19. *Sewanee Min. Co. v. E. L. Best & Co.*, 3 Head (Tenn.) 701.

[a] "Matters of science are always to be proven, and are treated as matters of fact, and the court should not instruct in regard to them." *People v. Hubert*, 119 Cal. 216, 51 Pac. 329.

[b] **Variations of compass** in a given latitude is for the jury. *Harlan v. Brown*, 2 Gill (Md.) 475, 41 Am. Dec. 436.

20. *Howland v. Marine Ins. Co.*, 2 Cranch C. C. 474, 12 Fed. Cas. No. 6,798.

21. *Case v. Weber*, 2 Ind. 108.

22. **Ala.**—*Thomas v. State*, 103 Ala. 18, 16 So. 4; *Sylvester v. State*, 71 Ala. 17. **Ga.**—*Meriwether v. State*, 104 Ga. 500, 30 S. E. 806. **Mo.**—*State v. Belfiglio*, 232 Mo. 235, 134 S. W. 508; *Buffington v. Atlantic & P. R. Co.*, 64 Mo. 246, whether buffer of an engine and buffer of car would strike each other on a level track. **N. H.**—*Lambert v. Pembroke*, 66 N. H. 280, 23 Atl.

81, suitability of appliances for purposes for which used, as wooden planks supporting a sidewalk.

[a] **Whether stains were blood-stains**, or caused by chestnut timber. *Campbell v. State*, 23 Ala. 44.

[b] **Whether practical and necessary to cover a mining pit** when blasting. *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30.

[c] **Drainage capacity of culvert** in action for personal injuries caused by giving way of roadbed. *Stoher v. St. Louis, I. M. & S. Ry. Co.*, 91 Mo. 509, 4 S. W. 389.

[d] **Whether Light, Brilliant and Conspicuous.**—*Pennsylvania Co. v. Conlan*, 101 Ill. 93.

[e] **Whether Animals Diseased.** *Troy v. State*, 10 Tex. App. 319.

[f] **Whether defect in highway open and visible to ordinary observation.** *Galveston v. Hemmis*, 72 Tex. 558, 11 S. W. 29, 13 Am. St. Rep. 528.

[g] **Under what circumstances conception may occur** is a question of fact. *State v. Carpenter*, 124 Iowa 5, 98 N. W. 775.

Whether liquor intoxicating, see 14 STANDARD PROC. 444.

[h] **Whether Object Likely To Frighten Horses.**—*Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 396; *Dimock v. Suffield*, 30 Conn. 129, 134; *Chamberlain v. Enfield*, 43 N. H. 356. See the title "Highways, Streets and Bridges."

[i] **Obscenity of publication or picture** is generally a question for the jury. *United States v. Bennett*, 16 Blatchf. (U. S.) 338, 24 Fed. Cas. No. 14,371, 2 N. Y. Cr. R. 284, note; *United*

whether or not a thing is in good condition.²³ Whether things which by the law are defined and the characteristics or elements thereof specified, answer such legal requirements, is usually a question to be determined by the jury under appropriate instructions, being so-called mixed questions of law and fact.²⁴ Thus whether certain things are fixtures;²⁵ what are necessities for infants;²⁶ whether certain property is baggage;²⁷ the navigability of water,²⁸ are questions to

States *v. Clarke*, 38 Fed. 500; *People v. Muller*, 32 Hun (N. Y.) 209, 2 N. Y. Crim. 279. See, however, *United States v. Smith*, 45 Fed. 476; *McNair v. People*, 89 Ill. 441. See the title "**Obscenity**."

[i] Whether or not a watercourse exists has been said to be a question for the jury. *Vernum v. Wheeler*, 35 Hun (N. Y.) 53. See the title "**Waters and Watercourses**."

23. *Mass.*—*Harris v. Great Barrington*, 169 *Mass.* 271, 47 N. E. 881, whether a highway is reasonably safe and convenient for travelers, or is defective. *Mich.*—*Pomaski v. Grant*, 119 *Mich.* 675, 78 N. W. 891, whether street torn up. *Mo.*—*Young v. Webb City*, 150 *Mo.* 333, 51 S. W. 709, whether there was a hole in the sidewalk into which plaintiff claims she stepped and was thereby injured. *N. H.*—*Chamberlain v. Enfield*, 43 N. H. 356. *R. I.*—*McCloskey v. Moies*, 19 R. I. 297, 33 *Atl.* 225. *Tex.*—*Texas & P. Ry. Co. v. Robertson*, 82 *Tex.* 657, 17 S. W. 1041, 27 *Am. St. Rep.* 929, condition of a brakebeam.

[a] Whether Sidewalk Was Sufficient.—*Forker v. Sandy Lake*, 130 *Pa.* 123, 18 *Atl.* 609.

24. *U. S.*—*United States v. Williams*, 2 Fed. 61, 6 *Sawy.* 244. *Ala.*—*Jackson v. State*, 117 *Ala.* 155, 23 *So.* 47 (what is a public place); *Carwile v. State*, 35 *Ala.* 392. *Mo.*—*State v. Shipley*, 174 *Mo.* 512, 74 S. W. 612. *Neb.*—*Krehnay v. State*, 43 *Neb.* 337, 61 N. W. 628. *N. C.*—*State v. Jarrott*, 23 N. C. 76. *Tex.*—*Shelton v. State*, 30 *Tex.* 431. *Wash.*—*State v. Anderson*, 30 *Wash.* 14, 70 *Pac.* 104.

[a] What Is a Deadly Weapon. See 11 *STANDARD PROC.* 640, et seq.

25. *Ala.*—*Grubbs v. Hawes*, 173 *Ala.* 383, 56 *So.* 227; *De Lacy v. Tillman*, 83 *Ala.* 155, 3 *So.* 294. *Ark.*—*British & American Mtg. Co. v. Scott*, 70 *Ark.* 230, 65 S. W. 936. *Cal.*—*Miller v. Waddingham*, 91 *Cal.* 377, 27 *Pac.* 750, 13 *L. R. A.* 680. *D. C.*—*Towson v. Smith*, 13 *App. Cas.* 48. *Ind.*—*Ochs v. Tilton*,

181 *Ind.* 81, 103 N. E. 837. *Kan.*—*Traders' Bank v. First Nat. Bank*, 6 *Kan. App.* 400, 50 *Pac.* 1098. *Mass.*—See *Hopewell Mills v. Taunton Sav. Bank*, 150 *Mass.* 519, 23 N. E. 327, 15 *Am. St. Rep.* 235, 6 *L. R. A.* 249. *Mich.*—*Thomas v. Wagner*, 131 *Mich.* 601, 92 N. W. 106. *Neb.*—*President, etc. of Ins. Co. v. Buckstaff*, 92 N. W. 755; *Brownell v. Fuller*, 60 *Neb.* 553, 83 N. W. 669. *Pa.*—*Catasauqua Bank v. North*, 160 *Pa.* 303, 28 *Atl.* 694. *S. C.*—*Hurst v. J. D. Craig Furniture Co.*, 95 *S. C.* 221, 78 S. E. 960. *Va.*—*Tunis Lumb. Co. v. R. G. Dennis Lumb. Co.*, 97 *Va.* 682, 34 S. E. 613. *Wash.*—*Philadelphia Mtg. & Tr. Co. v. Miller*, 20 *Wash.* 607, 56 *Pac.* 382, 72 *Am. St. Rep.* 138, 44 *L. R. A.* 559. *Wis.*—*Multerer v. Dallendorfer*, 158 *Wis.* 268, 148 N. W. 1084. *Wyo.*—*Anderson v. Englehart*, 18 *Wyo.* 409, 108 *Pac.* 977.

26. *Conn.*—*International Text Book Co. v. Doran*, 80 *Conn.* 307, 68 *Atl.* 255. *Ga.*—*Geiger v. Worth*, 17 *Ga. App.* 361, 86 S. E. 938; *McLean v. Jackson*, 12 *Ga. App.* 51, 76 S. E. 792. *N. C.*—*Jordan v. Coffield*, 70 N. C. 110.

See 12 *STANDARD PROC.* 763.

27. *U. S.*—*Mauritz v. New York, L. E. & W. R. Co.*, 23 *Fed.* 765. *Ark.*—*Chicago, etc. R. Co. v. Whitten*, 90 *Ark.* 462, 119 S. W. 835, 21 *Ann. Cas.* 726. *Fla.*—*Brock v. Gale*, 14 *Fla.* 523, 14 *Am. Rep.* 356. *Ga.*—*Dibble v. Brown*, 12 *Ga.* 217, 56 *Am. Dec.* 460. *Kan.*—*Kansas City, etc. R. Co. v. Morrison*, 34 *Kan.* 502, 9 *Pac.* 225, 55 *Am. Rep.* 252. *N. Y.*—*Merrill v. Grinnell*, 30 *N. Y.* 594; *Grant v. Newton*, 1 *E. D. Smith* 95. *Ore.*—*Oakes v. Northern Pac. R. Co.*, 20 *Ore.* 392, 26 *Pac.* 230, 23 *Am. St. Rep.* 126, 12 *L. R. A.* 318. *S. C.*—*Vlasservitch v. Augusta & A. R. Co.*, 85 S. C. 291, 67 S. E. 306. *Tex.*—*Bonner v. Blum*, 25 *S. W.* 60; *Jones v. Priester*, 1 *Tex. App. Civ. Cas.*, §613.

28. *Ala.*—*Olive v. State*, 86 *Ala.* 88, 5 *So.* 653, 4 *L. R. A.* 33. See also *Rhodes v. Otis*, 33 *Ala.* 578, 73 *Am. Dec.* 439. *Ark.*—*Little Rock, etc. R. Co. v. Brooks*, 39 *Ark.* 403, 43 *Am.*

be determined by the jury under instructions from the court as to the elements necessary to determine the legal status of such matters.

C. **PHYSICAL CAPACITY AND CONDITION.**—Questions pertaining to the physical capacity,²⁹ or condition,³⁰ of a person are generally for the jury to determine. Thus whether a person was diseased,³¹ the age of a person;³² whether a person could see a certain object,³³ or hear a bell, whistle, or train³⁴ under the circumstances of the particular case; the fitness for a position;³⁵ and similar questions are for the jury.

D. **MENTAL CONDITION AND OPERATIONS.**—1. **Generally.**—A person's mental qualities, state, or capacity is usually to be determined by the jury under proper instructions from the court as to the proper tests to be applied by them in the particular case.³⁶

Rep. 277. **Me.**—*Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298. **N. Y.**—See *Morgan v. King*, 18 Barb. 277, 285. **Wis.** See *Eulrich v. Richter*, 37 Wis. 226, what is a "watercourse."

29. *State v. Johnson*, 66 S. C. 23, 44 S. E. 58, whether defendant was able to strike a fatal blow.

30. *Dorey v. Metropolitan Life Ins. Co.*, 172 Mass. 234, 51 N. E. 974, whether person in sound health at certain time.

[a] **Whether a person is a mulatto** is for jury. *State v. Scott*, 1 Bailey L. (S. C.) 270.

31. *Dorey v. Metropolitan Life Ins. Co.*, 172 Mass. 234, 51 N. E. 974.

32. *Lynch v. Metropolitan St. R. Co.*, 112 Mo. 420, 20 S. W. 642.

33. *Vance v. Ravenswood, S. & G. R. Co.*, 53 W. Va. 338, 44 S. E. 461.

[a] **Whether a Person Could See a Train.**—III.—*Chicago City Ry. Co. v. Van Vleck*, 143 Ill. 480, 32 N. E. 262; *Pennsylvania Coal Co. v. Conlan*, 101 Ill. 93. **Ia.**—*Selensky v. Chicago G. W. R. Co.*, 120 Iowa 113, 94 N. W. 272. **Ohio.**—*Cleveland, etc. R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633.

34. *Petty v. Hannibal & St. J. R. Co.*, 88 Mo. 306 (train); *McLean v. Erie R. Co.*, 69 N. J. L. 57, 54 Atl. 234, ability to hear bell or whistle.

35. *Moore v. Chicago, B. & Q. Ry. Co.*, 65 Iowa 505, 22 N. W. 650, 54 Am. Rep. 26.

36. **Ala.**—*Reynolds v. State*, 154 Ala. 14, 51 So. 894; *Porter v. State*, 135 Ala. 45, 33 So. 694; *Parsons v. State*, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; *McLean v. State*, 16 Ala. 672. **Cal.** *People v. Landman*, 103 Cal. 577, 37 Pac. 518. **Ga.**—*Central of Georgia R.*

Co. v. Harper, 124 Ga. 836, 53 S. E. 391 (sanity); *Gardner v. Lambach*, 47 Ga. 133. **Ind.**—*Guetic v. State*, 63 Ind. 278. **Ia.**—*Shuman v. Supreme Lodge, K. H.*, 110 Iowa 480, 81 N. W. 717. **Kan.**—*State v. Newman*, 57 Kan. 705, 47 Pac. 881. **Ky.**—*Henning v. Stevenson*, 118 Ky. 318, 80 S. W. 1135, 26 Ky. L. Rep. 159; *Dunaway v. Smoot*, 23 Ky. L. Rep. 2289, 67 S. W. 62, undue influence. **Mo.**—*State v. Hyde*, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191. **Mont.**—*State v. Keerl*, 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579. **N. H.**—*State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533. **N. Y.** *Matter of Miller's Will*, 72 App. Div. 615, 76 N. Y. Supp. 351; *Matter of Stapleton's Will*, 71 App. Div. 1, 75 N. Y. Supp. 657, 33 Civ. Proc. 25. **N. C.** *State v. Jones*, 126 N. C. 1099, 36 S. E. 38. **Ohio.**—See *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579. **Okla.** *Turner v. Territory*, 11 Okla. 660, 69 Pac. 804. **S. D.**—*State v. Shanley*, 20 S. D. 18, 104 N. W. 522. **Tex.**—*Angel v. State*, 45 Tex. Crim. 135, 74 S. W. 553. **W. Va.**—*State v. Young*, 50 W. Va. 96, 40 S. E. 334, 88 Am. St. Rep. 846.

See 19 STANDARD PROC. 766.

[a] **Testamentary Capacity of a Deceased.**—*Walker v. Walker's Exr.*, 34 Ala. 469; *Tobin v. Jenkins*, 29 Ark. 151.

[b] **Whether Deed Obtained by Fraud.**—**Me.**—*Hill v. Nash*, 41 Me. 585, 66 Am. Dec. 266, intellectual capacity of the grantor and the circumstances attending the conveyance are for the jury to consider. **Mich.**—*John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41, sanity. **Miss.**—*Kelly v. Miller*, 39 Miss. 17.

2. **Of Children.**—The question of a child's mental development and discretion is usually for the jury,³⁷ thus whether a child between the ages of seven and fourteen years has the requisite guilty knowledge and capacity to commit a crime is for the jury.³⁸

3. **Intent and Belief.**³⁹—Unless it depends on the construction of a written instrument,⁴⁰ the question of intent in civil cases is generally one of fact for the jury.⁴¹ So, too, what a party believed

[c] **Whether Reliance Placed on False Representations.**—*Banta v. Savage*, 12 Nev. 151; *Daly v. Bernstein*, 6 N. M. 380, 28 Pac. 764. And see 10 STANDARD PROC. 62.

[d] **Whether Mental Capacity Affected by Drunkenness.**—*State v. Carey*, 15 Wash. 549, 46 Pac. 1050.

[e] **Whether Mind Was Diverted.**—*Lichtenberger v. Meriden*, 100 Iowa 221, 69 N. W. 424.

[f] **Whether Passion Aroused.**—*Smith v. State*, 103 Ala. 4, 15 So. 843.

Premeditation and deliberation are questions of fact for the jury, see 11 STANDARD PROC. 644.

37. **D. C.**—*Moore v. Metropolitan R. Co.*, 2 Mackey 437. **Ill.**—*Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 308; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25. **Mo.**—*Lynch v. Metropolitan St. R. Co.*, 112 Mo. 420, 20 S. W. 642. **Tex.**—*Evansich v. Gulf, C. & S. F. R. Co.*, 57 Tex. 126, 44 Am. Rep. 586. **Utah.**—*Gesas v. Oregon Short Line R. Co.*, 33 Utah 156, 93 Pac. 274.

38. *Reynolds v. State*, 154 Ala. 14, 45 So. 894 (murder); *State v. Learnara*, 41 Vt. 585.

39. **Intent in criminal cases**, see *infra*, IV, P, 7.

40. *Lewis v. Harris*, 4 Metc. (Ky.) 353. See *infra*, IV, G, 1.

41. **U. S.**—See *Hinchman v. Parlin & O. Co.*, 74 Fed. 698, 21 C. C. A. 273 (*affirmed*, 81 Fed. 157, 26 C. C. A. 323); *Drainage Commission v. National Contracting Co.*, 136 Fed. 780; *Howe Machine Co. v. Claybourn*, 6 Fed. 438. **Ala.**—*Fitzpatrick v. Bridgman*, 133 Ala. 242, 31 So. 940; *Woolsey v. Jones*, 84 Ala. 88, 4 So. 190; *Law v. Law*, 83 Ala. 432, 3 So. 752; *De Lacy v. Tillman*, 83 Ala. 155, 3 So. 294. **Cal.**—*McFadden v. Mitchell*, 54 Cal. 628; *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135; *Wellington v. Sedgwick*, 12 Cal. 469; *Billings v. Billings*, 2 Cal. 107, 56 Am. Dec. 319. **Colo.**—*Williams v. Williams*, 20 Colo. 51, 37 Pac. 614. **Ga.**—*Hobbs v. Davis*, 50 Ga. 213. See

also *Southern R. Co. v. Horner*, 115 Ga. 381, 41 S. E. 649. **Ind.**—*Higham v. Vanosdol*, 101 Ind. 160. **Ia.**—*Press v. Duncan*, 100 Iowa 355, 69 N. W. 543; *Davidson v. Vorse*, 52 Iowa 384, 3 N. W. 477; *Menderschid v. Dubuque*, 29 Iowa 73, 4 Am. Rep. 196. **Kan.**—*Eagan v. Eagan*, 60 Kan. 697, 57 Pac. 942; *Traders' Bank v. First Nat. Bank*, 6 Kan. App. 400, 50 Pac. 1098. **Ky.**—*Loeke v. Lyon Medicine Co.*, 27 Ky. L. Rep. 1, 84 S. W. 307 (issue of mistake in reducing terms of contract to writing is for the jury on conflicting evidence); *Lytle v. Newell*, 24 Ky. L. Rep. 188, 68 S. W. 118. **Me.**—*Schwartz v. Kuhn*, 10 Me. 274, 25 Am. Dec. 239. **Mass.**—*Multer v. Knibbs*, 193 Mass. 556, 79 N. E. 762; *Homer v. Perkins*, 124 Mass. 431, 26 Am. Rep. 677; *Patch v. Washburn*, 16 Gray 82. **Mich.**—*Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Gardner v. Gorham*, 1 Doug. 507; *Jackson v. Dean*, 1 Doug. 519. **Minn.**—*Wileox v. Landberg*, 30 Minn. 93, 14 N. W. 365. **Miss.**—*Ladnier v. Ladnier*, 64 Miss. 368, 1 So. 492. **Mo.**—*Hartpence v. Rodgers*, 143 Mo. 623, 45 S. W. 650; *Leavell v. Leavell*, 114 Mo. App. 24, 89 S. W. 55; *Love v. Love*, 98 Mo. App. 562, 73 S. W. 255; *Modisett v. McPike*, 74 Mo. 636; *Cochran v. Missouri, K. & T. R. Co.*, 94 Mo. App. 469, 68 S. W. 367. **N. H.**—*First Nat. Bank v. Hunton*, 69 N. H. 509, 45 Atl. 351; *Fuller v. Brown*, 67 N. H. 188, 34 Atl. 463; *Kelsea v. Haines*, 41 N. H. 246. **N. J.**—*Cadwallader v. Hirschfield*, 62 N. J. L. 747, 42 Atl. 1075, 72 Am. St. Rep. 671; *Hendricks v. Mount*, 5 N. J. L. 738, 8 Am. Dec. 623. **N. Y.**—*Babeock v. Eckler*, 24 N. Y. 623; *Gansberg v. Sagemohl*, 67 App. Div. 554, 73 N. Y. Supp. 984; *Wilson v. Coulter*, 29 App. Div. 85, 51 N. Y. Supp. 804; *Smith v. Lyke*, 13 Hun 204; *Warner v. Miller*, 17 Abb. N. C. 221. **N. C.**—*Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; *Hardy v. Simpson*, 35 N. C. 132. **Ohio.**—*Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397. **Ore.**—*Oliver v. Ore-*

is for the jury to determine.⁴²

4. **Notice and Knowledge.**⁴³—Whether a party had notice or knowledge of certain facts is generally for the jury.⁴⁴ Whether notice

gon Sugar Co., 45 Ore. 77, 76 Pac. 1086. Pa.—Reading v. Gazzam, 200 Pa. 70, 49 Atl. 889; Renninger v. Spätz, 128 Pa. 524, 18 Atl. 405, 15 Am. St. Rep. 692; Seeger v. Pettit, 77 Pa. 437, 18 Am. Rep. 452; McKibbin v. Martin, 64 Pa. 352, 3 Am. Rep. 588; Allentown Bank v. Beck, 49 Pa. 394. S. C.—Harvey v. Doty, 50 S. C. 548, 27 S. E. 943; Hume, Small & Co. v. Providence Washington Ins. Co., 23 S. C. 190; Hamilton v. Greenwood, 1 Bay 173, 1 Am. Dec. 607. Tex.—Tennent, S. & E. Shoe Co. v. Partridge, 82 Tex. 329, 18 S. W. 310. Wash.—Durand v. Heney, 33 Wash. 38, 73 Pac. 775. Wis.—Hooser v. Hunt, 65 Wis. 71, 26 N. W. 442; Evans v. Rugee, 63 Wis. 31, 23 N. W. 24.

[a] **Question of illegal purpose of parties** to a contract, the evidence being conflicting, should be left to the jury. United States Consol. S. R. Co. v. Griffin & Skelley Co., 126 Fed. 364, 61 C. C. A. 334.

[b] **Where terms of contract are ambiguous**, the intention of the parties is a question for the jury. Summerour v. Pappa, 119 Ga. 1, 45 S. E. 713. See 11 STANDARD PROC. 1057.

[c] **Sense in which parties to a contract used the word "tailings"** held properly left to jury. Butte & B. Consol. Min. Co. v. Montana Ore. P. Co., 121 Fed. 524, 58 C. C. A. 634.

[d] **Whether grantor intended to deliver deed to grantee under the circumstances** is a question for the jury to determine. Fitzpatrick v. Bridgman, 133 Ala. 242, 31 So. 940.

[e] **Intent to dedicate property** is a fact to be determined by the jury. U. S.—Boston v. Leeraw, 17 How. 426, 15 L. ed. 118. Cal.—Harding v. Jasper, 14 Cal. 642. Md.—See Maenner v. Carroll, 46 Md. 193. Miss.—New Orleans, J. & G. N. R. Co. v. Moye, 39 Miss. 374. Wis.—Gardiner v. Tisdale, 2 Wis. 153, 60 Am. Dec. 407.

[f] **Intent of alleged donor as to making a gift** is a question of fact for the jury. Stroup v. Bridger, 124 Iowa 401, 100 N. W. 113.

[g] **Question of delivery of goods sold or passing of title**, where it depends on the intention of the parties, is to be determined by the jury. Clark

v. Shannon & Mott Co., 117 Iowa 645, 91 N. W. 923.

[h] **Malice a Question of Fact.** D. C.—Porter v. White, 5 Mackey 180. Ind.—Newell v. Downs, 8 Blackf. 523. Kan.—Malone v. Murphy, 2 Kan. 250. Ky.—Bunton v. Worley, 4 Bibb 38, 7 Am. Dec. 735. Me.—Cooper v. Waldron, 50 Me. 80. Md.—Smith v. Thompson, 55 Md. 5, 39 Am. Rep. 409; Turner v. Walker, 3 Gill & J. 377, 22 Am. Dec. 329. Mo.—Hyde v. McCabe, 100 Mo. 412, 13 S. W. 875. N. Y.—Laird v. Taylor, 66 Barb. 139. Utah.—Lowe v. Herald Co., 6 Utah 175, 21 Pac. 991.

Malice in particular proceedings, see specific titles; in criminal prosecutions, see *infra*, IV, P. 1. And see the title "Malicious Prosecution."

42. U. S.—Stewart v. Sonneborn, 98 U. S. 187, 25 L. ed. 116. Ill.—Anderson v. Friend, 71 Ill. 475; Chicago Forge & Bolt Co. v. Rose, 69 Ill. App. 123. Ia.—Warfield v. Clark, 118 Iowa 69, 91 N. W. 833. Mass.—Healey v. Aspinwall, 195 Mass. 453, 81 N. E. 256. N. Y.—Hall v. Suydam, 6 Barb. 83. N. D.—Kolka v. Jones, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615. Wis.—Billingsley v. Maas, 93 Wis. 176, 67 N. W. 49; Spear v. Hiles, 67 Wis. 350, 30 N. W. 506. Eng.—Hicks v. Faulkner, 8 Q. B. Div. 167.

See 19 STANDARD PROC. 108.

[a] **But where there is no conflict in the evidence** the belief of the defendant should not be left to the jury to determine. Krause v. Bishop, 18 S. D. 298, 100 N. W. 434; Blatchford v. Dod, 2 B. & Ad. 179, 22 E. C. L. 83, 9 L. J. K. B. O. S. 196, 109 Eng. Reprint 1110.

43. **Knowledge in criminal cases**, see *infra*, IV, P. 7.

44. Ala.—Smith v. Collins, 94 Ala. 394, 10 So. 334; Louisville & N. R. Co. v. Watson, 90 Ala. 68, 8 So. 249; Collins v. State, 33 Ala. 434, 73 Am. Dec. 426; Saltmarsh v. Bower & Co., 22 Ala. 221. Ark.—Overton v. Matthews, 35 Ark. 146, 37 Am. Rep. 9. D. C.—District of Columbia v. Payne, 13 App. Cas. 500; Washington & G. R. Co. v. Grant, 11 App. Cas. 107. Ga.—Mounce v. Byars, 11 Ga. 180. Ill.—Murray v. Beckwith, 48 Ill. 391. Ind.—Judd v.

is imputable from the face of commercial paper is generally a question of law for the judge to determine,⁴⁵ but whether a holder of com-

Gray, 156 Ind. 278, 59 N. E. 849; Ab-bitt v. Lake Erie & W. Ry. Co., 150 Ind. 498, 50 N. E. 729; Fulwider v. Ingels, 87 Ind. 414. **Ia.**—Farmers' & Merchants' State Bank v. Shaffer, 172 Iowa 173, 154 N. W. 485; Williams v. Barrett, 52 Iowa 637, 3 N. W. 690. **Kan.**—Davis v. Holton, 59 Kan. 707, 54 Pac. 1050; Kansas City v. Bradbury, 45 Kan. 381, 25 Pac. 889, 23 Am. St. Rep. 731. **Me.**—Colley v. Westbrook, 57 Me. 181, 2 Am. Rep. 30; Garcelon v. Hampden Fire Ins. Co., 50 Me. 580. **Md.**—Norfolk & W. R. Co. v. Hoover, 79 Md. 253, 29 Atl. 994, 47 Am. St. Rep. 392, 25 L. R. A. 710. **Mass.**—Freeman's Nat. Bank v. Savery, 127 Mass. 75, 34 Am. Rep. 345. **Mich.**—Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176, 9 N. W. 243, knowledge by master of incompetency of servant. **Mo.**—Gratiot v. Missouri Pac. R. Co., 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189 (knowledge of speed of train); State v. Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390; Owens v. Rector, 44 Mo. 389. **Neb.**—Central Nat. Bank v. Ericson, 92 Neb. 396, 138 N. W. 563. **N. Y.**—Duffy v. People, 26 N. Y. 588; Clark v. Dearborn, 6 Duer 309; Schutt v. Large, 6 Barb. 373. **Ohio.**—Hadley v. Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454. **Ore.**—Farmers' State Bank v. West, 77 Ore. 602, 152 Pac. 238. **Pa.**—Goff v. Philadelphia, 214 Pa. 172, 63 Atl. 431. **S. C.**—Tart v. Crawford, 1 McCord 479. **S. D.**—Rapp v. Giddings, 4 S. D. 492, 57 N. W. 237. **Tex.**—Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; La Brie v. Cartwright, 55 Tex. Civ. App. 144, 118 S. W. 785; El Paso & N. W. Ry. Co. v. McComus, 36 Tex. Civ. App. 170, 81 S. W. 760. **Va.**—Dickinson v. Dickinson & Co., 25 Gratt. (66 Va.) 321. **Wis.**—Westberg v. Chicago Lumb. & Coal Co., 117 Wis. 589, 94 N. W. 572; Warner v. Benjamin, 89 Wis. 290, 62 N. W. 179.

[a] Whether notice of dishonor of negotiable paper was received is generally question for jury. **Ala.**—Stanley v. Bank of Mobile, 23 Ala. 652. **Ill.**—Kewanee Nat. Bank v. Ladd, 175 Ill. App. 151. **Mass.**—Marston v. Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43. **Pa.**—Stewart v. Allison, 6 Serg. & R. 324, 9 Am. Dec. 433.

[b] Where facts are uncontroverted, question of notice is for court. **Ia.**—Arnd v. Aylesworth, 145 Iowa 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638. **N. Y.**—Birdsall v. Russell, 29 N. Y. 220. **N. C.**—Smathers & Co. v. Toxaway Hotel Co., 168 N. C. 69, 84 S. E. 47.

[c] Whether due inquiry was made by a party under the circumstances of the case is a question for the jury. Nute v. Nute, 41 N. H. 60.

[d] Sufficiency of facts to put reasonable person upon inquiry is for the jury. Park v. Buxton, 10 Ga. App. 356, 73 S. E. 557; Hume v. Ware, 87 Tex. 380, 28 S. W. 935.

[e] Constructive Notice.—Whether the possession of a person with an unrecorded deed is of such a character as to amount to constructive notice is a question of fact. Helm v. Kaddatz, 107 Ill. App. 413; Ponton v. Ballard, 24 Tex. 619.

[f] Whether city had notice of defect in street, either actual or constructive, is for the jury to determine under instructions of the court. **Ga.**—Enright v. Atlanta, 78 Ga. 288. **Ill.**—Decatur v. Besten, 169 Ill. 340, 48 N. E. 186; Joliet v. Walker, 7 Ill. App. 267. **Ind.**—Aurora v. Bitner, 100 Ind. 396; Evansville v. Senhenn, 26 Ind. App. 362, 59 N. E. 863. **Ia.**—Cutter v. Des Moines, 137 Iowa 643, 113 N. W. 1081; Garnetz v. Carroll, 136 Iowa 569, 114 N. W. 57; Smith v. Sioux City, 119 Iowa 50, 93 N. W. 81. **Kan.**—Holitz v. Kansas City, 68 Kan. 157, 74 Pac. 594. **Mass.**—Welsh v. Amesbury, 170 Mass. 437, 49 N. E. 735. **N. Y.**—Duncan v. Buffalo, 50 Hun 600, 18 N. Y. St. 841, 2 N. Y. Supp. 503. **N. C.**—Fitzgerald v. Concord, 140 N. C. 110, 52 S. E. 309. **S. D.**—Fritz v. Watertown, 21 S. D. 280, 111 N. W. 630. **Tex.**—Klein v. Dallas, 71 Tex. 280, 8 S. W. 90. See the title "Highways, Streets and Bridges."

45. **U. S.**—Pittsburg Bank v. Neal, 22 How. 96, 16 L. ed. 323; Goodman v. Simonds, 20 How. 343, 15 L. ed. 934; Fowler v. Brentley, 14 Pet. 318, 10 L. ed. 473; Andrews v. Pond, 13 Pet. 65, 10 L. ed. 61. **Ia.**—See Campbell v. Rusch, 9 Iowa 337. **Mass.**—Freeman's Nat. Bank v. Savery, 127 Mass. 75, 34 Am. Rep. 345.

mercial paper had notice of infirmities from matters not appearing on the face of the paper is for the jury.⁴⁶

5. Ratification.—Whether an act has been ratified is generally to be determined by the jury.⁴⁷

6. Good Faith.—The question of bona fides and good faith is usually to be determined by the jury under the instructions of the court.⁴⁸ So whether the plaintiff in an action on a negotiable instrument is a bona fide holder is for the jury,⁴⁹ unless but one in-

46. Ia.—Farmers' etc. State Bank *v.* Shaffer, 172 Iowa 173, 154 N. W. 485. **Mass.**—Freeman's Nat. Bank *v.* Savery, 127 Mass. 75, 34 Am. Rep. 345. **Minn.**—Mendenhall *v.* Ulrich, 94 Minn. 100, 101 N. W. 1057. **Mo.**—Wright Investment Co. *v.* Fillingham, 85 Mo. App. 534. **N. Y.**—Western Nat. Bank *v.* Flannagan, 14 Misc. 317, 35 N. Y. Supp. 848, 70 N. Y. St. 324. **Pa.**—Charnley *v.* Dulles, 8 Watts & S. 353. **S. D.**—Landauer *v.* Sioux Falls Imp. Co., 10 S. D. 205, 72 N. W. 467.

See *infra*, IV, D, 6.

47. U. S.—Edison Phonograph Works *v.* Goodwin Mfg. Co., 191 Fed. 560, 112 C. C. A. 170. **Ga.**—Dixon *v.* Bristol Sav. Bank, 102 Ga. 461, 31 S. E. 96, 66 Am. St. Rep. 193, whether depositor has ratified an unauthorized delivery of a deed by the depository to the grantee. **Ill.**—Chicago Edison Co. *v.* Fay, 164 Ill. 323, 45 N. E. 534. **Kan.**—Hartwell *v.* Equitable Mfg. Co., 78 Kan. 259, 97 Pac. 432. **Mass.**—Silbee *v.* Webber, 171 Mass. 378, 50 N. E. 555 (ratification of act done under duress); Fogg *v.* Boston & L. R. Corp., 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 533. **Mo.**—Butts *v.* Ajax-Grieb Rubber Co., 169 Mo. App. 657, 155 S. W. 837. **Mont.**—Carlson *v.* Stone-Odean Wells Co., 40 Mont. 434, 107 Pac. 419. **N. Y.**—Lilienthal *v.* German American Brewing Co., 121 App. Div. 628, 106 N. Y. Supp. 402. **Pa.**—Farmers' & Mechanics' Bank *v.* Third Nat. Bank, 165 Pa. 500, 30 Atl. 1008. **Tex.**—Fifth Nat. Bank *v.* Iron City Nat. Bank, 92 Tex. 436, 49 S. W. 368. **W. Va.**—Uniontown Grocery Co. *v.* Dawson, 68 W. Va. 332, 69 S. E. 845, Ann. Cas. 1912B, 148.

Ratification by principal of act of agent, see the title "Principal and Agent."

48. U. S.—Wright *v.* Mattison, 18 How. 50, 15 L. ed. 280. **Ala.**—Barnes *v.* State, 103 Ala. 44, 15 So. 901. **Cal.**—People *v.* Eastman, 77 Cal. 171, 19 Pac. 266. **Ga.**—Broughton *v.* Foster, 69 Ga. 712. **Ill.**—Anthony *v.* Wheeler, 130 Ill.

128, 22 N. E. 494, 17 Am. St. Rep. 281. **Ky.**—Chiles *v.* Conley's Heirs, 2 Dana 21. **Mich.**—Thomas *v.* Wagner, 131 Mich. 601, 92 N. W. 106; People *v.* Hillhouse, 80 Mich. 580, 45 N. W. 484. **N. Y.**—Perth Amboy Mut. Loan H. & B. Assn. *v.* Chapman, 80 App. Div. 556, 81 N. Y. Supp. 38. **N. C.**—Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468. **Pa.**—Duff *v.* Patterson, 159 Pa. 312, 28 Atl. 250. **S. C.**—Templeton *v.* Lowry, 22 S. C. 389. **S. D.**—Meadows *v.* Osterkamp, 13 S. D. 571, 83 N. W. 624. **Tex.**—Tram Lumber Co. *v.* Hancock, 70 Tex. 312, 7 S. W. 724; Downs *v.* Stevenson, 56 Tex. Civ. App. 211, 119 S. W. 315; Stipe *v.* Shirley, 33 Tex. Civ. App. 223, 76 S. W. 307; Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888.

49. U. S.—Crosley *v.* Reynolds, 196 Fed. 640, 116 C. C. A. 314. **Ark.**—Hogg *v.* Thurman, 90 Ark. 93, 117 S. W. 1070, 17 Ann. Cas. 383. **Ill.**—Taft *v.* Myerseough, 197 Ill. 600, 64 N. E. 711. **Ia.**—Shaulis *v.* Buxton, 109 Iowa 355, 80 N. W. 397; Richardson *v.* Monroe, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301; Merchants' Nat. Bank *v.* McNulty, 36 Iowa 229. **Md.**—Williams *v.* Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477; Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620. **Mich.**—Neyens *v.* Worthington, 150 Mich. 580, 114 N. W. 404, 18 L. R. A. (N. S.) 142; Burroughs *v.* Ploof, 73 Mich. 607, 41 N. W. 704. **Minn.**—Mendenhall *v.* Ulrich, 94 Minn. 100, 101 N. W. 1057; Drew *v.* Wheelihan, 75 Minn. 68, 77 N. W. 558. **Mo.**—First State Bank *v.* Hammond, 104 Mo. App. 403, 79 S. W. 493; Hahn *v.* Bradley, 92 Mo. App. 399. **Mont.**—Harrington *v.* Butte & B. Min. Co., 27 Mont. 1, 69 Pac. 102. **Neb.**—Padget *v.* O'Connor, 71 Neb. 314, 98 N. W. 870; State Bank *v.* Wilkie, 35 Neb. 579, 53 N. W. 603. **N. H.**—Haddock *v.* Young, 72 N. H. 416, 57 Atl. 236. **N. Y.**—Joy *v.* Diefendorf, 130 N. Y. 6, 28 N. E. 602, 27 Am. St. Rep. 484; Vosburgh

ference can be reasonably drawn from the evidence.⁵⁰

7. Insanity.—Insanity is generally a question for the jury to determine, whether in a civil,⁵¹ or criminal,⁵² proceeding.

8. Election.—Whether an election has been made is a question for the jury.⁵³

E. OWNERSHIP AND TITLE.—Unless it depends on the construction of writings,⁵⁴ the question of the ownership of real property,⁵⁵ personality,⁵⁶ or choses in action,⁵⁷ is for the jury where more than one

v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; *Duncan v. Gasche*, 8 Bosw. 243, 21 How. Pr. 344; *Pool v. Watson*, 18 Jones & S. 53; *Bailey v. Griswold*, 4 Jones & S. 68. **N. C.**—Fidelity Trust Co. *v. Whitehead*, 165 N. C. 74, 80 S. E. 1065, Ann. Cas. 1915D, 200. **Ore.**—*Owens v. Snell*, *Heitshu & Woodard Co.*, 29 Ore. 483, 44 Pac. 827. **Pa.**—*Lancaster County Nat. Bank v. Garber*, 178 Pa. 91, 35 Atl. 848; *National Bank of Bedford v. Stever*, 169 Pa. 574, 32 Atl. 603. **S. D.**—*Bank of Spearfish v. Graham*, 16 S. D. 49, 91 N. W. 340; *Dunn v. National Bank*, 11 S. D. 305, 77 N. W. 111. **Tex.**—*Masterson v. Mansfield*, 25 Tex. Civ. App. 262, 61 S. W. 505. **Vt.**—*Gould v. Stevens*, 43 Vt. 125, 5 Am. Rep. 265; *Benier v. Paquin*, 40 Vt. 199; *Roth & Co. v. Colvin, Allen & Co.*, 32 Vt. 125. **Wash.**—*Barry v. Danielson*, 78 Wash. 453, 139 Pac. 223. **Wis.**—*Thompson v. Brennan*, 104 Wis. 564, 80 N. W. 947.

See *supra*, IV, D, 4.

50. Ala.—*Scott v. Taul*, 115 Ala. 529, 22 So. 447. **Fla.**—*Berryhill-Cromartie Co. v. Manitowoc Shipbuilding & Dry Dock Co.*, 66 Fla. 170, 63 So. 729. **Kan.**—*Lowe v. Higginbotham*, 13 Pac. 790, *affirmed* on rehearing, 36 Kan. 765, 15 Pac. 151. **Mich.**—*Drovers' Nat. Bank v. Potvin*, 116 Mich. 474, 74 N. W. 724. **N. Y.**—*Holbrook v. Wilson*, 4 Bosw. 64. **S. C.**—*Citizens' Trust & Savings Bank v. Stackhouse*, 91 S. C. 455, 74 S. E. 977, 40 L. R. A. (N. S.) 454. **Wash.**—*McLaughlin v. Dopps*, 84 Wash. 442, 147 Pac. 6; *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102.

51. Ala.—*Burney v. Torrey*, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33. **Ark.**—*Tobin v. Jenkins*, 29 Ark. 151. **Conn.**—*Dunham's Appeal*, 27 Conn. 192. **Ga.**—*Gardner v. Lambaek*, 47 Ga. 133. **Ill.**—*Myatt v. Walker*, 44 Ill. 485. **Ind.**—*Koile v. Ellis*, 16 Ind. 301. **Ia.**—*Vannest v. Murphy*, 135 Iowa 123, 112 N. W. 236; *Shuman v. Supreme Lodge*,

K. H., 110 Iowa 480, 81 N. W. 717. **Me.**—*Hill v. Nash*, 41 Me. 585, 66 Am. Dec. 266. **Mass.**—*Wright v. Wright*, 139 Mass. 177, 29 N. E. 380. **N. H.**—*Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592. **Tenn.**—*Nashville, C. & St. L. Ry. Co. v. Brundige*, 114 Tenn. 31, 84 S. W. 805. **Tex.**—*Rogers v. Armstrong Co. (Tex. Civ. App.)*, 30 S. W. 848. **Wis.**—See *Boorman v. Northwestern Mut. Relief Assn.*, 90 Wis. 144, 62 N. W. 924.

52. In criminal cases generally, see 13 STANDARD PROC. 625.

In homicide cases, see 11 STANDARD PROC. 650.

53. Zimmerman v. Lebo, 151 Pa. 345, 24 Atl. 1082, 17 L. R. A. 536; *Mayo v. Tudor's Heirs*, 74 Tex. 471, 12 S. W. 117, whether election to take under will has taken place.

54. Hunt v. Missouri Pac. R. Co., 75 Mo. 252; *Connellogue v. English*, 8 Watts & S. (Pa.) 11. See *infra*, IV, G.

55. People v. Scott, 22 Cal. App. 54, 133 Pac. 496, prosecution for selling land twice.

56. Ala.—*Smart v. Hodges*, 105 Ala. 634, 17 So. 22; *Corbett v. State*, 31 Ala. 329. **Cal.**—*Stanton v. French*, 91 Cal. 274; 27 Pac. 657, 25 Am. St. Rep. 174 (ownership of property claimed to be exempt); *People v. Treadwell*, 69 Cal. 226, 236, 10 Pac. 502 (ownership of money embezzled); *Smith v. Arnold*, 56 Cal. 640. **Ill.**—*Charles v. Lasher*, 20 Ill. App. 36. **Ia.**—*Stephens v. Williams*, 46 Iowa 540. **Mich.**—*Van Baalen v. Dean*, 27 Mich. 104. **Minn.**—*Honeywell v. Norby*, 61 Minn. 188, 63 N. W. 488. **Mo.**—*Calderwood v. Robertson*, 112 Mo. App. 103, 86 S. W. 879; *Anchor Milling Co. v. Walsh*, 24 Mo. App. 97. **S. D.**—*Peet v. Dakota, F. & M. Ins. Co.*, 1 S. D. 462, 47 N. W. 532.

In replevin actions, see the title "Replevin."

57. Crosley v. Reynolds, 196 Fed. 640, 116 C. C. A. 314, note.

[a] **Whether One Is Owner of Ne-**

inference may be drawn from the evidence; otherwise it should not be submitted to the jury.⁵⁸ However, what constitutes ownership is a question for the court.⁵⁹

F. POSSESSION AND OCCUPANCY.—While what constitutes possession or occupancy is a question of law,⁶⁰ whether property was unoccupied,⁶¹ or who was in possession of real,⁶² or personal,⁶³ property is generally for the jury to determine under proper instructions from the court.

Whether possession was adverse is to be determined by the jury under the instructions of the court.⁶⁴

G. MATTERS RELATING TO WRITTEN INSTRUMENTS.⁶⁵ — **1. Construction of.**—The construction of writings is generally⁶⁶ for the

gotiable Paper.—Mich.—Reed *v.* McCready, 170 Mich. 532, 136 N. W. 488; Big Rapids Nat. Bank *v.* Peters, 120 Mich. 518, 79 N. W. 891. **N. Y.**—Zimmer *v.* Chew, 34 App. Div. 504, 54 N. Y. Supp. 685. **Tex.**—Jones *v.* Gainesville First Nat. Bank (Tex. Civ. App.), 160 S. W. 126. **Wis.**—Davy *v.* Kelley, 66 Wis. 452, 29 N. W. 232.

58. Fisher *v.* Muecke, 82 Iowa 547, 48 N. W. 936.

59. Ware *v.* Souders, 120 Ill. App. 209. See also Charles *v.* Lasher, 20 Ill. App. 36.

60. Moody *v.* Amazon Insurance Co., 52 Ohio St. 12, 38 N. E. 1011, 49 Am. St. Rep. 699, 26 L. R. A. 313. "What constitutes vacancy or nonoccupancy of a building is a question of law; but whether a building is vacant or unoccupied, or not; within the meaning of the law, is a question of fact for the jury."

61. Bass *v.* Dinwiddie, Cooke 130, 2 Fed. Cas. No. 1,092; Moody *v.* Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 49 Am. St. Rep. 699, 26 L. R. A. 313.

62. **Ala.**—Lawrence *v.* Alabama State Land Co., 144 Ala. 524, 41 So. 612; Herbert *v.* Hanrick, 16 Ala. 581. **Cal.**—Hicks *v.* Davis, 4 Cal. 67. **Conn.**—Gage *v.* Smith, 27 Conn. 70; St. Peter's Church *v.* Beach, 26 Conn. 355. **Ga.**—Baxley *v.* Baxley, 117 Ga. 60, 43 S. E. 436. **La.**—Succession of Zebriska, 119 La. 1076, 44 So. 893. **Md.**—Armstrong *v.* Risteau's Lessee, 5 Md. 256, 59 Am. Dec. 115. **Mich.**—Maxwell *v.* Paine, 53 Mich. 30, 18 N. W. 546; Hendricks *v.* Rasson, 42 Mich. 104, 3 N. W. 281; Twogood *v.* Hoyt, 42 Mich. 609, 4 N. W. 445. **Miss.**—Ford *v.* Wilson, 35 Miss. 490, 72 Am. Dec. 137. **Mo.**—Gordon *v.* Park, 219 Mo. 600, 117 S. W. 1163. **N. M.**—Johnston *v.* Albuquerque,

12 N. M. 20, 72 Pac. 9. **N. Y.**—Martin *v.* Rector, 101 N. Y. 77, 4 N. E. 183; Lucas *v.* Johnson, 8 Barb. 244. **Ore.**—Altschul *v.* O'Neill, 35 Ore. 202, 58 Pac. 95. **Pa.**—Rung *v.* Shoneberger, 2 Watts 23, 26 Am. Dec. 95. **S. C.**—Bryce *v.* Cayce, 62 S. C. 546, 40 S. E. 948. **Wis.**—Illinois Steel Co. *v.* Budzisz, 119 Wis. 580, 97 N. W. 166.

[a] Whether one holds possession by consent of plaintiff, for jury. Jones *v.* Porter, 3 Pen. & W. (Pa.) 132.

As to adverse possession, see 1 STANDARD PROC. 635, et seq.

63. **Mass.**—Odd Fellows' Hall Assn. *v.* McAllister, 153 Mass. 292, 26 N. E. 862, 11 L. R. A. 172. **Mich.**—Clute *v.* Everhart, 137 Mich. 5, 100 N. W. 124. **N. Y.**—Merritt *v.* Lyon, 3 Barb. 110.

In replevin cases, see the title "Replevin."

64. See 1 STANDARD PROC. 632, et seq.

65. Questions of law and fact pertaining to contracts generally, see 11 STANDARD PROC. 1054, et seq.

66. **Fla.**—Upchurch *v.* Mizell, 50 Fla. 456, 40 So. 29. **Ill.**—Recke *v.* Sayers, 106 Ill. App. 283. **Ind.**—Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. 811; Louthain *v.* Miller, 85 Ind. 161; Nipp *v.* Diskey, 81 Ind. 214, 42 Am. Rep. 124; Leviston *v.* Junction R. Co., 7 Ind. 597. **Kan.**—Dobbs *v.* Campbell, 66 Kan. 805, 72 Pac. 273; Akin *v.* Davis, 11 Kan. 580. **Mass.**—Dunnell *v.* Fiske, 11 Mete. 551. **Mich.**—Slater *v.* United States Health & Accident Ins. Co., 133 Mich. 347, 95 N. W. 89. **Mo.**—Brewer *v.* White, 110 Mo. App. 571, 85 S. W. 641. **N. J.**—Boulevard Globe & Lamp Co. *v.* Kern Incandescent Gaslight Co., 67 N. J. L. 279, 51 Atl. 704. **Pa.**—Ryon *v.* Starr, 214 Pa. 310, 63 Atl. 701; Gill *v.* Fisher & O'Rourke, 6 Pa.

court, and the court should inform the jury of their legal meaning and effect.⁶⁷

2. Execution and Genuineness.—Unless depending on the construction of written instruments or evidence from which but one inference may be drawn, the execution of a contract is for the jury to determine.⁶⁸ The genuineness of a written instrument sued on is for the jury on conflicting evidence.⁶⁹

3. Delivery.—What constitutes a delivery of an instrument is a question of law,⁷⁰ while whether a delivery was made under the circumstances of a particular case will be for the jury where the facts are disputed.⁷¹

4. Consideration.—The questions whether there was any consideration for an agreement,⁷² whether the consideration was an illegal one,⁷³ or whether there has been a failure of consideration,⁷⁴

Super. 605, 42 Wkly. Notes Cas. 67. **S. C.**—*Riordan v. Doty*, 56 S. C. 111, 34 S. E. 68. **Tex.**—*Ellis v. Littlefield*, 41 Tex. Civ. App. 318, 93 S. W. 171.

[a] **May Be Mixed Question of Law and Fact.**—While the construction of a written instrument is the exclusive province of the court, the description of land conveyed, its limits and contents, are frequently mixed questions of law and fact, and where from the generality of the terms used in a deed or from uncertainty of description, a doubt is raised as to the boundaries or location or limits of land sold, evidence aliunde may be resorted to for the purpose of aiding a jury to determine what land was intended to be included in the grant. *Little v. Greek*, 233 Pa. 534, 82 Atl. 955.

67. Ind.—*Nipp v. Diskey*, 81 Ind. 214, 42 Am. Rep. 124. **Md.**—*Aetna Indem. Co. v. Waters*, 110 Md. 673, 73 Atl. 712. **Mass.**—*Eaton v. Smith*, 20 Pick. 150. **N. J.**—*Rogers v. Colt*, 21 N. J. L. 18. **Pa.**—*Codding v. Wood*, 112 Pa. 371, 3 Atl. 455.

68. Ill.—*Telluride Power Trans. Co. v. Crane Co.*, 103 Ill. App. 647. **Mich.** *International Text-Book Co. v. Roberts*, 168 Mich. 501, 134 N. W. 460. **Mo.** See *International Text-Book Co. v. Yount*, 129 Mo. App. 247, 108 S. W. 124, is a question of fact. **Neb.**—*Lipps v. Panko*, 93 Neb. 469, 140 N. W. 761. **Wis.**—*First Nat. Bank of Antigo v. Wunderlich*, 145 Wis. 193, 130 N. W. 98.

69. Ala.—*Corbett v. State*, 31 Ala. 329. **Ga.**—*Dupree v. Price*, 37 Ga. 235, note. **Mass.**—*Sears v. Moore*, 171 Mass. 514, 50 N. E. 1027.

70. See cases cited in next note.

71. Ill.—*Telluride Power Trans. Co. v. Crane Co.*, 103 Ill. App. 647. **Miss.** *Young v. Power*, 41 Miss. 197. **Mich.** *Jaquith v. Hudson*, 5 Mich. 123. **N. Y.** *Hickok v. Bunting*, 67 App. Div. 560, 73 N. Y. Supp. 967; *Scott v. Pentz*, 5 Sandf. 572.

72. Ill.—*Knowles v. Knowles*, 128 Ill. 110, 21 N. E. 196. **Ia.**—*State Bank of Indiana v. Mentzer*, 125 Iowa 101, 100 N. W. 69. **Kan.**—*Calvin v. Sterrit*, 41 Kan. 215, 21 Pac. 103; *Bank of Horton v. Brooks*, 10 Kan. App. 576, 62 Pac. 675. **Mass.**—*Mercantile Guaranty Co. v. Hilton*, 191 Mass. 141, 77 N. E. 312; *Chemical Electric L. & P. Co. v. Howard*, 148 Mass. 352, 20 N. E. 92, 2 L. R. A. 168; *Morris v. Bowman*, 12 Gray 467. **N. Y.**—*Kramer v. Kramer*, 90 App. Div. 176, 86 N. Y. Supp. 129 (*reversed*), 181 N. Y. 477, 74 N. E. 474; *Hickok v. Bunting*, 67 App. Div. 560, 73 N. Y. Supp. 967. **Ore.** *First Nat. Bank v. Cecil*, 23 Ore. 58, 31 Pac. 61, 32 Pac. 393. **Pa.**—*Heffner v. Wenrich*, 32 Pa. 423; *Swain v. Ettling*, 32 Pa. 486; *Kirkpatrick v. Muirhead*, 16 Pa. 117.

[a] **Whether there was a valuable consideration for jury.** *Pelton v. Spider Lake S. & L. Co.*, 117 Wis. 569, 94 N. W. 293, 98 Am. St. Rep. 946.

73. Ala.—*Thedford v. McClintock*, 47 Ala. 647. **Ia.**—*State Bank of Indiana v. Mentzer*, 125 Iowa 101, 100 N. W. 69. **Mass.**—*Baker v. Callender*, 118 Mass. 390 (whether consideration was illegal sale of intoxicating liquor); *Taylor v. Jaques*, 106 Mass. 291, whether note given to compound felony. **Neb.** *Kittle v. De Lamater*, 3 Neb. 325.

74. Ill.—*Murray v. Beckwith*, 48 Ill. 391. **Ia.**—*Richardson v. Monroe*, 85 Iowa 359, 52 N. W. 339, 39 Am. St.

are for the jury under appropriate instructions from the court, where there is conflict in the evidence or more than one conclusion may be drawn therefrom.

H. AS TO THE PLEADINGS.⁷⁵—The construction of the pleadings lies in the province of the court,⁷⁶ and it is for the court to determine the sufficiency of the pleadings;⁷⁷ what are material allegations,⁷⁸ what allegations are admitted or denied,⁷⁹ and to determine the issues raised,⁸⁰ as well as other questions relating to the pleadings.⁸¹

I. FOREIGN LAWS.—While the existence of a foreign law is generally a question of fact,⁸² some authorities hold that the foreign law

Rep. 301. **Me.**—Herbert v. Ford, 29 Me. 546.

75. **Variance as a question of law or fact**, see the title "**Variance and Failure of Proof.**"

76. **Ala.**—Birmingham R., etc. Co. v. Hayes, 153 Ala. 178, 44 So. 1032; Alexander v. Wheeler, 69 Ala. 332. **Conn.** Fenton v. Mansfield, 82 Conn. 343, 73 Atl. 770. **Ia.**—Pharo v. Johnson, 15 Iowa 560. **Ky.**—Hall & Co. v. Renfro, 3 Mete. 51.

77. **Ky.**—Becker v. Crow, 7 Bush 198; Yeiser v. Brown, 6 Bush 190. **Md.** Burgess v. Lloyd, 7 Md. 178. **Mich.** Sherwood v. Chicago & W. M. Ry. Co., 88 Mich. 108, 50 N. W. 101. **R. I.** Cimini v. Tambarano, 36 R. I. 122, 89 Atl. 295.

78. **Ill.**—Chicago Terminal Transfer R. Co. v. Schmelling, 197 Ill. 619, 64 N. E. 714; St. Clair County School Trustees v. Yoch, 133 Ill. App. 32; Lodge v. Hampton, 116 Ill. App. 414; Davenport, R. I. & N. W. Ry. Co. v. De Yaeger, 112 Ill. App. 537; Davies v. Cobb, 11 Ill. App. 587. **Ia.**—Otto-way v. Milroy, 144 Iowa 631, 123 N. W. 467; Williams v. Iowa Cent. R. Co., 121 Iowa 270, 96 N. W. 774. **Ky.**—Allard v. Smith, 2 Mete. 297; Tipton v. Triplett, 1 Mete. 570; Becker v. Crow, 7 Bush 198. **W. Va.**—Dicken v. Liverpool Salt & Coal Co., 41 W. Va. 511, 23 S. E. 582.

79. Potter v. Wooster, 10 Iowa 334; Fannon v. Robinson, 10 Iowa 272; Steil v. Ackli, 15 Mo. 289.

80. Erb v. German-American Ins. Co., 112 Iowa 357, 83 N. W. 1053; Gabrielson v. Hague Box & Lumber Co., 55 Wash. 342, 104 Pac. 635, 133 Am. St. Rep. 1032.

81. Beebe v. Stutsman, 5 Iowa 271 (nature of action or what plaintiff seeks to recover); Oliver v. Chapman, 15 Tex. 400, should not leave to jury to decide what facts are not distinctly

averred and charged in the petition.

[a] **Whether Plea Has Been Abandoned.**—Moore v. Stuart, 215 Mass. 456, 102 N. E. 658.

[b] **Court may instruct jury as to meaning of words in the pleadings.** Smith v. Plant, 216 Mass. 91, 103 N. E. 58.

[c] **Where Burden of Proof Rests.** McClintock v. McClure, 171 Ky. 714, 188 S. W. 867.

82. **U. S.**—Mexican Cent. Ry. Co. v. Chantry, 136 Fed. 316, 69 C. C. A. 454. **Ill.**—Mexican Cent. Ry. Co. v. Gehr, 66 Ill. App. 173. **Md.**—De Sobry v. De Laistre, 2 Har. & J. 191, 3 Am. Dec. 535; Thrasher v. Everhart, 3 Gill & J. 145. **Mass.**—Cook v. Bartlett, 179 Mass. 576, 61 N. E. 266; Hancock Nat. Bank v. Ellis, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232, 42 L. R. A. 396; Ufford v. Spaulding, 156 Mass. 65, 30 N. E. 360; Murphy v. Collins, 121 Mass. 6; Haven v. Foster, 9 Pick. 112, 19 Am. Dec. 353; Holman v. King, 7 Mete. 384. **Mo.**—Charlotte v. Chouteau, 33 Mo. 194. **N. Y.**—Bank of China v. Morse, 44 App. Div. 435, 61 N. Y. Supp. 268, *affirmed*, 168 N. Y. 458, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L. R. A. 139. **N. C.**—Hancock v. Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403. **Ohio.** Ingraham v. Hart, 11 Ohio 255. **Vt.** Morrisette v. Canadian Pac. R. Co., 74 Vt. 232, 52 Atl. 520.

[a] **Story on Conflict of Laws**, §638, states the rule: "All matters of law are properly referable to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversy before them. The court are therefore to decide what is the proper evidence of the laws of a foreign country; and, when evidence is given of those laws, the court are to judge of their ap-

is to be determined by the court,⁸³ others that it is a question for the jury to determine the same as any other fact.⁸⁴ The question of the construction and effect of foreign laws shown by statutes or judicial decisions is generally for the court.⁸⁵

J. NECESSITY FOR ACT.—Whether or not a particular act was necessary under the circumstances is generally to be determined by the jury.⁸⁶

plicability, when proved, to the case in hand." But when the evidence consists of parol testimony of experts as to the existence or prevailing construction of a statute; or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. But when the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone.

83. Ill.—*Christiansen v. William Graver Tank Works*, 223 Ill. 142, 79 N. E. 97, 7 Ann. Cas. 69. **Kan.**—*Hutchings, Sealy & Co. v. Missouri, K. & T. R. Co.*, 84 Kan. 479, 114 Pac. 1077. "By the weight of authority, and, as we think by the better reason, the court ordinarily determines the law of a sister state without the intervention of the jury, notwithstanding the question is one of fact." **Ky.**—*Collins v. Norfolk & W. R. Co.*, 152 Ky. 755, 154 S. W. 37. **N. C.**—*Hooper v. Moore*, 50 N. C. 130. See also *Moore v. Gwynn*, 27 N. C. 187; *Knight v. Wall*, 19 N. C. 125, 129. **Wash.**—*Ongaro v. Twohy*, 57 Wash. 668, 107 Pac. 834.

84. Ill.—*Mexican Cent. Ry. Co. v. Gehr*, 66 Ill. App. 173. **Mass.**—*Electric Welding Co. v. Prince*, 200 Mass. 386, 86 N. E. 947, 128 Am. St. Rep. 434; *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 360. **Vt.**—*Jenness v. Simpson*, 84 Vt. 127, 78 Atl. 886; *Morrisette v. Canadian Pac. R. Co.*, 74 Vt. 232, 52 Atl. 520.

[a] "The question of what the foreign law was after it was proved as facts did not depend merely upon the construction and effect of a written statute or the interpretation of judicial opinion; it involved, as seen, the construction and effect of written statutes and of judicial opinion, with the opinions of expert witnesses touching the meaning and legal effect of the same, together with the common law proved by expert testimony as having a mate-

rial bearing upon the same question of liability and, in the absence of statutory provisions found applicable, determinative of this branch of the case. Clearly in these circumstances the question of what the provincial law was, was a question of fact for the jury." *Rainey v. Grand Trunk R. Co.*, 84 Vt. 521, 80 Atl. 723.

85. Ill.—*Mexican Cent. Ry. Co. v. Gehr*, 66 Ill. App. 173. **Mass.**—*Electric W. Co. v. Prince*, 200 Mass. 386, 86 N. E. 947, 128 Am. St. Rep. 434; *Cook v. Bartlett*, 179 Mass. 576, 61 N. E. 266; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232, 42 L. R. A. 396; *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 360. **N. Y.**—*Bank of China v. Morse*, 44 App. Div. 435, 61 N. Y. Supp. 268 (*affirmed*), 168 N. Y. 458, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L. R. A. 139; *Molson's Bank v. Boardman*, 47 Hun 135, 14 N. Y. St. 658. **S. C.**—*Fraser v. Charleston & W. C. R. Co.*, 73 S. C. 140, 52 S. E. 964. **Va.**—*Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271. **Vt.**—*Bradley v. Bentley*, 85 Vt. 412, 82 Atl. 669.

86. Ala.—*Williams v. State*, 44 Ala. 41. **Ga.**—*Clay v. State*, 124 Ga. 795, 53 S. E. 179; *Mitchell v. State*, 71 Ga. 128. **Ind.**—*Ellis v. State*, 152 Ind. 326, 52 N. E. 82. **Ky.**—*Tapscott v. Com.*, 140 Ky. 573, 131 S. W. 487. **Miss.**—*Jackson v. State*, 66 Miss. 89, 5 So. 690, 14 Am. St. Rep. 542. **Mo.**—*State v. Lane*, 158 Mo. 572, 59 S. W. 965; *State v. Hicks*, 92 Mo. 431, 4 S. W. 742. **Neb.**—*Housh v. State*, 43 Neb. 163, 61 N. W. 571. **N. J.**—*Brown v. State*, 62 N. J. L. 666, 42 Atl. 811. **N. Y.**—*Conraddy v. People*, 5 Park. Crim. 234. **N. C.**—*State v. Bland*, 97 N. C. 438, 2 S. E. 460. **Ore.**—*Lander v. Miles*, 3 Ore. 40.

[a] Whether obstruction of sidewalk or street was necessary is for the jury. *Jochem v. Robinson*, 66 Wis. 638, 29 N. W. 642, 57 Am. Rep. 298.

K. REASONABLENESS. — 1. Generally. — Whether punishment inflicted on a scholar was reasonable and proper;⁸⁷ whether reasonable diligence exercised,⁸⁸ or reasonable notice given;⁸⁹ or the reasonableness of a contract,⁹⁰ are generally for the jury. The reasonableness or unreasonableness of a municipal ordinance, there being no dispute as to the facts, is to be determined by the court,⁹¹ but the reasonableness of a carrier's rule requiring notice of damage to freight has been held to be for the jury.⁹²

2. Reasonable Time. — What is a reasonable time, where the facts are undisputed, is generally a question of law for the court,⁹³ but if

See the title "**Highways, Streets and Bridges.**"

Whether killing done in necessary self-defense, see 11 STANDARD PROC. 652.

87. Ala.—Boyd v. State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31. **Conn.** Sheehan v. Sturges, 53 Conn. 481, 2 Atl. 841. **Ia.**—State v. Mizner, 45 Iowa 248, 24 Am. Rep. 769. **Mass.**—Com. r. Randall, 4 Gray 36. **Mo.**—State v. Boyer, 70 Mo. App. 156. **Neb.**—Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640. **Tex.**—Smith v. State (Tex. Crim.), 20 S. W. 360. **Vt.**—Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156.

88. Rehberg v. New York, 91 N. Y. 137, 43 Am. Rep. 657. See the title "**Negligence.**"

89. Warder v. Bell, 2 Dall. 233, 1 Yeates (Pa.) 531, 1 L. ed. 361.

[a] **Reasonableness of notice to quit for jury.** Wheeler v. Wheeler, 77 Vt. 177, 59 Atl. 842.

90. Kansas & A. V. R. Co. v. Ayers, 63 Ark. 331, 38 S. W. 515.

91. U. S.—Lusk v. Dora, 224 Fed. 650. **Cal.**—*Ex parte* Frank, 52 Cal. 606, 28 Am. Rep. 642. **Ill.**—Hawes v. City of Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225. **Ia.**—Meyers v. Chicago, R. I. & P. R. Co., 57 Iowa 555, 10 N. W. 896, 42 Am. Rep. 50. **Mo.**—St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 109 Am. St. Rep. 774, 1 L. R. A. (N. S.) 918, 4 Ann. Cas. 112. **Ore.**—Wygant v. McLaughlan, 39 Ore. 429, 64 Pac. 867, 87 Am. St. Rep. 673, 54 L. R. A. 636. **Wis.**—Maercker v. Milwaukee, 151 Wis. 324, 129 N. W. 199, L. R. A. 1915F, 1196.

92. Texas & P. Ry. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56, rule requiring notice thirty-six hours after delivery.

93. U. S.—Long-Bell Lumber Co. v. Stump, 86 Fed. 574, 30 C. C. A. 260. **Colo.**—Denver & R. G. Co. v. Doyle, 58

Colo. 327, 145 Pac. 688. **Del.**—See *Cov-erdale v. Rickards*, 6 Penne. 467, 69 Atl. 1065. **Fla.**—Mizell v. Watson, 57 Fla. 111, 49 So. 149. **Ill.**—Doane v. Dunham, 65 Ill. 512. **Kan.**—Cooking-ham v. Dusa, 41 Kan. 229, 21 Pac. 95. **Me.**—Libby v. Haley, 91 Me. 331, 39 Atl. 1004; Kingsley v. Wallis, 14 Me. 57. **Mass.**—Williams v. Powell, 101 Mass. 467, 3 Am. Rep. 396; Holbrook v. Burt, 22 Pick. 546; Gilmore v. Wilbur, 12 Pick. 120, 22 Am. Dec. 410. **N. J.**—Rosengarten v. Delaware, L. & W. R. Co., 77 N. J. L. 71, 71 Atl. 35. **N. Y.**—Wright v. Bank of Metropolis, 110 N. Y. 237, 18 N. E. 79, 6 Am. St. Rep. 356, 1 L. R. A. 289; Colt v. Owens, 90 N. Y. 368; Hedges v. Hudson River R. Co., 49 N. Y. 223; Dressner v. Manhattan Del. Co., 92 N. Y. Supp. 800. **Ore.**—McGregor v. Oregon R. & N. Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668. **Pa.**—Muncy Borough School Dist. v. Com., 84 Pa. 464; Morgan v. McKee, 77 Pa. 228; Zineman & Bro. v. Harris, 6 Pa. Super. 303. **Tex.**—Luhn v. Fordtran, 53 Tex. Civ. App. 148, 115 S. W. 667. **Wis.**—Gammon v. Abrams, 53 Wis. 323, 10 N. W. 479; Churchill v. Price, 44 Wis. 540.

Reasonable time for performance of a contract, see 11 STANDARD PROC. 1064, et seq.

[a] **Whether statement of account returned or objected to in reasonable time in determining whether account stated was reached,** is a question for the court where the facts are clear. **U. S.**—Standard Oil Co. v. Van Etten, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. ed. 319; Wiggins v. Burkham, 10 Wall. 129, 19 L. ed. 884; Toland v. Sprague, 12 Pet. 300, 9 L. ed. 1093; Charlotte Oil & Fertilizer Co. v. Hartog, 85 Fed. 150, 29 C. C. A. 56; Edwards v. Haefinghoff, 38 Fed. 635. **Cal.**—See *Cusick v. Boyne*, 1 Cal. App. 643, 82 Pac. 985. **Fla.**—Daytona Bridge Co. v. Bond, 47

the facts be disputed, or different conclusions may be drawn from the evidence, it is a question for the jury.⁹⁴ What is a reasonable time within which a tenant may remove his fixtures after the expiration of his term,⁹⁵ what is a reasonable time for transportation by a carrier of goods,⁹⁶ or whether a chattel mortgage is recorded with reasonable dispatch,⁹⁷ what is a reasonable time for passengers to call for baggage after arrival so as to terminate liability of the carrier as such,⁹⁸ or a reasonable time for the completion by a street

Fla. 136, 36 So. 445; *Martyn v. Arnold*, 36 Fla. 446, 18 So. 791. **Mo.**—*Brown v. Kimmel*, 67 Mo. 430. See also *Ottoby v. Winsor*, 137 Mo. App. 272, 119 S. W. 40; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281. **Ore.**—*Nodine v. First Nat. Bank*, 41 Ore. 386, 68 Pac. 1109; *Howell v. Johnson*, 38 Ore. 571, 64 Pac. 659; *Fleischner v. Kubli*, 20 Ore. 328, 25 Pac. 1086. **Wash.**—*Ault v. Interstate Sav. & L. Assn.*, 15 Wash. 627, 47 Pac. 13. *Contra*, it is a question for the jury, see: **Idaho.**—*Lewis v. Utah Construction Co.*, 10 Idaho 214, 77 Pac. 336. **Ill.**—*Moran v. Gordon*, 33 Ill. App. 46. **Ia.**—*Hollenbeck v. Ristine*, 105 Iowa 488, 75 N. W. 355, 67 Am. St. Rep. 306. **Mich.**—*Peter v. Thickstun*, 51 Mich. 589, 17 N. W. 68. **N. H.**—*Austin v. Ricker*, 61 N. H. 97. **N. Y.**—*Little v. McClain*, 134 App. Div. 197, 118 N. Y. Supp. 916.

94. **Ark.**—*Kansas City, etc. R. Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781. **Ind.**—*American Window Glass Co. v. Indiana Natural Gas & Oil Co.*, 37 Ind. App. 439, 76 N. E. 1006; *Pennsylvania Co. v. Liveright*, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162. **Ky.**—*Louisville, C. & L. R. Co. v. Mahan*, 8 Bush 184. **Me.**—*Libby v. Haley*, 91 Me. 331, 39 Atl. 1004. **Mo.**—*Felton v. Chicago G. W. R. Co.*, 86 Mo. App. 332; *Burks v. Stam*, 65 Mo. App. 455. **N. J.**—*Burr v. Adams Express Co.*, 71 N. J. L. 263, 58 Atl. 609. **N. Y.**—*Roth v. Buffalo & S. L. R. Co.*, 34 N. Y. 548, 90 Am. Dec. 736; *Burgevin v. New York Cent. & H. R. R. Co.*, 69 Hun 479, 23 N. Y. Supp. 415, 52 N. Y. St. 617; *German-American Bank v. Mills*, 99 App. Div. 312, 91 N. Y. Supp. 142; *Church v. New York Cent. & H. R. R. Co.*, 116 N. Y. Supp. 560. **Ohio.**—*Crane v. Standard L. & Acc. Ins. Co.*, 4 Ohio N. P. 309. **Pa.**—*Aspinwall v. Viney*, 206 Pa. 383, 55 Atl. 1038. **Tex.**—*Luhn v. Fordtran*, 53 Tex. Civ. App. 148, 115 S. W. 667.

[a] "Where what is a reasonable

time depends upon certain other controverted points, or where the motives of the party enter into the question, the whole is necessarily to be submitted to a jury before any judgment can be formed whether the time was or was not reasonable." *Hill v. Hobart*, 16 Me. 164, 168.

[b] Whether reasonable time for city to repair street elapsed is for the jury. *Covington v. Gates* (Ky.), 117 S. W. 342; *Revis v. Raleigh*, 150 N. C. 348, 63 S. E. 1049.

[c] Whether reasonable time given passengers to alight from a train is for the jury to determine. **U. S.**—*Texas & P. Ry. Co. v. Nunn*, 98 Fed. 963, 39 C. C. A. 364; *McSloop v. Richmond & D. R. Co.*, 59 Fed. 431. **Ga.**—*Central of Georgia R. Co. v. McKenney*, 116 Ga. 13, 42 S. E. 229. **Ill.**—*Illinois Central R. Co. v. Taylor*, 46 Ill. App. 141.

95. **Ill.**—*Berger v. Hoerner*, 36 Ill. App. 360. **Mo.**—*Idalia Realty & Dev. Co. v. Norman* (Mo. App.), 183 S. W. 348; *Cowgill v. Little Persimmon, etc. Co.* (Mo. App.), 183 S. W. 346. **Wash.**—*Welsh v. McDonald*, 64 Wash. 108, 116 Pac. 589.

96. *Fremont Canning Co. v. Pere Marquette R. Co.*, 180 Mich. 283, 146 N. W. 678. See also 10 STANDARD PROC. 258.

97. *Hardcastle v. Stiles*, 70 N. J. L. 828, 59 Atl. 1117.

98. *Schnitzmeyer v. Illinois Cent. R. Co.*, 147 Ill. App. 101; *Wallace v. Detroit, G. H. & M. R. Co.*, 176 Mich. 128, 142 N. W. 550, Ann. Cas. 1915B, 631.

[a] "Where the facts are not disputed what constitutes a reasonable time for a passenger to remove his baggage after arriving at its destination is a question of law which the court must determine. . . . The court left the jury to determine from all the admitted facts and circumstances whether plaintiff called for her baggage within a reasonable time, and

railway company of its road where no time is specified,⁹⁹ are held questions of fact for the jury to determine.

3. Of Attorney's Fees.—What is a reasonable attorney's fee to be allowed in a given case is usually for the court to determine.¹

L. IDENTITY OF PERSONS AND PROPERTY.—The identity of persons,² or property,³ is for the jury, if more than one inference may be drawn from the evidence.

M. RELATION BETWEEN PERSONS.—Whether a certain legal relation did or did not exist between persons is generally for the jury under proper instructions.⁴ Thus whether the relation of principal

whether the liability of the company had shifted from that of a common carrier to that of a warehouseman. This was error. Plaintiff's baggage arrived at 1:45 p. m., on the 15th, and remained in the baggage room until the night of the 16th without being called for, and it was the duty of the court to have held, as a matter of law, that the baggage was not demanded within a reasonable time after it arrived." *Denver & R. G. R. Co. v. Doyle*, 58 Colo. 327, 145 Pac. 688.

99. *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086.

1. *Holder Turpentine Co. v. M. C. Kiser Co.*, 68 Fla. 312, 67 So. 85; *Fowler v. Bell* (Tex. Civ. App.), 35 S. W. 822.

2. **Ia.**—*State v. Rankin*, 150 Iowa 701, 130 N. W. 732. **Mich.**—*Campau v. Dewey*, 9 Mich. 381. **N. C.**—*State v. Lilliston*, 141 N. C. 857, 54 S. E. 427, 115 Am. St. Rep. 705. **Pa.**—*Com. v. Ronello*, 242 Pa. 381, 89 Atl. 553. **Tex.** *Oates v. State*, 50 Tex. Crim. 39, 95 S. W. 105. **Wash.**—*State v. Williams*, 36 Wash. 143, 78 Pac. 780.

In homicide cases, see 11 STANDARD PROC. 645.

3. **Ark.**—*Kennedy v. State*, 119 Ark. 611, 178 S. W. 929. **Cal.**—*Hicks v. Davis*, 4 Cal. 67. **Conn.**—*Munson v. Munson*, 30 Conn. 425. **Ill.**—*Linnertz v. Dorway*, 175 Ill. 508, 51 N. E. 809, 67 Am. St. Rep. 232; *Vennum v. Thompson*, 38 Ill. 143. **Mo.**—*Miller v. Marks*, 20 Mo. App. 369. **Pa.**—*Franklin Coal Co. v. Bertels*, 109 Pa. 550.

Identification of stolen property, see 18 STANDARD PROC. 774.

In replevin suits, see the title "Replevin."

4. **U. S.**—*Cunard S. S. Co. v. Carey*, 119 U. S. 245, 7 Sup. Ct. 1360, 30 L. ed. 354; *Northwestern Union Packet Co. v. McCue*, 17 Wall. 508, 21 L. ed. 705; *Quinlan & Co. v. Holbrook*, 162

Fed. 272, 89 C. C. A. 252; *Northern Pac. R. Co. v. Clarke*, 106 Fed. 794, 45 C. C. A. 635. **Ala.**—*Mobile, J. & K. C. R. Co. v. Odom*, 169 Ala. 507, 53 So. 765; *Boswell v. Thompson*, 160 Ala. 306, 49 So. 73. **Ark.**—*Short & Co. v. Johnson*, 89 Ark. 279, 116 S. W. 658; *Kansas City, Ft. S. & M. Ry. Co. v. Hammond*, 58 Ark. 324, 24 S. W. 723; *Vahlberg v. Keaton*, 51 Ark. 534, 11 S. W. 878, 14 Am. St. Rep. 73, 4 L. R. A. 462. **Conn.**—*Bloch v. De Lucia*, 80 Conn. 716, 66 Atl. 769; *Graves v. Lockwood*, 30 Conn. 276. **Ga.** *Wilson v. Huguenin*, 117 Ga. 546, 43 S. E. 857; *Chandler v. Southern Ry. Co.*, 113 Ga. 130, 38 S. E. 305; *Barnett v. Northeastern R. Co.*, 87 Ga. 199, 13 S. E. 646; *White Sewing Mach. Co. v. Horkan*, 7 Ga. App. 283, 66 S. E. 811. **Ill.**—*Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145, 69 N. E. 12; *St. Louis Consol. Coal Co. v. Bruce*, 150 Ill. 449, 37 N. E. 912; *Hankinson v. Lombard*, 25 Ill. 572, 79 Am. Dec. 348; *Franklin County v. Layman*, 43 Ill. App. 163. **Ind.**—*Indiana Ins. Co. v. Hartwell*, 100 Ind. 566; *American Car & F. Co. v. Smock*, 48 Ind. App. 359, 91 N. E. 749; *Evansville & T. H. R. Co. v. Claspell*, 8 Ind. App. 685, 36 N. E. 297. **Ia.**—*Aga v. Harbach*, 127 Iowa 144, 102 N. W. 833, 109 Am. St. Rep. 377; *Jewell v. Posey*, 119 Iowa 412, 93 N. W. 379; *Theleman v. Moeller*, 73 Iowa 108, 34 N. W. 765, 5 Am. St. Rep. 663. **Kan.**—*Brower v. Timreck*, 66 Kan. 770, 71 Pac. 581. **Ky.**—*Crabtree Coal Min. Co. v. Sample's Admr.*, 24 Ky. L. Rep. 1703, 72 S. W. 24. **Md.** *Morrison v. Whiteside*, 17 Md. 452, 79 Am. Dec. 661. **Mass.**—*Whittier v. Child*, 174 Mass. 36, 54 N. E. 344; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101. **Mich.**—*Fontaine Crossing & Elect. Co. v. Rauch*, 117 Mich. 401, 75 N. W. 1063; *McDonald v. Michigan Cent. R. Co.*, 108 Mich. 7, 65 N. W. 597. **Minn.**

and agent,⁵ bailor and bailee,⁶ master and servant,⁷ partners,⁸ landlord and tenant,⁹ or passenger and carrier,¹⁰ existed between persons is generally to be determined by the jury where it does not depend on the construction of a written instrument.

N. TIME AND PLACE.—The time when a particular event occurred,¹¹ or the place of occurrence,¹² are questions for the jury to determine.

O. PERFORMANCE.¹³—Whether a particular act has been performed is a question for the jury if more than one inference may be drawn from the evidence.¹⁴

Caron v. Powers-Simpson Co., 96 Minn. 192, 104 N. W. 889; *Jensen v. Weide*, 42 Minn. 59, 43 N. W. 688. **Mo.**—*Gayle v. Missouri Car & F. Co.*, 177 Mo. 427, 76 S. W. 987; *Rice v. Groffmann*, 56 Mo. 434. **Neb.**—*Walsh v. Peterson*, 59 Neb. 645, 81 N. W. 853; *Union Pacific Ry. Co. v. Doyle*, 50 Neb. 555, 70 N. W. 43. **N. J.**—*Hardy v. Delaware, L. & W. R. Co.*, 57 N. J. L. 505, 31 Atl. 281; *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728. **N. Y.**—*Brophy v. Bartlett*, 108 N. Y. 632, 15 N. E. 368, 1 Silv. 575; *Greenwood v. Shumacker*, 82 N. Y. 614. **Ohio.**—*Cincinnati Ice Co. v. Higdon*, 7 Ohio Dec. (Reprint) 239. **Okla.**—*Scott v. Moore*, 52 Okla. 200, 152 Pac. 823; *McNabb v. Hunt*, 28 Okla. 43, 119 Pac. 210. **Ore.**—*Busch v. Robinson*, 46 Ore. 539, 81 Pac. 237; *Ringue v. Oregon Coal Co.*, 44 Ore. 407, 75 Pac. 703; *Connell v. McLoughlin*, 28 Ore. 230, 42 Pac. 218. **Pa.**—*Evilhoek v. Philadelphia, H. & P. R. Co.*, 169 Pa. 592, 32 Atl. 588; *Playford v. Hutchinson*, 135 Pa. 426, 19 Atl. 1019; *Union Refining & Storage Co. v. Bushnell*, 88 Pa. 89. **S. C.**—*Davis v. Atlanta & C. Air Line Ry. Co.*, 63 S. C. 370, 41 S. E. 468; *Dickert v. Farmers' Mut. Ins. Assn.*, 52 S. C. 412, 29 S. E. 786; *Whaley v. Bartlett*, 42 S. C. 454, 20 S. E. 745. **Tenn.**—*Willeox v. Hines*, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761. **Tex.**—*Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405. **Vt.** *Sherman v. Delaware & H. Canal Co.*, 71 Vt. 325, 45 Atl. 227; *Taplin v. Marcy*, 81 Vt. 428, 71 Atl. 72; *Briggs v. Georgia*, 15 Vt. 61. **Va.**—*Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71. **Wash.**—*Hammons v. Setzer*, 72 Wash. 550, 130 Pac. 1141; *Novelty Mill Co. v. Heinzerling*, 39 Wash. 244, 81 Pac. 742. **Wis.**—*Garlick v. Morley*, 147 Wis. 397, 132 N. W. 601; *Kronshage v. Chicago, M. & St. P. R. Co.*, 40 Wis. 589.

5. See the title "Principal and Agent."

6. See the title "Personal Property."

7. See the title "Master and Servant."

[a] Whether one is a fellow-servant of another is a question of fact. *Chicago & A. R. Co. v. Kelly*, 127 Ill. 637, 21 N. E. 203. See the title "Master and Servant."

8. See the title "Partnership."

9. *Jennings v. McCarthy*, 16 N. Y. Supp. 161, 40 N. Y. St. 678.

10. See the title "Passengers."

11. **Kan.**—*Ball v. Biggam*, 6 Kan. App. 42, 49 Pac. 678. **N. Y.**—*Coons v. Chambers*, 1 Abb. Dec. 439, 1 Abb. Pr. 165. **Va.**—*Keen's Exr. v. Monroe*, 75 Va. 424.

[a] Time when indorsement of credit on note was made is for jury. *Carter v. Carter*, 44 Mo. 195.

[b] Whether note was delivered on Sunday when shown to have been signed on that day but is dated another, is for the jury. *Flanagan v. Meyer & Co.*, 41 Ala. 132.

Reasonableness of time, see *supra*, IV, K, 2.

12. *Vaughan v. State*, 130 Ala. 18, 30 So. 669; *People v. More*, 68 Cal. 500, 504, 9 Pac. 461, county in which crime committed. See also the title "Venue."

13. Performance of contract, see 11 STANDARD PROC. 1064, et seq.

14. **Ill.**—*Ogden v. Kirby*, 79 Ill. 555. **Mo.**—*Lewis v. Slack*, 27 Mo. App. 119. **Mont.**—*Waite v. Shoemaker & Co.*, 50 Mont. 264, 146 Pac. 736. **Neb.**—*Estabrook v. Omaha Hotel Co.*, 5 Neb. 76.

[a] Whether Revenue Stamps Canceled.—*Rees v. Jackson*, 64 Pa. 486, 3 Am. Rep. 608.

Whether the grantee has performed the acts required by a condition in a

P. IN CRIMINAL PROSECUTIONS.¹⁵ — **1. Generally.** — Questions as to the admissibility of evidence,¹⁶ and the construction of writings,¹⁷ in a criminal case are for the judge, the same as in civil cases.

2. Motive. — The question of motive is one of fact for the jury to determine.¹⁸

3. Corpus Delicti.¹⁹ — It is for the jury to determine whether the corpus delicti has been proven.²⁰

4. Reasonable Doubt. — Whether there is a reasonable doubt of the guilt of the defendant in a criminal prosecution is to be determined by the jury under the instruction of the court.²¹

deed is for the jury on conflicting evidence. See 18 STANDARD PROC. 711.

15. Questions for court and jury in homicide cases, see 11 STANDARD PROC. 639.

Identification, see *supra*, IV, L.

Variance as a question of law or fact in criminal prosecution, see the title "Variance."

Whether venue properly laid, see the title "Venue."

16. See *infra*, IV, Q, 2.

[a] **Conspiracy.** — It is for the court in the first instance to determine whether there is sufficient *prima facie* evidence of a conspiracy to warrant the admission of evidence of acts and declarations of a supposed co-conspirator; but ultimately it is for the jury to determine whether upon the whole evidence any conspiracy has been shown, and if they find that none has been established it is then their duty not to consider the acts and declarations of the supposed co-conspirator which have been admitted. **Colo.** — *Solander v. People*, 2 Colo. 48. **Ia.** — *State v. Walker*, 124 Iowa 414, 100 N. W. 354. **Mo.** — *State v. Kennedy*, 177 Mo. 98, 119, 75 S. W. 979. **Okla.** — *Driggers v. United States*, 21 Okla. 60, 95 Pac. 612. **Tex.** — *Crook v. State*, 27 Tex. App. 198, 11 S. W. 444. **Wis.** — *Schultz v. State*, 133 Wis. 215, 113 N. W. 428. And see 3 ENCY. OF EV. 428.

[b] **Competency of child to testify** is for the court to determine. *Peters v. State*, 106 Miss. 333, 63 So. 666, and *infra*, IV, P, 2.

[c] **Whether alleged confession is** admissible is primarily a question for the court to determine. **U. S.** — *Harold v. Oklahoma*, 169 Fed. 47, 94 C. C. A. 415. **Ala.** — *Bush v. State*, 136 Ala. 85, 33 So. 878. **Ark.** — *Iverson v. State*, 99 Ark. 453, 138 S. W. 958; *Smith v. State*, 74 Ark. 397, 85 S. W. 1123. **Cal.** *People v. Siemsen*, 153 Cal. 387, 95 Pac.

863. **Conn.** — *State v. Wakefield*, 88 Conn. 164, 90 Atl. 230. **Fla.** — *Thomas v. State*, 58 Fla. 122, 51 So. 410. **Ill.** *Zuckerman v. People*, 213 Ill. 114, 72 N. E. 741. **Ind.** — *Thurman v. State*, 169 Ind. 240, 82 N. E. 64. **Ia.** — *Simons v. Petersberger*, 171 Iowa 564, 151 N. W. 392. **Md.** — *McCleary v. State*, 122 Md. 394, 89 Atl. 1100. **N. M.** — *State v. Ascarate*, 21 N. M. 191, 153 Pac. 1036. **Ore.** — *State v. Humphrey*, 63 Ore. 540, 128 Pac. 824. **Pa.** — *Com. v. Johnson*, 217 Pa. 77, 66 Atl. 233. **S. D.** — *State v. Allison*, 24 S. D. 622, 124 N. W. 747. **Wis.** — *Hintz v. State*, 125 Wis. 405, 104 N. W. 110.

17. See *supra*, IV, G, 1.

18. Ala. — *Salm v. State*, 89 Ala. 56, 8 So. 66; *Burke v. State*, 71 Ala. 377. **Mass.** — *Vogel v. Brown*, 201 Mass. 261, 87 N. E. 686. **N. M.** — *Territory v. Montoya*, 17 N. M. 122, 125 Pac. 622. **N. Y.** *People v. Zachello*, 168 N. Y. 35, 60 N. E. 1051; *People v. Whaley*, 6 Cow. 661, motives of justice of peace charged with extortion, as whether corrupt or whether he acted through a mistake of law, is for the jury. **Wash.** — *State v. Gates*, 28 Wash. 689, 69 Pac. 385.

19. In homicide cases, see 11 STANDARD PROC. 639.

20. U. S. — *Perovich v. United States*, 205 U. S. 86, 27 Sup. Ct. 456, 51 L. ed. 722. **Ala.** — *Winslow v. State*, 76 Ala. 42. **Ill.** — *Cunningham v. People*, 195 Ill. 550, 63 N. E. 517. **Kan.** — *See State v. Jackson*, 42 Kan. 384, 22 Pac. 427. **Ky.** — *Levering v. Com.*, 132 Ky. 666, 117 S. W. 253, 136 Am. St. Rep. 192.

[a] **Prima facie sufficiency of preliminary proof of corpus delicti** is for the determination of the court. *Floyd v. State*, 82 Ala. 16, 2 So. 683; *Lambright v. State*, 34 Fla. 564, 16 So. 582.

21. Ala. — *Howard v. State*, 108 Ala. 571, 18 So. 813; *Albritton v. State*, 94

5. False Imprisonment.—False imprisonment is a mixed question of law and fact. Whether there has been an imprisonment is a question for the jury,²² and whether the authority under which the imprisonment was effected was lawful is generally a question for the court.²³

6. Former Jeopardy.—Where only the record of the former proceeding is produced the question of former jeopardy is for the court to determine,²⁴ but when evidence outside of the record is presented it becomes a question of fact for the jury.²⁵

Ala. 76, 10 So. 426. **Ark.**—Byrd *v.* State, 69 Ark. 537, 64 S. W. 270. **Colo.**—Wisdom *v.* People, 11 Colo. 170, 17 Pac. 519. **Ga.**—Tarver *v.* State, 95 Ga. 222, 21 S. E. 381. **Ia.**—State *v.* Trout, 74 Iowa 545, 38 N. W. 405, 7 Am. St. Rep. 499. **Miss.**—Pollard *v.* State, 53 Miss. 410, 24 Am. Rep. 703. **Neb.**—Nightingale *v.* State, 62 Neb. 371, 87 N. W. 158; Henry *v.* State, 51 Neb. 149, 70 N. W. 924, 66 Am. St. Rep. 450. **Nev.**—State *v.* Waterman, 1 Nev. 543. **Okla.**—Shoemaker *v.* Territory, 4 Okla. 118, 43 Pac. 1059. **S. C.**—State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575. **Tenn.**—Ford *v.* State, 101 Tenn. 454, 47 S. W. 703. **W. Va.**—State *v.* Strauder, 11 W. Va. 745, 27 Am. Rep. 606.

22. Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250.

23. Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250.

[a] **Where evidence not conflicting** may be question of law for court. Diers *v.* Mallon, 46 Neb. 121, 64 N. W. 722, 50 Am. St. Rep. 598.

24. **Cal.**—See People *v.* Cummings, 123 Cal. 269, 55 Pac. 898. **Ga.**—Minyard *v.* State, 17 Ga. App. 398, 87 S. E. 710; Darsey *v.* State, 17 Ga. App. 280, 86 S. E. 781. **Ia.**—State *v.* Blodgett, 143 Iowa 578, 121 N. W. 685. **Kan.**—State *v.* Bowen, 16 Kan. 475. **Ky.**—Brady *v.* Com., 1 Bibb 517. **La.**—State *v.* Foley, 114 La. 412, 38 So. 402. **Md.**—Watson *v.* State, 105 Md. 650, 66 Atl. 635. **Mo.**—State *v.* Potter, 125 Mo. App. 465, 102 S. W. 668. **N. J.**—State *v.* Rosa, 72 N. J. L. 462, 62 Atl. 695. **N. M.**—Territory *v.* West, 14 N. M. 546, 99 Pac. 343. **N. C.**—State *v.* Smith, 170 N. C. 742, 87 S. E. 981; State *v.* Ellsworth, 131 N. C. 773, 42 S. E. 699, 92 Am. St. Rep. 790. **Okla.**—Lloyd *v.* State, 6 Okla. Crim. 76, 116 Pac. 959; Morris *v.* Territory, 1 Okla. Crim. 617, 99 Pac. 760. **S. C.**—State *v.* Dewees, 76 S. C. 72, 56 S. E. 674.

Tenn.—Slaughter *v.* State, 6 Humph. 410; Hite *v.* State, 9 Yerg. 357; Hill *v.* State, 2 Yerg. 248. **Wis.**—Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128. See 14 STANDARD PROC. 621, 622.

[a] **When raised on demurrer** (1) court determines question of former jeopardy. State *v.* Rosa, 72 N. J. L. 462, 62 Atl. 695. (2) The court cannot overrule a plea of former jeopardy on demurrer, because, from the facts within its own knowledge, the averments are untrue, but the issues must be submitted to a jury. Dockstader *v.* People, 43 Colo. 437, 97 Pac. 254.

[b] **If no evidence to support plea** of former jeopardy it is for the court. Territory *v.* West, 14 N. M. 546, 99 Pac. 343.

25. **Ala.**—Reynolds *v.* State, 1 Ala. App. 24, 55 So. 1016. **Cal.**—People *v.* Ammerman, 118 Cal. 23, 50 Pac. 15; People *v.* Hamberg, 84 Cal. 468, 24 Pac. 298. **Colo.**—Kinkle *v.* People, 27 Colo. 459, 62 Pac. 197. **Del.**—State *v.* Day, 5 Penn. 101, 58 Atl. 946. **Ga.**—Daniels *v.* State, 78 Ga. 98, 6 Am. St. Rep. 238. **Ind.**—Dunn *v.* State, 70 Ind. 47; Cooper *v.* State, 47 Ind. 61; Willard *v.* State, 4 Ind. 407. **Ky.**—Raubold *v.* Com., 111 Ky. 433, 63 S. W. 781; Chesapeake & O. Ry. Co. *v.* Com., 88 Ky. 368, 11 S. W. 87. **La.**—State *v.* Williams, 45 La. Ann. 936, 12 So. 932; State *ex rel.* Voorhies *v.* Judge, 42 La. Ann. 414, 7 So. 678. **Miss.**—Helm *v.* State, 67 Miss. 562, 7 So. 487. **Mo.**—State *v.* Williams, 152 Mo. 115, 53 S. W. 424, 75 Am. St. Rep. 441; State *v.* Wisebeck, 139 Mo. 214, 40 S. W. 946; State *v.* Laughlin, 168 Mo. 415, 68 S. W. 340. **Neb.**—Arnold *v.* State, 38 Neb. 752, 57 N. W. 378. **Nev.**—State *v.* Johnson, 11 Nev. 273. **N. J.**—State *v.* Ackerman, 64 N. J. L. 99, 45 Atl. 27. **N. Y.**—Grant *v.* People, 4 Park. Crim. 527. **Ohio.**—Miller *v.* State, 3 Ohio St. 475. **S. D.**—State *v.* Irwin, 17 S. D. 380, 97 N. W. 7. **Tenn.**—Hite

Knowledge and Intent.²⁶ — Whether a defendant in a criminal case had guilty knowledge,²⁷ or committed the act with the requisite criminal or felonious intent,²⁸ is for the jury.

v. State, 9 Yerg. 357. **Tex.**—*Scott v. State* (Tex. Crim.), 68 S. W. 680; *Cook v. State*, 43 Tex. Crim. 182, 63 S. W. 872, 96 Am. St. Rep. 854; *Munch v. State*, 25 Tex. App. 30, 7 S. W. 341. **Utah.**—*People v. Kerm*, 8 Utah 268, 30 Pac. 988. **Eng.**—*Reg. v. Bird*, 5 Cox C. C. 20.

[a] See, however, *Storm v. Territory*, 12 Ariz. 109, 99 Pac. 275, where the court says: "No constitutional privilege of the defendant is invaded when the court in its instruction directs the jury that it cannot in defiance of the facts decide the issue of former jeopardy in favor of the defendant, nor is any privilege invaded which was recognized at common law. When courts have held that a plea of former jeopardy raises an issue upon which the trial court cannot direct a verdict against the defendant, they have held so either by reason of provisions of state constitutions, which find no counterpart in the constitution of the United States, or the acts of Congress, which comprise the fundamental law of this territory, or through failure to observe the difference in status between pleas of former jeopardy and pleas of not guilty under the provisions of such constitutions, and also under the common law. If such verdict may lawfully be directed, it is a necessary inference that where the record affirmatively shows that the jury, with legal propriety, could not have found for the defendant upon the plea of former jeopardy and the trial court formally so adjudicated and so instructed the jury, the defendant has been deprived of no fundamental right by the absence of the jury's finding upon the plea and is uninjured thereby."

26. In civil cases, see *supra*, IV, D, 3, 4.

27. **U. S.**—*United States v. Houghton*, 14 Fed. 544; *United States v. Smith*, 1 Sawy. 277, 27 Fed. Cas. No. 16,341. **Mich.**—*Bonker v. People*, 37 Mich. 4. **Tex.**—*Hailes v. State*, 15 Tex. App. 93.

[a] Whether defendant knew goods were stolen, in a prosecution for receiving stolen property, is for the jury.

People v. Teal, 1 Wheel. Crim. Cas. (N. Y.) 199.

[b] In a prosecution for assisting and comforting a felon, the question of the defendant's knowledge that the person was a felon is for the jury. *Wren v. Com.*, 26 Gratt. (67 Va.) 952.

28. **U. S.**—*United States v. Houghton*, 14 Fed. 544. **Ala.**—*Hainsworth v. State*, 136 Ala. 13, 34 So. 203; *McMullen v. State*, 53 Ala. 531; *Frank v. State*, 27 Ala. 37. **Cal.**—*People v. Wilson*, 119 Cal. 384, 51 Pac. 639; *People v. Mize*, 80 Cal. 41, 45, 22 Pac. 80; *People v. Claudius*, 8 Cal. App. 597, 97 Pac. 687. **Colo.**—*Horton v. People*, 47 Colo. 252, 107 Pac. 257. **Ga.**—*Glaze v. State*, 2 Ga. App. 704, 58 S. E. 1126. **Idaho.**—*State v. Hines*, 5 Idaho 789, 51 Pac. 984. **Ia.**—*State v. Sego*, 161 Iowa 71, 140 N. W. 802. **Mo.**—*State v. Hyde*, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191. **Mont.**—*State v. Howard*, 30 Mont. 518, 77 Pac. 50. **Neb.**—*Goldsberry v. State*, 66 Neb. 312, 92 N. W. 906. **Nev.**—*State v. Newton*, 4 Nev. 410. **N. Y.**—*People v. Hall*, 6 Park. Crim. 642; *People v. Teal*, 1 Wheel. Crim. Cas. 199; *People v. Wiman*, 9 Misc. 441, 29 N. Y. Supp. 1034, 9 N. Y. Crim. 304, 61 N. Y. St. 65. **N. C.**—*State v. Coy*, 119 N. C. 901, 26 S. E. 120; *State v. Barbee*, 92 N. C. 820; *State v. Boon*, 35 N. C. 244, 57 Am. Dec. 555. **Pa.**—*Com. v. Chapler*, 228 Pa. 630, 77 Atl. 1013, 34 L. R. A. (N. S.) 74. **S. C.**—*Herriott v. State*, 1 McMull. 126. **Tex.**—*Angel v. State*, 45 Tex. Crim. 135, 74 S. W. 553. **Vt.**—*State v. White*, 70 Vt. 225, 39 Atl. 1085. **W. Va.**—*State v. Legg*, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152; *State v. Beatty*, 51 W. Va. 232, 41 S. E. 434.

See 19 STANDARD PROC. 966.

[a] Whether act done with malice is for the jury. **U. S.**—*United States v. Alden*, 1 Spr. 95, 24 Fed. Cas. No. 14,427. **Ala.**—*Dixon v. State*, 128 Ala. 54, 29 So. 623. **Conn.**—*State v. Scheele*, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106. **Ky.**—*Crittenden v. Com.*, 3 Ky. L. Rep. 56, that an instruction that the law implies malice under certain circumstances, is erroneous, the existence of malice, in every instance, is to be determined by the jury. **Mich.**

8. **Degree of Crime.**—The question of degree of crime is one of fact for the jury to determine under proper instructions,²⁹ though the court determines whether there is evidence tending to establish any particular degree of crime.³⁰

9. **Miscellaneous Questions.**—Whether a witness was an accomplice,³¹ whether an alibi has been proven so as to raise a reason-

Maheer v. People, 10 Mich. 212, 81 Am. Dec. 781. **Mo.**—*Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *State v. Allen*, 22 Mo. 318. **N. C.**—*Coble v. Huffines*, 133 N. C. 422, 45 S. E. 760; *State v. Rash*, 34 N. C. 382, 55 Am. Dec. 420.

Malice in homicide cases, see 11 STANDARD PROC. 644.

[b] **Premeditation and deliberation** are questions for the jury. *People v. Jones*, 34 Hun 620, 3 N. Y. Crim. 252. And see 11 STANDARD PROC. 644.

[c] **Though evidence thereof is clear and convincing**, question of criminal intent is still for the jury. *People v. Wiman*, 9 Misc. 441, 29 N. Y. Supp. 1034, 9 N. Y. Crim. 304, 61 N. Y. St. 65.

[d] **Intent in Burglary Cases.**—**Cal.** *People v. Winters*, 93 Cal. 277, 28 Pac. 946; *People v. Soto*, 53 Cal. 415. **Ga.** *Woodward v. State*, 54 Ga. 406. **Ill.** *Schwabacher v. People*, 165 Ill. 618, 46 N. E. 809.

[e] **Intent in Kidnaping Prosecutions.**—*Oliver v. State*, 17 Ala. 587; *Com. v. Nickerson*, 5 Allen (Mass.) 518. See also 8 ENCY. OF EV. 1.

[f] **In Larceny Cases.**—**Ariz.**—*Miller v. Territory*, 9 Ariz. 123, 80 Pac. 321. **Ark.**—*Jackson v. State*, 101 Ark. 473, 142 S. W. 1153. **Cal.**—*People v. Mullaley*, 16 Cal. App. 44, 116 Pac. 88. **Fla.**—*Collier v. State*, 55 Fla. 7, 45 So. 752. **Ind.**—*Robinson v. State*, 113 Ind. 510, 16 N. E. 184. **Mo.**—*Witt v. State*, 9 Mo. 671. **N. Y.**—*McCourt v. People*, 64 N. Y. 583. **Vt.**—*State v. Smith*, 2 Tyler 272. **W. Va.**—*State v. Bailey*, 63 W. Va. 668, 60 S. E. 785. **Wis.**—*Stoddard v. State*, 132 Wis. 520, 112 N. W. 453. See also 18 STANDARD PROC. 773.

29. **U. S.**—*Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. ed. 262. **Ala.**—*Young v. State*, 149 Ala. 16, 43 So. 100. **Cal.**—*People v. Mahatch*, 148 Cal. 200, 82 Pac. 779 ("It is exclusively the province of a jury to determine the degree of crime when there is any evidence in the case which will support the determination"); *People v.*

Russell, 81 Cal. 618, 23 Pac. 418; *People v. Belencia*, 21 Cal. 544. **Conn.** *State v. Dowd*, 19 Conn. 388. **Fla.** *Adams v. State*, 28 Fla. 511, 10 So. 106. **Ga.**—*Crawford v. State*, 12 Ga. 142. **Idaho.**—*State v. Phinney*, 13 Idaho 307, 89 Pac. 634, 12 L. R. A. (N. S.) 935. **Ia.**—*State v. Moran*, 7 Iowa 236. **Mo.**—*State v. Turlington*, 102 Mo. 642, 15 S. W. 141. **Nev.**—*State v. Lindsey*, 19 Nev. 47, 5 Pac. 822, 3 Am. St. Rep. 776. **N. Y.**—*People v. Johnson*, 185 N. Y. 219, 77 N. E. 1164. **Ohio.**—*Beaudien v. State*, 8 Ohio St. 634. **Pa.** *Com. v. Chapler*, 228 Pa. 630, 77 Atl. 1013, 34 L. R. A. (N. S.) 74; *Com. v. Frucci*, 216 Pa. 84, 64 Atl. 879; *Com. v. Sutton*, 205 Pa. 605, 55 Atl. 781. **Tex.**—*McGill v. State*, 60 Tex. Crim. 614, 132 S. W. 941. **Wash.**—*State v. Boyce*, 24 Wash. 514, 64 Pac. 719.

In homicide prosecutions, see 11 STANDARD PROC. 645, et seq., and 13 STANDARD PROC. 942.

30. *State v. Turlington*, 102 Mo. 642, 15 S. W. 141.

31. **U. S.**—*Holmgren v. United States*, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. ed. 861. **Ala.**—*Washington v. State*, 58 Ala. 355. **Cal.**—*People v. Compton*, 123 Cal. 403, 56 Pac. 44; *People v. Curlee*, 53 Cal. 604, 607; *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370. **Ga.**—*Hargrove v. State*, 125 Ga. 270, 54 S. E. 164. **Ia.**—*State v. Norris*, 127 Iowa 683, 104 N. W. 282. **N. Y.**—*People v. Swersky*, 216 N. Y. 471, 111 N. E. 212; *People v. O'Farrell*, 175 N. Y. 323, 67 N. E. 588. **Okl.** *Driggers v. United States*, 21 Okla. 60, 95 Pac. 612; *Cudjoe v. State*, 12 Okla. Crim. 246, 154 Pac. 500. **Tex.**—*Brown v. State*, 58 Tex. Crim. 336, 125 S. W. 915.

[a] If facts are admitted it is a question for the court. *People v. Wood*, 157 N. Y. Supp. 541; *Hatcher v. State*, 43 Tex. Crim. 237, 65 S. W. 97. But see *Bell v. State*, 39 Tex. Crim. 677, 47 S. W. 1010, where the court said: "In our view, much the better practice in all cases is to instruct the jury what it takes to constitute an accom-

able doubt of defendant's guilt,³² whether the instrument used by the defendant was a deadly weapon,³³ or whether a person was really a participant in or accessory to a crime, or only a feigned accomplice,³⁴ are questions to be determined by the jury under the instructions of the court.

Q. MATTERS AS TO EVIDENCE.—1. Weight and Sufficiency of. The weight and sufficiency of the evidence is for the jury,³⁵ and where there is any evidence tending to support the issues in the case, although slight, the cause should go to the jury.³⁶ So too, where there

plice, and then leave them free to find whether or not such a person is an accomplice."

32. Ala.—*Albritton v. State*, 94 Ala. 76, 10 So. 426. **Cal.**—*People v. Sears*, 119 Cal. 267, 270, 51 Pac. 325. **Colo.** *Wisdom v. People*, 11 Colo. 170, 17 Pac. 519. **Ga.**—*Montford v. State*, 144 Ga. 582, 87 S. E. 797; *Evans v. State*, 13 Ga. App. 700, 79 S. E. 916. **Miss.**—*Polard v. State*, 53 Miss. 410, 24 Am. Rep. 703. **Neb.**—*Nightingale v. State*, 62 Neb. 371, 87 N. W. 158; *Henry v. State*, 51 Neb. 149, 70 N. W. 924, 66 Am. St. Rep. 450. **Nev.**—*State v. Waterman*, 1 Nev. 543. **Okla.**—*Wright v. Territory*, 5 Okla. 78, 47 Pac. 1069; *Shoemaker v. Territory*, 4 Okla. 118, 43 Pac. 1059. **Tenn.**—*Ford v. State*, 101 Tenn. 454, 47 S. W. 703. **Wash.**—*State v. Fair*, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897.

33. See 11 STANDARD PROC. 640, et seq.

34. Cal.—*People v. Bolanger*, 71 Cal. 17, 11 Pac. 799. **Ia.**—*State v. McKean*, 36 Iowa 343, 14 Am. Rep. 530. **Kan.** *State v. Jansen*, 22 Kan. 498. **Mass.** *Com. v. Baker*, 155 Mass. 287, 29 N. E. 512. **Pa.**—*Campbell v. Com.*, 84 Pa. 187. **Tex.**—*Wright v. State*, 7 Tex. App. 574, 32 Am. Rep. 599.

35. Ark.—*Ingram v. Marshall*, 23 Ark. 115. **Dak.**—*Territory v. Egan*, 3 Dak. 119, 13 N. W. 568. **Ga.**—*Lake v. Hardee*, 55 Ga. 667; *Warner v. Robertson*, 13 Ga. 370. **Ill.**—*Paton v. Stewart*, 78 Ill. 481; *Stacy v. Cobbs*, 36 Ill. 349. **Md.**—*Jackson v. Jackson*, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773. **Mo.** *Chouquette v. Barada*, 28 Mo. 491; *Patterson v. McClanahan*, 13 Mo. 507; *Davis v. Kroyden*, 60 Mo. App. 441. **N. M.** *Territory v. O'Donnell*, 4 N. M. 196, 12 Pac. 743. **N. Y.**—*Tuttle v. Buck*, 41 Barb. 417; *Michigan Carbon Works v. Schad*, 38 Hun 71. **N. C.** *Wittkowsky v. Wasson*, 71 N. C. 451. **Pa.**—*Hill v. Canfield*, 56 Pa. 454; *Kies-*

ter v. Miller, 25 Pa. 481. **Tex.**—*Wood v. Samuels*, 1 White & W. Civ. Cas., §922. **Va.**—*Hardaway v. Manson*, 2 Munf. (16 Va.) 230. **Wis.**—*Zonne v. Wiersom*, 3 Pin. 217, 3 Chand. 240.

[a] **Relative weight of positive and negative testimony** is for the jury; the court cannot say as a matter of law that positive testimony will control negative. *Rhoades v. Chicago & G. T. Ry. Co.*, 58 Mich. 263, 25 N. W. 182.

36. Cal.—*Braunton v. Southern Pac. Co.*, 2 Cal. App. 173, 83 Pac. 265. **Idaho.** *Idaho Comstock Min. & Mill. Co. v. Lundstrum*, 9 Idaho 257, 74 Pac. 975. **Ill.**—*Chicago City R. Co. v. McCaughna*, 216 Ill. 202, 74 N. E. 819; *Illinois Third Vein Coal Co. v. Cioni*, 215 Ill. 583, 74 N. E. 751; *West Chicago St. R. Co. v. Shiplett*, 85 Ill. App. 683. **Ind.**—*Galbraith v. Holmes*, 15 Ind. App. 34, 43 N. E. 575. **Kan.**—*Duncan v. Huse*, 73 Kan. 432, 85 Pac. 589; *Waterson v. Rogers*, 21 Kan. 529. **Ky.**—*Evening Post Co. v. Richardson*, 113 Ky. 641, 68 S. W. 665; *Jenkins v. Louisville & N. R. Co.*, 104 Ky. 673, 47 S. W. 761; *Hughes v. Cincinnati, N. O. & T. P. R. Co.*, 91 Ky. 526, 16 S. W. 275; *Gladstone Baptist Church v. Scott*, 25 Ky. L. Rep. 237, 74 S. W. 1075. **Mich.**—*Chamberlain v. Detroit Stove Works*, 103 Mich. 124, 61 N. W. 532; *Mynning v. Detroit, L. & N. R. Co.*, 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804. **Minn.**—*Hamm Realty Co. v. New Hampshire Fire Ins. Co.*, 80 Minn. 139, 83 N. W. 41. **Mo.**—*Clafin v. Rosenberg*, 42 Mo. 439, 97 Am. Dec. 336; *Rosenbaum v. Gilliam*, 101 Mo. App. 126, 74 S. W. 507; *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351, 73 S. W. 281; *Carr v. Ubsdell*, 97 Mo. App. 326, 71 S. W. 112. **N. C.**—*Craft v. Norfolk & S. R. Co.*, 136 N. C. 49, 48 S. E. 519. **Ore.**—*North Pac. Lumb. Co. v. Spore*, 44 Ore. 462, 75 Pac. 890. **Pa.**—*Kelton v. Fifer*, 26 Pa. Super. 603. **S. C.**—*Riordan v. Doty*, 56 S. C. 111,

is a conflict in the evidence on material issues,³⁷ or different minds

- 34 S. E. 68. **Tex.**—Bowman v. Texas Brewing Co., 17 Tex. Civ. App. 446, 43 S. W. 808. **Vt.**—Brooks v. Thacher, 49 Vt. 492.
- 37. U. S.**—New York Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531; Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Weightman v. Washington, 1 Black 39, 17 L. ed. 52. **Ala.** Alabama Midland Ry. Co. v. Johnson, 123 Ala. 197, 26 So. 160; Alabama Mineral R. Co. v. Jones, 121 Ala. 113, 25 So. 814; Cole v. Propst, 119 Ala. 99, 24 So. 884; Loeb v. Huddleston, 105 Ala. 257, 16 So. 714; De Loach Mills Mfg. Co. v. Middlebrooks, 95 Ala. 459, 10 So. 917. **Ark.**—St. Louis, I. M. & S. Ry. Co. v. Lewis, 60 Ark. 409, 30 S. W. 765, 1135; Sibley v. Ratliffe, 50 Ark. 477, 8 S. W. 686; Little Rock & Ft. S. R. Co. v. Atkins, 46 Ark. 423. **Cal.**—Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976, 101 Am. St. Rep. 84, 65 L. R. A. 419; Taylor v. Middleton, 67 Cal. 656, 8 Pac. 594; Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131; Godchaux v. Mulford, 26 Cal. 316, 322, 85 Am. Dec. 178; Gerke v. California Steam Nav. Co., 9 Cal. 251, 70 Am. Dec. 650. **Colo.**—Sanderson v. Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544. **Del.**—Mauck v. Merchants' & Mfrs. Fire Ins. Co., 4 Penne. 325, 54 Atl. 952. **D. C.**—Payne v. Pomeroy, 10 Mackey 243; Olmstead v. Webb, 5 App. Cas. 38; Huber v. Teuber, 3 MacArthur 484, 36 Am. Rep. 110. **Fla.**—Smith v. Klay, 47 Fla. 216, 36 So. 54. **Ga.** Gardner v. Lamback, 47 Ga. 133; Peterson v. State, 47 Ga. 524. **Haw.** Pahukula v. Parke, 6 Hawaii 210. **Idaho.** York v. Pacific & N. R. R. Co., 8 Idaho 574, 69 Pac. 1042. **Ill.**—Sandwich v. Dolan, 133 Ill. 177, 24 N. E. 526, 23 Am. St. Rep. 598; Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136. **Ind.**—Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Cincinnati, H. & I. R. Co. v. Eaton, 94 Ind. 474, 48 Am. Rep. 179; Albion v. Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Noblesville & E. Gravel Road Co. v. Gause, 76 Ind. 142, 40 Am. Rep. 224; Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103. **Ia.**—Crittenden v. Springfield F. & M. Ins. Co., 85 Iowa 652, 52 N. W. 548, 39 Am. St. Rep. 321; Kaufman v. Farley Mfg. Co., 78 Iowa 679, 43 N. W. 612, 16 Am. St. Rep. 462; Burns v. Chicago, M. & St. P. Ry. Co., 69 Iowa 150, 30 N. W. 25, 58 Am. Rep. 227; Manderschied v. Dubuque, 29 Iowa 73, 4 Am. Rep. 196. **Kan.**—Kansas City v. Bradbury, 45 Kan. 381, 25 Pac. 889, 23 Am. St. Rep. 731; Baughman v. Penn., 33 Kan. 504, 6 Pac. 890. **Ky.**—Dedway v. Powell, 4 Bush 77, 96 Am. Dec. 283; Bunton v. Worley, 4 Bibb 38, 7 Am. Dec. 735; White v. Fox, 1 Bibb 369, 4 Am. Dec. 643; Green v. Hollingsworth, 5 Dana 173, 30 Am. Dec. 680. **Me.**—Nugent v. Boston, C. & M. R. R. Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; Rhoda v. Annis, 75 Me. 17, 46 Am. Rep. 354; Lake v. Milliken, 62 Me. 240, 16 Am. Rep. 456; Hill v. Nash, 41 Me. 585, 66 Am. Dec. 266. **Md.**—Newbold v. Hayward, 96 Md. 247, 54 Atl. 67; Cumberland Valley R. Co. v. Maugans, 61 Md. 53, 48 Am. Rep. 88; Baltimore, etc. R. Co. v. Miller, 29 Md. 252, 96 Am. Dec. 528; Sprigg v. Moale, 28 Md. 497, 92 Am. Dec. 698. **Mass.**—A. J. Tower Co. v. Southern Pac. Co., 184 Mass. 472, 69 N. E. 348; Holst v. Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442; Flag v. Hudson, 142 Mass. 280, 8 N. E. 42, 56 Am. Rep. 674; Gaynor v. Old Colony & N. Ry. Co., 100 Mass. 208, 97 Am. Dec. 96; Woods v. Keyes, 14 Allen 236, 92 Am. Dec. 765. **Mich.**—Reid v. Detroit Ideal Paint Co., 132 Mich. 528, 94 N. W. 3; Lee v. Huron Indemnity Union, 135 Mich. 291, 97 N. W. 709; Carland v. Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; Dundas v. Lansing, 75 Mich. 499, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162. **Minn.**—Price v. Standard Life & Accident Ins. Co., 92 Minn. 238, 99 N. W. 887; Dahlberg v. Minneapolis St. R. Co., 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585. **Miss.**—Williams v. Southern R. Co., 33 So. 972; Griffin v. Brock, 33 So. 968. **Mo.**—Henderson v. Kansas City, 177 Mo. 477, 76 S. W. 1045; Glascock v. Swofford Bros. Dry Goods Co. (Mo. App.), 74 S. W. 1039; Lynch v. Metropolitan St. Ry. Co., 112 Mo. 420, 20 S. W. 642; State v. Mason, 112 Mo. 374, 20 S. W. 629, 34 Am. St. Rep. 390. **Mont.**—Nord v. Boston & M. Consol. C. & S. Min. Co., 30 Mont. 48, 75 Pac. 681. **Neb.**—New Omaha Thompson-Houston E. L. Co. v. Rombold, 68

might reasonably draw different conclusions from, or place different

- Neb. 54, 72, 93 N. W. 966, 97 N. W. 1030; Chicago, R. I. & P. R. Co. v. Sporer, 69 Neb. 8, 94 N. W. 991; Dempster Mill Mfg. Co. v. Lofquist, 3 Neb. (Unof.) 388, 91 N. W. 524. **Nev.** Sharon v. Davidson, 4 Nev. 416. **N. H.** First Nat. Bank v. Hunton, 69 N. H. 509, 45 Atl. 351; Huntress v. Boston & M. R. R. Co., 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; Graves v. Shattuck, 35 N. H. 257, 69 Am. Dec. 536; Lord v. Colley, 6 N. H. 99, 25 Am. Dec. 445. **N. J.**—Underfeed Stoker Co. v. Hudson County Consumers' Brewing Co., 70 N. J. L. 649, 58 Atl. 296; Henn v. Metropolitan Life Ins. Co., 67 N. J. L. 310, 51 Atl. 689; Baumann v. Hamburg-American Packet Co., 67 N. J. L. 250, 51 Atl. 641. **N. M.** Crabtree v. Segrist, 3 N. M. 278, 6 Pac. 202. **N. Y.**—McDonald v. Metropolitan St. Ry. Co., 167 N. Y. 66, 66 N. E. 282; Tolman v. Syracuse, B. & N. Y. R. Co., 98 N. Y. 198, 50 Am. Rep. 649; Mangam v. Brooklyn City R. Co., 38 N. Y. 455, 98 Am. Dec. 66; Johnson v. Weed, 9 Johns. 310, 6 Am. Dec. 279. **N. C.**—North Carolina Corporation Commission v. Atlantic Coast Line R. Co., 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636; Brown v. Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748; Wallace v. Western North Carolina R. Co., 98 N. C. 494, 4 S. E. 503, 2 Am. St. Rep. 346; State v. Boon, 35 N. C. 244, 57 Am. Dec. 555. **N. D.**—Pewonka v. Stewart, 13 N. D. 117, 99 N. W. 1080; Hazelton Boiler Co. v. Fargo Gas & E. Co., 4 N. D. 365, 61 N. W. 151. **Ohio.** Pennsylvania R. R. Co. v. Snyder, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700; Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 49 Am. St. Rep. 699, 26 L. R. A. 313; Hadley v. Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; Harris v. Protection Ins. Co., Wright 548. **Okla.**—Neeley v. Southwestern Cotton Seed Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145; Turner v. Territory, 11 Okla. 660, 69 Pac. 804. **Pa.**—Heh v. Consolidated Gas Co., 201 Pa. 443, 50 Atl. 994, 88 Am. St. Rep. 819; Corcoran v. Pennsylvania R. Co., 203 Pa. 380, 53 Atl. 240; Annville Nat. Bank v. Kettering, 106 Pa. 531, 51 Am. Rep. 536; Hass v. Philadelphia & S. S. Co., 88 Pa. 269, 32 Am. Rep. 462; Stahl v. Berger, 10 Serg. & R. 170, 13 Am. Dec. 666. **R. I.**—Le Beau v. Dyer-ville Mfg. Co., 26 R. I. 34, 57 Atl. 1092; Hampson v. Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; Butcher v. Providence Gas Co., 12 R. I. 149, 34 Am. Rep. 626. **S. C.**—Morrow v. Gaffney Mfg. Co., 70 S. C. 242, 49 S. E. 573; Wood v. Victor Mfg. Co., 66 S. C. 482, 45 S. E. 81; State v. Johnson, 66 S. C. 23, 44 S. E. 58; Carolina Nat. Bank v. Wallace, 13 S. C. 347, 36 Am. Rep. 694. **S. D.**—Lockhart v. Hewitt, 18 S. D. 522, 101 N. W. 355; McKeever v. Homestake Mining Co., 10 S. D. 599, 74 N. W. 1053. **Tenn.** Hines v. Wilcox, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824, 832; Shadden v. McElwee, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821; Swindle v. State, 2 Yerg. 581, 24 Am. Dec. 515. **Tex.**—Texas & P. Ry. Co. v. Robertson, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929; Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405; Shepherd v. Cassidy, 20 Tex. 24, 70 Am. Dec. 372; Northern Texas Traction Co. v. Peterman (Tex. Civ. App.), 80 S. W. 535. **Utah.**—Olson v. Oregon Short Line R. Co., 24 Utah 460, 68 Pac. 148; Lowe v. Herald Co., 6 Utah 175, 21 Pac. 991; Burrows v. Guest, 5 Utah 91, 12 Pac. 847. **Vt.** Morrisette v. Canadian Pac. R. Co., 74 Vt. 232, 52 Atl. 520; *In re Claffin*, 73 Vt. 129, 50 Atl. 815, 87 Am. St. Rep. 693; Drew v. Sutton, 55 Vt. 586, 45 Am. Rep. 644; Hill v. New Haven, 37 Vt. 501, 88 Am. Dec. 613. **Va.**—Bowen v. Flanagan, 84 Va. 313, 4 S. E. 724; Coleman v. Com., 25 Gratt. (66 Va.) 865, 18 Am. Rep. 711. **Wash.**—Rattelmiller v. Stone, 28 Wash. 104, 68 Pac. 168; Lane v. Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153; State v. Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154. **W. Va.**—Snooks v. Wingfield, 52 W. Va. 441, 44 S. E. 277; Young v. West Virginia & P. R. Co., 44 W. Va. 218, 28 S. E. 932; Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227; Sheff v. Huntington, 16 W. Va. 307. **Wis.** Teesdale v. Bennett, 123 Wis. 355, 101 N. W. 688; Morton v. Smiley, 119 Wis.

constructions on the evidence,³⁸ the case should go to the jury for them to determine the issues of fact.³⁹ The court is to determine whether there is any evidence warranting the submission of the case to the jury.⁴⁰ Where the evidence would support but one verdict the court may instruct the jury to return that verdict.⁴¹ A complete

156, 96 N. W. 534; *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Spen- cer v. Milwaukee & P. du C. R. Co.*, 17 Wis. 487, 84 Am. Dec. 758.

38. **U. S.**—*Sioux City & Pac. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Standard Life & Acc. Ins. Co. v. Sale*, 121 Fed. 664, 57 C. C. A. 418, 61 L. R. A. 337; *Goldsmith v. Thuringia Ins. Co.*, 114 Fed. 914, 52 C. C. A. 534. **Ala.**—*Allman v. Gann*, 29 Ala. 240. **Fla.**—*Rogers Co. v. Meinhardt*, 37 Fla. 480, 19 So. 878. **Ga.**—*Cunningham v. Central of Georgia R. Co.*, 118 Ga. 276, 45 S. E. 246. **Ill.**—*Wallen v. North Chicago St. R. Co.*, 82 Ill. App. 103. **Kan.**—*Chicago, R. I. & P. R. Co. v. Wood*, 66 Kan. 613, 72 Pac. 215. **Mich.**—*Howey v. Fisher*, 111 Mich. 422, 69 N. W. 741. **Mo.**—*Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 12 L. R. A. 746; *Voegli v. Pickel Marble & Granite Co.*, 56 Mo. App. 678. **Neb.**—*Suiter v. Park Nat. Bank*, 35 Neb. 372, 53 N. W. 205. **N. Y.**—*Hagan v. Sone*, 174 N. Y. 317, 66 N. E. 973. **N. C.**—*Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201. **S. D.**—*Lockhart v. Hewitt*, 18 S. D. 522, 101 N. W. 355; *Sweet v. Chicago, M. & St. P. Ry. Co.*, 6 S. D. 281, 60 N. W. 77. **Tex.**—*Hutchens v. St. Louis Southwestern R. Co.*, 40 Tex. Civ. App. 245, 89 S. W. 24.

39. Review on appeal, see 2 STAND-ARD PROC. 434.

Review on motion for new trial, see the title "New Trial."

40. **U. S.**—*Western Union Tel. Co. v. Baker*, 140 Fed. 315, 72 C. C. A. 87; *United States F. & G. Co. v. Board of Comrs.*, 145 Fed. 144, 76 C. C. A. 114. **Del.**—*Daniels v. Liebig Mfg. Co.*, 2 Marv. 207, 42 Atl. 447. **Ill.**—*Libby, McNeill & Libby v. Banks*, 209 Ill. 109, 70 N. E. 599. **Mo.**—*Hillman v. Gray's Point Terminal R. Co.*, 99 Mo. App. 271, 73 S. W. 220. **Pa.**—*Dixon & Co. v. Daub*, 17 Pa. Super. 168.

41. **U. S.**—*McGuire v. Blount*, 199 U. S. 142, 26 Sup. Ct. 1, 50 L. ed. 125; *Cudahy Packing Co. v. Marcan*, 106 Fed. 645, 45 C. C. A. 515, 54 L. R. A.

258; *Turnbull v. Ross*, 141 Fed. 649, 72 C. C. A. 609; *Guild v. Pringle*, 145 Fed. 312, 76 C. C. A. 192; *Hodges v. Kimball*, 104 Fed. 745, 44 C. C. A. 193. **Ala.**—*Gulf City Const. Co. v. Louisville & N. R. Co.*, 121 Ala. 621, 25 So. 579. **Cal.**—*Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 75 Pac. 787. **Del.**—*Wilcox v. Wilmington City R. Co.*, 2 Penne. 157, 44 Atl. 686. **D. C.**—*Adams v. Washington & G. R. Co.*, 9 App. Cas. 26. **Ga.**—*McCullough v. Pritchett*, 120 Ga. 585, 48 S. E. 148; *McCall v. Herring*, 118 Ga. 522, 45 S. E. 442. **Ill.**—*Siddall v. Jansen*, 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112; *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455; *Illinois Cent. R. Co. v. Shumann*, 101 Ill. App. 668; *Kluska v. Chicago*, 97 Ill. App. 665. **Ind.**—*Dunnington v. Syfers*, 157 Ind. 458, 62 N. E. 29; *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268. **Ia.**—*Shuman v. Supreme Lodge K. H.*, 110 Iowa 480, 81 N. W. 717. **Kan.**—*Holm v. Waters*, 8 Kan. App. 859, 56 Pac. 507. **Ky.**—*Southern R. Co. v. Goddard*, 121 Ky. 567, 89 S. W. 675. **Md.**—*Vogeler v. Devries*, 98 Md. 302, 56 Atl. 782. **Mich.**—*Mar-cott v. Marquette, H. & O. R. Co.*, 47 Mich. 1, 10 N. W. 53. **Minn.**—*Min-neapolis Threshing Mach. Co. v. Jones*, 95 Minn. 127, 103 N. W. 1017. **Neb.**—*Sattler v. Chicago, R. I. & P. R. Co.*, 71 Neb. 213, 98 N. W. 663; *Fremont Brewing Co. v. Hansen*, 65 Neb. 456, 91 N. W. 279, 93 N. W. 211. **N. H.**—*Boston & M. R. Co. v. Sargent*, 72 N. H. 455, 57 Atl. 688. **N. J.**—*Loper v. Somers*, 71 N. J. L. 657, 61 Atl. 85; *Meyers v. Birch*, 59 N. J. L. 238, 36 Atl. 95. **Okla.**—*Pringey v. Guss*, 16 Okla. 82, 86 Pac. 292; *Kentucky Refin-ing Co. v. Purcell Cotton Seed Oil Mills*, 13 Okla. 220, 73 Pac. 945. **W. Va.**—*Klinkler v. Wheeling Steel & Iron Co.*, 43 W. Va. 219, 27 S. E. 237; *Wool-wine's Admr. v. Chesapeake & O. Ry. Co.*, 36 W. Va. 329, 15 S. E. 81, 32 Am. St. Rep. 859, 16 L. R. A. 271. **Wis.**—*O'Brien v. Chicago, St. P. M. & O. Ry. Co.*, 102 Wis. 628, 78 N. W. 1084.

discussion as to when the court should direct a verdict will be found elsewhere in this work.⁴²

2. Admissibility of.—Questions relating to the admissibility of evidence are generally to be determined by the court,⁴³ it being the province of the court to determine the competency of both the evidence and the witness.⁴⁴

3. Credibility of Witnesses.—The province of the court is to call the attention of the jury to any matters which legitimately affect the credibility of the witnesses,⁴⁵ but the testimony of each witness should

See the title "**Verdict.**"

[a] "The practice of directing a verdict for the defendant when it is clear that the evidence is not sufficient to make out a case for plaintiff is a wise one, for it saves time and costs, and expedites the business of the court." *Neal v. St. Louis*, 1 M. & S. R. Co., 71 Ark. 445, 78 S. W. 220.

42. See the title "**Verdict.**"

43. **U. S.**—*Pittsburgh & W. R. Co. v. Thompson*, 82 Fed. 720, 27 C. C. A. 333, 54 U. S. App. 222. **Ala.**—*Burnwell C. Co. v. Setzer*, 191 Ala. 398, 67 So. 604; *McKinstry v. Tuscaloosa*, 172 Ala. 344, 54 So. 629. **Ariz.**—*Fernandez v. State*, 16 Ariz. 269, 144 Pac. 640. **Cal.** *People v. Ivey*, 49 Cal. 56; *People v. Holloway*, 28 Cal. App. 214, 151 Pac. 975; *People v. Tyree*, 21 Cal. App. 701, 132 Pac. 784. **Ga.**—*Central Georgia Power Co. v. Cornwell*, 139 Ga. 1, 76 S. E. 387, Ann. Cas. 1914A, 880. **Idaho.** *State v. Simes*, 12 Idaho 310, 85 Pac. 914. **Ill.**—*People v. Enright*, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913E, 318. **La.**—*State v. William*, 130 La. 280, 57 So. 927; *State v. Lee*, 127 La. 1077, 54 So. 356; *State v. Perrioux*, 107 La. 601, 30 So. 1016. **Me.**—*Littlefield v. Cook*, 112 Me. 551, 92 Atl. 787. **Mass.** *Macnaughtan v. Com.*, 220 Mass. 550, 108 N. E. 357; *Slotofski v. Boston Elevated R. Co.*, 215 Mass. 318, 102 N. E. 417. **Mich.**—*Bowdle v. Detroit St. Ry. Co.*, 103 Mich. 272, 61 N. W. 529, 50 Am. St. Rep. 366, 4 Am. Neg. Cas. 180. **Minn.**—*Cleveland v. Rowe*, 99 Minn. 444, 109 N. W. 817; *Paterson v. Chicago, M. & St. P. R. Co.*, 95 Minn. 57, 103 N. W. 621. **Mo.**—*State v. Connors*, 233 Mo. 348, 135 S. W. 444, Ann. Cas. 1912C, 28; *State v. Whitsett*, 232 Mo. 511, 134 S. W. 555. **Mont.** *State v. Berberick*, 38 Mont. 423, 100 Pac. 209. **N. H.**—*State v. Tetrault*, 95 Atl. 669. **N. J.**—*State v. Lodico*, 88 N. J. L. 394, 95 Atl. 626. **Ohio.** *Berry v. State*, 31 Ohio St. 219,

27 Am. Rep. 506. **Okla.**—*Chicago, R. I. & P. R. Co. v. McBee*, 45 Okla. 192, 145 Pac. 331; *Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698. **Tex.**—*Hovey v. Sanders* (Tex. Civ. App.), 174 S. W. 1025; *Riggins v. Post* (Tex. Civ. App.), 172 S. W. 210. **Va.** *Johnson v. Com.*, 111 Va. 877, 69 S. E. 1104.

44. *McKinstry v. Tuscaloosa*, 172 Ala. 344, 54 So. 629; *Empire Life Ins. Co. v. Einstein*, 12 Ga. App. 380, 77 S. E. 209; *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983. See 3 ENCY. OF EV. 168, et seq.

[a] **Competency of infant to testify** is to be determined by the court. **Ark.** *Wakin v. Wakin*, 119 Ark. 509, 180 S. W. 471. **Cal.**—*People v. Bernal*, 10 Cal. 66. **Colo.**—*City of Victor v. Smilanich*, 54 Colo. 479, 131 Pac. 392. **Kan.**—*State v. Gaunt*, 98 Kan. 186, 157 Pac. 447. **Mo.**—*State v. Sykes*, 248 Mo. 708, 154 S. W. 1130. **N. H.**—*Madden v. Boston & M. R. R.*, 76 N. H. 379, 83 Atl. 129, 39 L. R. A. (N. S.) 1058. **N. Y.**—*People v. Washor*, 196 N. Y. 104, 89 N. E. 441. **Okla.**—*Walker v. State*, 12 Okla. Crim. 179, 153 Pac. 209. **Tex.**—*Tennel v. State*, 78 Tex. Crim. 400, 181 S. W. 458. **Utah.**—*State v. Morasco*, 42 Utah 5, 128 Pac. 571.

45. **U. S.**—*Reagan v. United States*, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. ed. 709; *Shecil v. United States*, 226 Fed. 184, 141 C. C. A. 182; *Fidelity Mut. Life Assn. v. Jeffords*, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193. **Ala.**—*Stinson v. State*, 10 Ala. App. 110, 64 So. 507. **Ariz.**—*Halderman v. Territory*, 7 Ariz. 120, 60 Pac. 876. **Del.**—*Fennemore v. Armstrong*, 6 Boyce 35, 96 Atl. 204. **Ill.**—*Village of Des Plaines v. Winkelman*, 270 Ill. 149, 110 N. E. 417; *People v. Harrison*, 261 Ill. 517, 101 N. E. 259; *People v. Archibald*, 258 Ill. 383, 101 N. E. 582. **Ind.** *Tippecanoe L. & T. Co. v. Jester*, 180 Ind. 357, 101 N. E. 915, L. R. A. 1915E,

be subjected to the same test, and the court should avoid expressions calculated to discredit the testimony of any particular witness,⁴⁶ or portions of the evidence.⁴⁷ The jury are the sole and exclusive judges

721; *Mishler v. Chicago, etc. Ry. Co.* (Ind. App.), 111 N. E. 460. **Mo.** *Cohen v. St. Louis Merchants', etc. Co.* (Mo. App.), 181 S. W. 1080. **N. J.** *State v. Rom*, 77 N. J. L. 248, 72 Atl. 431; *Faulkner v. Paterson Ry. Co.*, 65 N. J. L. 181, 46 Atl. 765. **N. M.** *State v. Perkins*, 21 N. M. 135, 153 Pac. 258. **N. C.**—*Stallings v. Hurdle*, 171 N. C. 4, 86 S. E. 80; *Herndon v. Southern R. Co.*, 162 N. C. 317, 78 S. E. 287. **Pa.**—*Com. v. McKwayne*, 221 Pa. 449, 70 Atl. 809. **Tex.**—*Cartwright v. La Brie* (Tex. Civ. App.), 144 S. W. 725. **W. Va.**—*State v. Clark*, 64 W. Va. 625, 63 S. E. 402.

See 13 STANDARD PROC. 899.

[a] Court is bound to instruct on weight of contradictions and false testimony on material matters. *Reynolds v. State*, 196 Ala. 586, 72 So. 20.

[b] If testimony is susceptible of only one inference, the court should declare what that inference is. *Sanders v. Southern Ry.*, 90 S. C. 331, 73 S. E. 356.

46. **U. S.**—*Norfolk & W. R. Co. v. United States*, 177 Fed. 623, 101 C. C. A. 249; *Chicago, M. & St. P. R. Co. v. Anderson*, 168 Fed. 901, 94 C. C. A. 241. **Ala.**—*Louisville & N. R. Co. v. Perkins*, 144 Ala. 325, 39 So. 305; *Bullington v. State*, 13 Ala. App. 61, 69 So. 319. **Cal.**—*People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520; *People v. Converse*, 28 Cal. App. 687, 153 Pac. 734; *People v. Muhly*, 11 Cal. App. 129, 104 Pac. 466. **Colo.**—*Lynch v. People*, 33 Colo. 128, 79 Pac. 1015. **Fla.**—*McDuffee v. State*, 55 Fla. 125, 46 So. 721. **Ga.**—*Georgia S. & F. R. Co. v. Wisenbacker*, 120 Ga. 656, 48 S. E. 146; *Woodard v. State*, 5 Ga. App. 447, 63 S. E. 573. **Ill.**—*Hoffman v. Stephens*, 269 Ill. 376, 109 N. E. 994; *Tri-City R. Co. v. Gould*, 217 Ill. 317, 75 N. E. 493. **Ia.**—*State v. Asbury*, 172 Iowa 606, 154 N. W. 915, Ann. Cas. 1918A, 856. **Minn.**—*Kerling v. G. W. Van Dusen & Co.*, 109 Minn. 481, 124 N. W. 235, 372. **Miss.**—*Gaines v. State*, 48 So. 182. **Mo.**—*State v. Potts*, 239 Mo. 403, 144 S. W. 495; *State v. Barrington*, 198 Mo. 23, 95 S. W. 235. **Neb.** *Clarence v. State*, 86 Neb. 210, 125 N. W. 540; *Holmes v. State*, 85 Neb. 506, 123 N. W. 1043. **N. J.**—*State v. Skill-*

man, 76 N. J. L. 464, 70 Atl. 83. **N. C.** *Dobbins v. Dobbins*, 141 N. C. 210, 53 S. E. 870, 115 Am. St. Rep. 682, 10 L. R. A. (N. S.) 185. **Okla.**—*Doud v. State*, 12 Okla. Crim. 273, 154 Pac. 1008; *Hughes v. State*, 3 Okla. Crim. 387, 106 Pac. 546; *Crow v. State*, 3 Okla. Crim. 428, 106 Pac. 556. **Ore.** *State v. Fuller*, 52 Ore. 42, 96 Pac. 456. **Tex.**—*St. Louis & S. F. R. Co. v. Sproule*, 45 Tex. Civ. App. 615, 101 S. W. 268; *Barnett v. Ward* (Tex. Civ. App.), 144 S. W. 697. **Wash.**—*Calhoun v. Whitcomb*, 90 Wash. 128, 155 Pac. 759; *McCowan v. Northeastern S. Co.*, 41 Wash. 675, 84 Pac. 614. **Wis.** *Bodenheimer v. Chicago & N. W. R. Co.*, 140 Wis. 623, 123 N. W. 148.

See 13 STANDARD PROC. 900.

[a] Testimony of impeached witness may be called to juror's attention, impeachment of no other witness being attempted. *Stevens v. People*, 215 Ill. 593, 74 N. E. 786.

[b] Comment on conduct of witness when not on stand is improper. *Cridland v. Crow*, 221 Pa. 618, 70 Atl. 888.

[c] Testimony of detectives should not be singled out and the jury told that their testimony and that of informers is to be closely and carefully scrutinized. *State v. Meyers*, 132 Minn. 4, 155 N. W. 766.

[d] Court should not conduct a disparaging examination of a witness and intimate a disbelief in his testimony; to do so is reversible error. *Bierkamp v. Beuthien*, 173 Iowa 436, 155 N. W. 819.

47. **Ala.**—*Ex parte Pollard*, 193 Ala. 32, 69 So. 425; *Louisville & N. R. Co. v. Perkins*, 144 Ala. 325, 39 So. 305; *Gibson v. Snow Hdw. Co.*, 94 Ala. 346, 10 So. 304; *Cunningham v. State*, 14 Ala. App. 1, 69 So. 982; *Brand v. State*, 13 Ala. App. 390, 69 So. 379. **Cal.**—*Still v. San Francisco & N. W. R. Co.*, 154 Cal. 559, 98 Pac. 672, 129 Am. St. Rep. 177, 20 L. R. A. (N. S.) 322; *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *People v. Converse*, 28 Cal. App. 687, 153 Pac. 734. **Ga.**—*Cowart v. State*, 120 Ga. 510, 48 S. E. 198; *Atlantic Coast L. R. Co. v. O'Neill*, 127 Ga. 685, 56 S. E. 986; *Warriek v. State*, 125 Ga. 133, 53 S. E. 1027. **Idaho.**—*State v. Fleming*, 17 Idaho

of the credibility of the witnesses,⁴⁸ and should determine the credibil-

471, 106 Pac. 305. **Ill.**—Mullins *v.* People, 110 Ill. 42; Cummins *v.* Cleveland, C. C. & St. Louis R. Co., 147 Ill. App. 291; Faulkner *v.* Birch, 120 Ill. App. 281. **Ia.**—Gray *v.* Chicago, R. I. & P. R. Co., 143 Iowa 268, 121 N. W. 1097; Hardwick *v.* Hardwick, 130 Iowa 230, 106 N. W. 639. **Kan.**—Schick *v.* Warren Mtg. Co., 82 Kan. 90, 107 Pac. 536. **Mass.**—Carroll *v.* Boston Elevated Ry. Co., 200 Mass. 527, 86 N. E. 793. **Minn.**—Kincaid *v.* Jungkunz, 109 Minn. 400, 123 N. W. 1082. **Mo.**—Huff *v.* St. Joseph Ry., Light, H. & P. Co., 213 Mo. 495, 111 S. W. 1145; State *v.* Young, 99 Mo. 666, 12 S. W. 879; Greenbrier D. Co. *v.* Van Frank, 147 Mo. App. 204, 126 S. W. 222. **Ore.** State *v.* Walsworth, 54 Ore. 371, 103 Pac. 516. **Tex.**—Cordes *v.* State, 54 Tex. Crim. 204, 112 S. W. 943; Cope-land *v.* State, 36 Tex. Crim. 576, 38 S. W. 210; White *v.* Houston & T. C. R. Co. (Tex. Civ. App.), 46 S. W. 382. **Va.** Strause *v.* Richmond W. Co., 109 Va. 724, 65 S. E. 659, 132 Am. St. Rep. 937. **Wash.**—State *v.* King, 50 Wash. 312, 97 Pac. 247; Gilmore *v.* Seattle & R. R. Co., 29 Wash. 150, 69 Pac. 743. **Wis.**—Valley Lumb. Co. *v.* Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216.

See 13 STANDARD PROC. 871.

48. **U. S.**—Southwestern Brew. & Ice Co. *v.* Schmidt, 226 U. S. 162, 33 Sup. Ct. 68, 57 L. ed. 170; Sheel *v.* United States, 226 Fed. 184, 141 C. C. A. 182; Waters *v.* Davis, 145 Fed. 912, 76 C. C. A. 444; United States *v.* Knoell, 230 Fed. 509; Huchberger *v.* Merchants' Fire Ins. Co., 4 Biss. 265, 12 Fed. Cas. No. 6,822; Union Sugar Refinery *v.* Matthiesson, 3 Cliff. 639, 24 Fed. Cas. No. 14,399. **Ala.**—Barnes *v.* Marshall, 193 Ala. 94, 69 So. 436; Olden *v.* State, 176 Ala. 6, 58 So. 307; Hamilton *v.* State, 147 Ala. 110, 41 So. 940; Wilkerson *v.* State, 140 Ala. 165, 37 So. 265; Moore *v.* Jones, 13 Ala. 296. **Ariz.**—Faltin *v.* State, 17 Ariz. 278, 151 Pac. 952; Fernandez *v.* State, 16 Ariz. 269, 144 Pac. 640. **Ark.**—Wilson *v.* State, 124 Ark. 477, 187 S. W. 440; Shearer *v.* Farmers' & Merchants' Bank, 121 Ark. 599, 182 S. W. 262; Robertson *v.* Chicago, R. I. & P. R. Co., 121 Ark. 233, 180 S. W. 507; Boyle *v.* State, 110 Ark. 318, 161 S. W. 1049. **Cal.**—Frost *v.* Los Angeles Ry. Co., 165

Cal. 365, 132 Pac. 442; People *v.* Luis, 158 Cal. 185, 110 Pac. 580; People *v.* Stephens, 29 Cal. App. 616, 157 Pac. 570; People *v.* Horn, 25 Cal. App. 583, 144 Pac. 641; People *v.* Waysman, 1 Cal. App. 246, 81 Pac. 1087. **Colo.** Foster *v.* People, 56 Colo. 452, 139 Pac. 10; Victor *v.* Smilanich, 54 Colo. 479, 131 Pac. 392; Lynch *v.* People, 33 Colo. 128, 79 Pac. 1015; Fincher *v.* People, 26 Colo. 169, 56 Pac. 902; Finerty *v.* Fritz, 6 Colo. 137. **Conn.**—Hurley *v.* Adams Express Co., 88 Conn. 732, 90 Atl. 932; Brodie *v.* Connecticut Co., 87 Conn. 363, 87 Atl. 798; Schleifenbaum *v.* Rundbaken, 81 Conn. 623, 71 Atl. 899; Bradley *v.* Gorham, 77 Conn. 211, 58 Atl. 698, 66 L. R. A. 934; Pierce *v.* Selleck, 18 Conn. 321. **Dak.**—Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568. **Del.**—Fennemore *v.* Armstrong, 6 Boyce 35, 96 Atl. 204; State *v.* Summers, 6 Boyce 13, 96 Atl. 195; Igle *v.* People's Ry. Co., 5 Boyce 376, 93 Atl. 666; Keatley *v.* Grand Fraternity, 2 Boyce 511, 82 Atl. 294. **Fla.**—Hamp-ton *v.* State, 50 Fla. 55, 39 So. 421; Peadon *v.* State, 46 Fla. 124, 35 So. 204. **Ga.**—Hamilton *v.* State, 143 Ga. 265, 84 S. E. 583; Lynn *v.* State, 140 Ga. 387, 79 S. E. 29; Mixon *v.* Pollock, 55 Ga. 321; Strozier *v.* Carroll, 31 Ga. 557. **Haw.**—Lum Ah Lee *v.* Ah Soong, 16 Hawaii 163; Bright *v.* Kawanakaoa, 15 Hawaii 622. **Ill.**—Reynolds *v.* Alton, G. & St. L. Traction Co., 273 Ill. 207, 112 N. E. 668; Mahlstedt *v.* Ideal Lighting Co., 271 Ill. 154, 110 N. E. 795, Ann. Cas. 1917D, 209; Rosenthal *v.* Chicago & A. R. Co., 255 Ill. 552, 99 N. E. 672; Stampofski *v.* Steffens, 79 Ill. 303; Kelly *v.* People, 29 Ill. 287. **Ind.**—Miller *v.* State, 183 Ind. 319, 109 N. E. 205; Southern R. Co. *v.* Limback, 172 Ind. 89, 85 N. E. 354; Indianapolis St. Ry. Co. *v.* Johnson, 163 Ind. 518, 72 N. E. 571; Oliver *v.* Pate, 43 Ind. 132; Van Vaeter *v.* Mc-Killip, 7 Blackf. 578. **Ind. Ter.**—Atoka Coal & M. Co. *v.* Miller, 7 Ind. Ter. 104, 104 S. W. 555. **Ia.**—Rasmussen *v.* Hansen, 176 Iowa 26, 157 N. W. 154; Morgan *v.* Muench, 156 N. W. 819; State *v.* Flynn, 175 Iowa 604, 155 N. W. 254; Forsythe *v.* Kluckhohn, 161 Iowa 267, 142 N. W. 225. **Kan.**—Hy-land *v.* Atchison, T. & S. F. Ry. Co., 96 Kan. 432, 151 Pac. 1107; Atchison, T. & S. F. R. Co. *v.* Vanordstrand, 67

ity of witnesses even though the opposing party has offered nothing

- Kan. 386, 73 Pac. 113. **Ky.**—Louisville *v.* Dahl, 170 Ky. 281, 185 S. W. 1127; South Covington & C. St. R. Co. *v.* Markel, 168 Ky. 625, 182 S. W. 850; Kentucky & T. R. Co. *v.* West, 160 Ky. 280, 169 S. W. 728; Chesapeake & O. R. Co. *v.* Com., 149 Ky. 386, 149 S. W. 826; Hammill *v.* Louisville & N. R. Co., 93 Ky. 343, 20 S. W. 263. **Me.**—Caldwell Co. *v.* Cushnoc Paper Co., 114 Me. 411, 96 Atl. 730; Billings *v.* Beggs, 114 Me. 67, 95 Atl. 354; Johnson *v.* New York, N. H. & H. R. R., 111 Me. 263, 88 Atl. 988; Parsons *v.* Huff, 41 Me. 410. **Md.**—Townshend *v.* Townshend, 6 Md. 295; Morris *v.* Brickley, 1 Har. & G. 107. **Mass.**—Hughes *v.* Williams, 218 Mass. 448, 105 N. E. 1056; James *v.* Boston Elevated Ry. Co., 213 Mass. 424, 100 N. E. 545; Kane *v.* Learned, 117 Mass. 190; Tucker *v.* Welsh, 17 Mass. 160, 9 Am. Dec. 137; Amory *v.* Fellowes, 5 Mass. 219. **Mich.**—Pawlicki *v.* Detroit United Ry., 191 Mich. 536, 158 N. W. 162; Payne *v.* Union Life Guards, 136 Mich. 416, 99 N. W. 376, 112 Am. St. Rep. 368. **Minn.** State *v.* Christianson, 131 Minn. 276, 154 N. W. 1095. **Miss.**—Godfrey *v.* Meridian L. & Ry. Co., 101 Miss. 565, 58 So. 534. **Mo.**—Holzmer *v.* Metropolitan St. R. Co., 261 Mo. 379, 169 S. W. 102; Eaton *v.* Cates, 175 S. W. 950; Haynes *v.* Trenton, 123 Mo. 326, 27 S. W. 622; Henry *v.* Forbes, 7 Mo. 455. **Mont.**—Fowlie *v.* Cruse, 52 Mont. 222, 157 Pac. 958; Alexander *v.* Great Northern Ry. Co., 51 Mont. 565, 154 Pac. 914; Murray *v.* Butte, 51 Mont. 258, 151 Pac. 1051; Bowen *v.* Webb, 37 Mont. 479, 97 Pac. 839. **Neb.**—Baker *v.* Racine-Sattley Co., 86 Neb. 227, 125 N. W. 587. **N. H.** Paro *v.* Whitefield Sav. Bk. & Tr. Co., 77 N. H. 394, 92 Atl. 331. **N. J.**—State *v.* Skillman, 76 N. J. L. 464, 70 Atl. 83; Allen *v.* Allen, 85 N. J. Eq. 55, 95 Atl. 363. **N. M.**—Territory *v.* O'Donnell, 4 N. M. 196, 12 Pac. 743. **N. Y.** *In re* Kindberg's Will, 207 N. Y. 220, 100 N. E. 789; Walters *v.* Syracuse R. T. R. Co., 178 N. Y. 50, 70 N. E. 98; National Bank *v.* Mills, 99 N. Y. 656, 2 N. E. 27; Fellowes *v.* Barton, 66 Barb. 608; Merritt *v.* Lyon, 3 Barb. 110. **N. C.**—Hadley *v.* Tinnin, 170 N. C. 84, 86 S. E. 1017; State *v.* Allison, 169 N. C. 375, 85 S. E. 129; Swan *v.* Carawan, 168 N. C. 472, 84 S. E. 699; Fortune *v.* Hunt, 149 N. C. 358, 63 S. E. 82; State *v.* Smallwood, 75 N. C. 104. **N. D.**—Jensen *v.* Clausen, 34 N. D. 637, 159 N. W. 30; Blackorby *v.* Ginther, 34 N. D. 248, 158 N. W. 354. **Okla.**—Kali Inla C. Co. *v.* Ghinelli, 155 Pac. 606; Silverwood *v.* Carpenter, 51 Okla. 745, 152 Pac. 381; Remillard *v.* State, 10 Okla. Crim. 438, 133 Pac. 1132; Roberts *v.* State, 8 Okla. Crim. 394, 127 Pac. 894. **Ore.**—Riddle Street Bank *v.* Link, 78 Ore. 498, 153 Pac. 1192; McIntosh *v.* McNair, 53 Ore. 87, 99 Pac. 74. **Pa.**—Com. *v.* Payne, 242 Pa. 394, 89 Atl. 559; Coates *v.* Allegheny Steel Co., 234 Pa. 199, 83 Atl. 77; Mewes' Admr. *v.* Crescent Pipe Line Co., 170 Pa. 369, 32 Atl. 1083; West Branch Bank *v.* Donaldson, 6 Pa. 179. **P. I.**—United States *v.* Flores, 28 Phil. Isl. 29. **P. R.**—Irwin *v.* Nater, 7 Porto Rico Fed. 98; United States *v.* Cerecedo, 6 Porto Rico Fed. 626; Escudero *v.* Bernard, 6 Porto Rico Fed. 501. **R. I.**—Tavares *v.* Dewing, 39 R. I. 174, 98 Atl. 54; Gibbons *v.* Rhode Island Co., 37 R. I. 89, 91 Atl. 9; Beebe *v.* Greene, 34 R. I. 171, 82 Atl. 796. **S. C.** Rish *v.* Jackson, 104 S. C. 163, 88 S. E. 380; Bell *v.* Bell, 103 S. C. 95, 87 S. E. 540; Etheredge *v.* Aetna Ins. Co., 102 S. C. 313, 86 S. E. 687; Bowman *v.* Smith, 1 Strobb. 246; City Council *v.* Haywood, 2 Nott. & McC. 308. **S. D.**—Roberts *v.* Brown, 36 S. D. 548, 156 N. W. 77. **Tex.**—Newell *v.* State, 68 Tex. Crim. 177, 145 S. W. 939; Baggett *v.* State, 65 Tex. Crim. 425, 144 S. W. 1136; Coats *v.* Elliott, 23 Tex. 606; Alley *v.* Booth, 16 Tex. 94; Wood *v.* Samuels, 1 White & W. Civ. Cas., §922. **Va.**—Carlton *v.* Boudar, 118 Va. 521, 88 S. E. 174; Equitable Life Assur. Soc. *v.* Kitts' Admr., 109 Va. 105, 63 S. E. 455; Coleman *v.* Com., 25 Gratt. (66 Va.) 865, 18 Am. Rep. 711; Harrison *v.* Brock, 1 Munf. (15 Va.) 22. **Wash.**—Calhoun *v.* Whitcomb, 90 Wash. 128, 155 Pac. 759; State *v.* Schuman, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633; State *v.* Druzman, 88 Wash. 424, 153 Pac. 381; Thoresen *v.* St. Paul & Tacoma L. Co., 73 Wash. 99, 131 Pac. 645; Gibson *v.* Chicago, M. & P. S. Ry. Co., 61 Wash. 639, 112 Pac. 919. **W. Va.** McGuire *v.* Norfolk & W. R. Co., 70 W. Va. 538, 74 S. E. 859. **Wis.** Guidinger *v.* Smalley Mfg. Co., 148

to contradict the testimony,⁴⁹ and they are not bound to accept the statements of a witness because not directly impeached or contradicted.⁵⁰ So whether the testimony of a witness who has been im-

Wis. 194, 134 N. W. 404. **Wyo.**—*Murdica v. State*, 22 Wyo. 196, 137 Pac. 574; *Starke v. State*, 17 Wyo. 55, 96 Pac. 148.

See *ENCY. OF EV.*, title "Credibility."

[a] **Testimony of one whose immoral and degraded life shows want of religious sentiment**, or a disregard to personal character or reputation in society, is to be given such weight as the jury may determine. *Bowman v. Smith*, 1 Strob. (S. C.) 246.

[b] **Testimony of a lunatic**, when permitted to testify, is to be given such credit as the jury may see fit. *Coleman v. Com.*, 25 Gratt. (66 Va.) 865, 18 Am. Rep. 711.

[c] **"The jury may go upon excursions of discovery for truth within the field of evidence to the uttermost boundaries of reason, not boundaries set by any particular persons, or persons generally, but such as rational men of common sense might set without passing beyond the dividing line between the field of probabilities into that of mere guessing or conjecture."** *Samulski v. Menasha Paper Co.*, 147 Wis. 285, 133 N. W. 142, *quoted in* *Micknezauski v. Helmholtz Mitten Co.*, 148 Wis. 153, 134 N. W. 369.

49. **Ala.**—*Davis v. Hays*, 89 Ala. 563, 8 So. 131. **Conn.**—*Bradley v. Gorham*, 77 Conn. 211, 58 Atl. 698, 66 L. R. A. 934; *Lewis v. Lewis*, 76 Conn. 586, 57 Atl. 735. **D. C.**—*Alexander v. Blackman*, 26 App. Cas. 541. **Ill.**—*Kennedy v. Modern Woodmen*, 243 Ill. 560, 90 N. E. 1084, 28 L. R. A. (N. S.) 181. **Ky.**—*Howard v. Louisville R. Co.*, 32 Ky. L. Rep. 309, 105 S. W. 952. **Mass.**—*Giles v. Giles*, 204 Mass. 383, 90 N. E. 595. **N. Y.**—*People v. Walker*, 198 N. Y. 329, 91 N. E. 806; *Sharp v. Erie R. Co.*, 184 N. Y. 100, 76 N. E. 923; *Manhattan Co. v. Phillips*, 109 N. Y. 383, 17 N. E. 129; *Becker v. Koch*, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515; *Lesser v. Wunder*, 9 Daly 70. **N. C.**—*Dobbins v. Dobbins*, 141 N. C. 210, 53 S. E. 870, 115 Am. St. Rep. 682, 10 L. R. A. (N. S.) 185. **Pa.**—*Smucker v. Pennsylvania R. Co.*, 6 Pa. Super. 521; *Troxell v. Malin*, 9 Pa. Super. 483. **Tex.**—*Appel v. Childress*, 53 Tex. Civ. App. 607, 116 S. W. 129;

Missouri, K. & T. R. Co. v. Harris, 45 Tex. Civ. App. 542, 101 S. W. 506. **Wash.**—*Brown & Bros. Merc. Co. v. Sherrod*, 53 Wash. 132, 101 Pac. 481.

[a] **"A witness may be contradicted by the facts he states as completely as by direct adverse testimony.** A court or jury is not bound to accept it as true merely because there is no direct testimony contradicting it where it contains inherent improbabilities or contradictions, which alone, or in connection with other circumstances in evidence, satisfy them of its falsity." *Anderson v. Liljengren*, 50 Minn. 3, 52 N. W. 219.

50. **U. S.**—*Tracey v. Phelps*, 22 Fed. 634. **Colo.**—*Ward v. Teller Res. & Irr. Co.*, 60 Colo. 47, 153 Pac. 219. **Conn.**—*Brethauer v. Schorer*, 81 Conn. 143, 70 Atl. 592. **D. C.**—*Thurston v. McLellan*, 34 App. Cas. 294. **Fla.**—*Atzroth v. State*, 10 Fla. 207. **Ga.**—*Detwiler v. Cox*, 120 Ga. 638, 48 S. E. 142; *Armstrong v. Ballew*, 118 Ga. 168, 44 S. E. 996. **Ind.**—*Cotner v. State*, 173 Ind. 168, 89 N. E. 847. **Ia.**—*Nason v. Chicago, R. I. & P. R. Co.*, 140 Iowa 533, 118 N. W. 751; *White v. Hatton*, 113 N. W. 830. **Mass.**—*Strong v. Carver C. G. Co.*, 202 Mass. 209, 88 N. E. 582; *Com. v. Loewe*, 162 Mass. 518, 39 N. E. 192. **Mich.**—*People v. Mindeman*, 157 Mich. 120, 121 N. W. 488; *Durant v. People*, 13 Mich. 351. **Minn.**—*Hoffman v. Chicago, M. & St. P. Ry. Co.*, 43 Minn. 334, 45 N. W. 608. **Mo.**—*Price v. Lederer*, 33 Mo. App. 426. **Neb.**—*Chezem v. State*, 56 Neb. 496, 76 N. W. 1056. **N. Y.**—*Joy v. Diefendorf*, 130 N. Y. 6, 28 N. E. 602, 27 Am. St. Rep. 484; *Kearney v. Mayor*, 92 N. Y. 617; *MacReynolds v. Coney Island & B. R. Co.*, 170 App. Div. 314, 155 N. Y. Supp. 655. **Pa.**—*Carter v. Henderson & Co.*, 224 Pa. 319, 73 Atl. 554. **S. C.**—*Chartrand v. Southern Ry.*, 85 S. C. 479, 67 S. E. 741. **S. D.**—*Mee v. Carlson*, 22 S. D. 365, 117 N. W. 1033, 29 L. R. A. (N. S.) 351. **Tex.**—*First Nat. Bank v. McWhorter* (Tex. Civ. App.), 179 S. W. 1147; *First Nat. Bank v. Howard* (Tex. Civ. App.), 174 S. W. 719; *Sovereign Camp W. O. W. v. Jackson* (Tex. Civ. App.), 138 S. W. 1137; *Missouri, K. & T. R. Co. v. Harris*, 45 Tex. Civ. App.

peached is entitled to consideration,⁵¹ and what weight should be given to the testimony of a party to the action,⁵² are for the jury to determine. The question of a witness' reputation for truth and veracity is one of fact for the jury.⁵³

542, 101 S. W. 506; *International R. Co. v. Johnson*, 23 Tex. Civ. App. 160, 55 S. W. 772. **Vt.**—*Miller v. Miller*, 89 Vt. 547, 95 Atl. 928. **Va.**—*Clopton v. Com.*, 109 Va. 813, 63 S. E. 1022. **Wis.**—*Dohmen Co. v. Niagara Fire Ins. Co.*, 96 Wis. 38, 71 N. W. 69; *Moore v. Ellis*, 89 Wis. 108, 61 N. W. 291.

See *ENCY. OF EV.*, title "Weight and Effect of Evidence."

51. **Ga.**—*Hodgkins v. State*, 89 Ga. 761, 15 S. E. 695; *McCoy v. State*, 78 Ga. 490, 3 S. E. 768; *Shorter v. Marshall*, 49 Ga. 31; *Western & A. R. R. v. Carlton*, 28 Ga. 180. **Ill.**—*Craig v. Rohrer*, 63 Ill. 325. **Minn.**—*Schuek v. Hagar*, 24 Minn. 339.

[a] Whether witness swears mistakenly or knowingly testifies falsely is for the jury. *Carey v. Henderson*, 61 Ill. 378.

52. **Ark.**—*Adkins v. Hershey*, 14 Ark. 442. **Fla.**—*White v. Ross*, 35 Fla. 377, 17 So. 640. **Ga.**—*Taylor v. Tucker*, 1 Ga. 231. **Ill.**—*Stampofski v. Steffens*, 79 Ill. 303. **Ia.**—*Henry v. Sioux City & P. Ry. Co.*, 75 Iowa 84, 39 N. W. 193, 9 Am. St. Rep. 457. **Kan.**—*Kansas Pac. Ry. Co. v. Little*, 19 Kan.

267. **Mo.**—*Mullally v. Greenwood*, 127 Mo. 138, 29 S. W. 1001, 48 Am. St. Rep. 613. **N. H.**—*Stevenson v. Chapman*, 12 N. H. 524. **N. Y.**—*Goldsmith v. Coverly*, 75 Hun 48, 27 N. Y. Supp. 116, 31 Abb. N. C. 149, 56 N. Y. St. 857; *Wilcox v. Selleck*, 92 Hun 37, 36 N. Y. Supp. 633, 71 N. Y. St. 800; *Lowe v. Fidelity Printing Co.*, 16 Misc. 549, 38 N. Y. Supp. 711; *Corn v. Rosenthal*, 1 Misc. 168, 20 N. Y. Supp. 632, 48 N. Y. St. 674. **Pa.**—*Shaffer v. Clark*, 90 Pa. 94; *Prowattain v. Tindall*, 80 Pa. 295. **S. C.**—*Hornsby v. South Carolina Ry. Co.*, 26 S. C. 187, 1 S. E. 594. **Wis.**—*O'Brien v. Chicago & N. W. Ry. Co.*, 92 Wis. 340, 66 N. W. 363.

53. *Bates v. Barber*, 4 Cush. (Mass.) 107. It is not competent for the court to institute or allow a preliminary examination of the impeaching witnesses, as to their knowledge and means of knowledge of the reputation of the witness sought to be impeached, and thereupon receive or reject their testimony according as the court is satisfied, or not, that the witnesses have the requisite knowledge to testify to the fact in question.

PROVISOS AND EXCEPTIONS. — See *Indictment and Information*.

PUBLIC ASSEMBLY. — See *Disturbing Public Assembly; Unlawful Assembly*.

PUBLICATION. — See *Newspapers; Service of Process and Papers*.

PUBLIC CHARITIES

By the Editorial Staff.

I. ADMINISTRATION AND ENFORCEMENT OF GENERALLY, 865

- A. *Equity Supervision*, 865
 - 1. *In General*, 865
 - 2. *Remedies and Relief*, 867
- B. *Legal Proceedings*, 868
- C. *Jurisdiction and Venue*, 868
- D. *Parties*, 869
- E. *Pleading*, 869
- F. *Judgment or Decree*, 870

II. CHARITABLE ORGANIZATIONS, 870

- A. *Actions Against*, 870
- B. *Proceedings To Dissolve*, 870

CROSS-REFERENCES:

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. ADMINISTRATION AND ENFORCEMENT OF GENERALLY.

A. EQUITY SUPERVISION.—1. *In General*.—Public charities are peculiarly a subject of equity jurisdiction,¹ and its powers when prop-

1. *Perin v. Carey*, 24 How. (U. S.) 465, 16 L. ed. 701.

[a] *Origin and Source of Jurisdiction*.—(1) The court of chancery has exercised an original inherent jurisdiction over public charities from a time long prior to the enactment of the statute of uses. **U. S.**—*Perin v. Carey*, 24 How. 465, 16 L. ed. 701. **Ill.**—*Hoeffer v. Clogan*, 171 Ill. 462, 49 N. E. 527, 63 Am. St. Rep. 241, 40 L. R. A. 730. **Neb.**—*St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 84 N. W. 273, 83 Am. St. Rep. 553. **N. Y.**—*Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420. **Ohio**.—*Mannix v. Purcell*, 16 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753. (2) But that

statute has had an important bearing on public charities, and in so far as it enlarged or curtailed the jurisdiction of chancery it is of importance in states where it has been adopted as the common law, re-enacted, abolished, or restored. **Mo.**—See *Buchanan v. Kennard*, 234 Mo. 117, 136 S. W. 415, Ann. Cas. 1912D, 50, 37 L. R. A. (N. S.) 993. **N. Y.**—*McCartee v. Orphan Asylum Soc.*, 9 Cow. 437, 18 Am. Dec. 516. **S. C.**—*Snider v. Snider*, 70 S. C. 555, 50 S. E. 504, 106 Am. St. Rep. 754.

[b] *Extent of Jurisdiction*.—(1) The jurisdiction of a court of equity does not generally extend to the creation of the trust. *Morris v. Boyd*, 110 Ark. 468, 162 S. W. 69, Ann. Cas. 1916A, 1004. (2) Nor will it alter a

erly invoked by one entitled to do so² will be exercised for the purpose of enforcing their administration or preventing their abuse.³

trust which has already been established. *Grimes' Exrs. v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690. (3) Its power is limited as a rule to the execution of the trust as indicated by the expressed intention or wishes of the donor. *Crow v. Clay*, 196 Mo. 234, 95 S. W. 369.

2. *Jenkins v. Berry*, 122 Ky. 311, 92 S. W. 10, 119 Ky. 350, 83 S. W. 594; *State ex rel. Heddens v. Rusk*, 236 Mo. 201, 139 S. W. 199.

[a] **Not on Its Own Volition.**—*Jenkins v. Berry*, 122 Ky. 311, 92 S. W. 10, 119 Ky. 350, 83 S. W. 594; *State ex rel. Heddens v. Rusk*, 236 Mo. 201, 139 S. W. 199.

[b] **The attorney-general should act**, either of his own initiative or on relation of an interested party, when the trust is in danger by reason of faulty or maladministration or failure of the trustee to act. **Cal.**—*People v. Cogswell*, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269. **Ill.**—*People v. Braucher*, 258 Ill. 604, 101 N. E. 944, 47 L. R. A. (N. S.) 1015. **Kan.**—*Troutman v. De Boissiere Odd Fellows', etc. Assn.*, 66 Kan. 1, 71 Pac. 286. **Ky.**—*Jenkins v. Berry*, 119 Ky. 350, 83 S. W. 594.

Mass.—*Attorney General v. Bedard*, 218 Mass. 378, 105 N. E. 993; *Attorney General v. Clark*, 167 Mass. 201, 45 N. E. 183; *Burbank v. Burbank*, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748. **Mo.**—*State ex rel. Heddens v. Rusk*, 236 Mo. 201, 139 S. W. 199; *Tyree v. Bingham*, 100 Mo. 451, 13 S. W. 952. **N. H.**—*Burnham's Petition*, 74 N. H. 492, 69 Atl. 720. **N. J.**—*Bliss v. Linden Cemetery Assn.*, 81 N. J. Eq. 394, 87 Atl. 224; *Trustees of Princeton University v. Wilson*, 78 N. J. Eq. 1, 78 Atl. 393; *MacKenzie v. Jersey City Presbytery*, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227. **N. Y.**—*Owens v. Methodist Episcopal Church Missionary Soc.*, 14 N. Y. 380, 67 Am. Dec. 160; *Indigent Females Relief Assn. v. Beekman*, 21 Barb. 565. **R. I.**—*Stearns v. Newport Hospital*, 27 R. I. 309, 62 Atl. 132. **Eng.**—*Attorney General v. Dublin*, 1 Bligh N. S. 312, 4 Eng. Reprint 888.

Attorney-general as a necessary party, see *infra*, I, D.

[c] **The state alone may question the capacity of the trustee to take**

after the trust fund has vested in the trustee. **U. S.**—*Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. ed. 401. **Md.**—*In re Stiekney's Will*, 85 Md. 79, 36 Atl. 654, 60 Am. St. Rep. 308, 35 L. R. A. 693; *Hanson v. Little Sisters of the Poor*, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293. **Miss.**—*Wade v. American Colonization Soc.*, 7 Smed. & M. 663, 45 Am. Dec. 324. **Ore.**—*Raley v. Umatilla*, 15 Ore. 172, 13 Pac. 890, 3 Am. St. Rep. 142. **R. I.**—*Stearns v. Newport Hospital*, 27 R. I. 309, 62 Atl. 132. **Tenn.**—*Gibson v. Frye Institute*, 137 Tenn. 452, 193 S. W. 1059, 1 L. R. A. 1917D, 1062. **Va.**—*Clark v. Oliver*, 91 Va. 421, 22 S. E. 175.

[d] **The trustee must institute the proceeding when the suit is for the purpose of protecting the subject matter of the trust.** **Ala.**—*Busbee v. Thomas*, 175 Ala. 423, 57 So. 587. **N. J.**—*MacKenzie v. Jersey City Presbytery*, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227. **N. Y.**—*Sailors' Snug Harbor v. Carmody*, 211 N. Y. 286, 105 N. E. 543. **Va.**—*Emory & Henry College v. Shoemaker College*, 92 Va. 320, 23 S. E. 765.

[e] **A private person may invoke the jurisdiction of equity to question the administration, or seek the enforcement of a public charity only when personally interested.** **Ga.**—*Trustees of Martin Institute v. Maddox*, 139 Ga. 491, 77 S. E. 629. **Ky.**—*Chambers v. Baptist Education Soc.*, 1 B. Mon. 215. **Mass.**—*Coe v. Washington Mills*, 149 Mass. 543, 21 N. E. 966. **Mich.**—*Hathaway v. New Baltimore*, 48 Mich. 251, 12 N. W. 186. **Mo.**—*First Baptist Church v. Robberson*, 71 Mo. 326; *Holman v. Renaud*, 141 Mo. App. 399, 125 S. W. 843. **N. H.**—*Oxford v. Union Congregational Soc. v. West Congregational Soc.*, 55 N. H. 463. **N. J.**—*Bliss v. Linden Cemetery Assn.*, 81 N. J. Eq. 394, 87 Atl. 224; *Holmes v. Wesley M. E. Church*, 58 N. J. Eq. 327, 42 Atl. 582; *Ludlam v. Higbee*, 11 N. J. Eq. 342. **N. Y.**—*Magee v. Genesco Academy*, 49 Hun 605, 1 N. Y. Supp. 709, 17 N. Y. St. 221. **Ohio.**—*Hullman v. Honcomp*, 5 Ohio St. 237. **R. I.**—*Stearns v. Newport Hospital*, 27 R. I. 309, 62 Atl. 132. **Vt.**—*Smith v. Nelson*, 18 Vt. 511.

3. **U. S.**—*Kain v. Gibboney*, 101 U.

2. Remedies and Relief.—**Appointment and Removal of Trustee.** Equity will appoint a trustee for a public charity where none is named by the donor,⁴ or where the original appointee is not yet in existence,⁵ or is dead or fails to act and no successor is provided by the instrument creating the trust.⁶

S. 362, 25 L. ed. 813. **Cal.**—Kauffman v. Foster, 3 Cal. App. 741, 86 Pac. 1108. **Del.**—Griffith v. State, 2 Del. Ch. 421; New Castle Common v. Megginson, 1 Boyce 361, 77 Atl. 565, Ann. Cas. 1914A, 1207. **Ill.**—People v. Braucher, 258 Ill. 604, 101 N. E. 944, 47 L. R. A. (N. S.) 1015. **Ky.**—Jenkins v. Berry, 119 Ky. 350, 83 S. W. 594; Coleman v. O'Leary's Exr., 114 Ky. 388, 70 S. W. 1068; Ellenherst v. Pythian, 110 Ky. 923, 63 S. W. 37; Moore's Heirs v. Moore's Devisees, 4 Dana, 354, 29 Am. Dec. 417. **Md.**—American Colonization Soc. v. Soulsby, 129 Md. 605, 99 Atl. 944, L. R. A. 1917C, 937. **Mass.**—Jackson v. Phillips, 14 Allen 539. **Mo.**—Lackland v. Walker, 151 Mo. 210, 52 S. W. 414; Barkley v. Donnelly, 112 Mo. 561, 19 S. W. 305. **N. H.**—Lyford v. Laconia, 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062. **N. J.**—Hoboken School for Industrial Education v. Hoboken, 70 N. J. Eq. 630, 62 Atl. 1; MacKenzie v. Jersey City Presbytery, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227; Attorney-General v. Moore's Exrs., 19 N. J. Eq. 503. **N. Y.**—*In re Cunningham's Will*, 206 N. Y. 601, 100 N. E. 437 (*affirming* 76 Misc. 120, 136 N. Y. Supp. 922, and 151 App. Div. 940, 135 N. Y. Supp. 1107); *Reformed Protestant Dutch Church v. Mott*, 7 Paige 77, 32 Am. Dec. 613; *In re Norton*, 97 Misc. 289, 161 N. Y. Supp. 710. **Ohio.**—Sowers v. Cyrenius, 39 Ohio St. 29, 48 Am. Rep. 418; Landis v. Wooden, 1 Ohio St. 160, 59 Am. Dec. 615; McIntire Poor School v. Zanesville Canal & Mfg. Co., 9 Ohio 203, 34 Am. Dec. 436. **Ore.**—Pennoyer v. Wadhams, 20 Ore. 274, 25 Pac. 720, 11 L. R. A. 210. **S. C.**—Shields v. Jolly, 1 Rich. Eq. 99, 42 Am. Dec. 349. **Tex.**—Hopkins v. Upshur, 20 Tex. 89, 70 Am. Dec. 375. **Wis.**—Kavanaugh v. Watt, 143 Wis. 90, 126 N. W. 672, 28 L. R. A. (N. S.) 470. **Eng.**—Attorney-General v. Pearson, 3 Meriv. 353, 36 Eng. Reprint 135; Craigdallie v. Aikman, 2 Bligh 529, 4 Eng. Reprint 435.

4. Ill.—Hitchcock v. Presbyterian Church Board of Home Missions, 259

Ill. 288, 102 N. E. 741, Ann. Cas. 1915B, 1; Morgan v. Grand Prairie Seminary, 70 Ill. App. 575. **Ia.**—Chapman v. Newell, 146 Iowa 415, 125 N. W. 324. **Ky.**—Green's Admrs. v. Fidelity Trust Co., 134 Ky. 311, 120 S. W. 283. **Mo.**—Buckley v. Monek, 187 S. W. 31. **N. J.**—Case v. Hasse, 83 N. J. Eq. 170, 93 Atl. 728; Bruere v. Cook, 63 N. J. Eq. 624, 52 Atl. 1001. **N. Y.**—Sawyer v. Dearstyne, 139 N. Y. Supp. 955.

Contra, Gibson v. Frye Institute, 137 Tenn. 452, 193 S. W. 1059, L. R. A. 1917D, 1062; Ewell v. Sneed, 136 Tenn. 602, 191 S. W. 131; Green v. Allen, 5 Humph. (Tenn.) 170.

[a] **Notice and Proof of Vacancy Necessary.**—The appointment of a trustee to fill a vacancy to administer a public charity should be made only upon proof of the existence of a vacancy and notice to all interested parties. Mason v. Bloomington Library Assn., 237 Ill. 442, 86 N. E. 1044; Ewell v. Sneed, 136 Tenn. 602, 191 S. W. 131.

[b] **Choice of Trustee.**—Aside from the general qualifications incidental to the position, a trustee should also be in harmony with the purpose of the trust which he is to administer, and it is therefore the duty of the court to appoint one not in opposition or hostile to the wishes of the donor. Glover v. Baker, 76 N. H. 393, 83 Atl. 916; Smith v. Nelson, 18 Vt. 511.

5. See *infra*, this note.

[a] **Where an association or corporation originally named for the position, has not yet been organized.** Mass. Darcree v. Kelley, 153 Mass. 433, 26 N. E. 1110. **N. J.**—Bruere v. Cook, 63 N. J. Eq. 624, 52 Atl. 1001. **N. Y.**—*In re Deming's Will*, 112 N. Y. Supp. 170.

6. **U. S.**—Handley v. Palmer, 91 Fed. 948; Duggan v. Slocum, 83 Fed. 244. **Conn.**—*In re Eliot's Appeal*, 74 Conn. 586, 51 Atl. 558. **Ga.**—Thompson v. Hale, 123 Ga. 305, 51 S. E. 383. **Ill.**—Mason v. Bloomington Library Assn., 237 Ill. 442, 86 N. E. 1044. **Ia.**—Grant v. Saunders, 121 Iowa 80, 95

Misconduct of the trustee in failing to apply or in misapplying the trust fund will justify a bill for injunction,⁷ or an accounting,⁸ or for his removal,⁹ or an information in equity by the attorney general.¹⁰

Sale of Land.—The trustee may obtain leave to sell land under the trust by instituting an action for that purpose,¹¹ or under some statutes may proceed by summary petition.¹²

B. LEGAL PROCEEDINGS.—Mandamus has been resorted to to enforce a legal right arising out of a charitable trust,¹³ but will not lie to enforce the administration of the trust itself.¹⁴

C. JURISDICTION AND VENUE.¹⁵—A public charity, as a general rule, is administered according to the law of the donor's domicile;¹⁶ but when a gift is contrary to the public policy of the state where it is to be distributed, the courts of that state may refuse to enforce its administration and order the fund returned to the donor's domicile.¹⁷ The courts of one state or country will not administer a public trust the funds of which are to be expended for charitable purposes in another state or country,¹⁸ but, having ordered the transfer of the fund, will leave its administration to the courts of the foreign jurisdiction.¹⁹ However, where the principal fund is required to be kept in one state and merely its income expended in a foreign state,

N. W. 411, 100 Am. St. Rep. 310. **Mass.**—Chase v. Dickey, 212 Mass. 555, 99 N. E. 410; Richardson v. Essex Institute, 208 Mass. 311, 94 N. E. 262; Hubbard v. Worcester Art Museum, 194 Mass. 280, 80 N. E. 490, 9 L. R. A. (N. S.) 689; Boston v. Doyle, 184 Mass. 373, 68 N. E. 851; Bliss v. American Bible Soc., 2 Allen 334. **N. Y.** *In re Powell's Will*, 136 App. Div. 830, 121 N. Y. Supp. 779. **R. I.**—Guild v. Allen, 28 R. I. 430, 67 Atl. 855; Wood v. Fourth Baptist Church, 26 R. I. 594, 61 Atl. 279.

7. Seitzinger v. Becker, 257 Pa. 264, 101 Atl. 650.

8. Seitzinger v. Becker, 257 Pa. 264, 101 Atl. 650.

9. Carroll County Academy v. Galatin Academy, 104 Ky. 621, 47 S. W. 617.

10. Attorney-General v. Parker, 126 Mass. 216.

[a] As to informations in equity generally, see 12 STANDARD PROC. 705.

11. Sailors' Snug Harbor Trustees v. Carmody, 158 App. Div. 738, 144 N. Y. Supp. 24.

12. Sailors' Snug Harbor Trustees v. Carmody, 158 App. Div. 738, 144 N. Y. Supp. 24.

13. Reg. v. Abrahams, 4 Q. B. 157, 114 Eng. Reprint 857. See People *ex rel.* Newman v. Sailors' Snug Har-

bor, 54 Barb. (N. Y.) 532, 5 Abb. Pr. (N. S.) 119.

14. *Ex parte Trustees of Rugby Charity*, 9 Dowl. & R. 214, 22 E. C. L. 589.

15. See also *supra*, I, A.

16. Green's Admrs. v. Fidelity Trust Co., 134 Ky. 311, 120 S. W. 283; Chamberlain v. Chamberlain, 43 N. Y. 424; Kennedy v. Palmer, 1 Thomp. & C. (N. Y.) 581.

17. Silcox v. Harper, 32 Ga. 639; Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407.

18. **U. S.**—Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. ed. 401; Duggan v. Slocum, 83 Fed. 244, *affirmed*, 92 Fed. 806, 34 C. C. A. 676; Sickles v. New Orleans, 80 Fed. 868, 26 C. C. A. 204. **N. J.**—Taylor's Exrs. v. Bryn Mawr College, 34 N. J. Eq. 101. **Eng.**—Attorney-General v. Sturge, 19 Beav. 597, 23 L. J. Ch. 495, 52 Eng. Reprint 482.

19. **Ga.**—Silcox v. Harper, 32 Ga. 639. **Ky.**—Green's Admrs. v. Fidelity Trust Co., 134 Ky. 311, 120 S. W. 283. **Mass.**—Burbank v. Whitney, 24 Pick. 146, 35 Am. Dec. 312. **N. J.**—Taylor's Exrs. v. Bryn Mawr College, 34 N. J. Eq. 101. **N. Y.**—Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359; Chamberlain v. Chamberlain, 43 N. Y. 424; Parsons v. Lyman, 20 N. Y. 103, 18 How. Pr. 193. **Eng.**

the courts of both states will act with respect to the part of the estate within their respective jurisdictions.²⁰

D. PARTIES.²¹—All interested parties should be included in a suit involving a public charity.²² The attorney general is usually a proper party plaintiff in a suit to enforce a charitable trust,²³ and a proper party defendant representing the public interest in a bill by the trustees for directions as to the mode of executing their trust,²⁴ or for a transfer of the trust fund to a new board of trustees.²⁵ Generally all the trustees should be joined in a bill to determine the disposition of the proceeds of a sale of trust property,²⁶ and also in a suit to enjoin them from exceeding their instructions.²⁷ The heirs of the donor should be brought in, when they have a possible interest in the fund, in a suit by the trustees for instructions as to the execution of their trust.²⁸

E. PLEADING.—In a suit relating to the administration or en-

Emery v. Hill, 1 Russ. 112, 38 Eng. Reprint 44.

20. Green's Admr. v. Fidelity Trust Co., 134 Ky. 311, 120 S. W. 283.

21. See the title "Parties."

22. Attorney-General v. Parker, 126 Mass. 216.

[a] Possible Beneficiaries.—Where a residuary estate is to be distributed for charitable purposes according to the judgment of the executor, it is not necessary or proper to make the various beneficiaries to whom the executor intends to distribute the fund, parties to a bill or petition to name them as recipients of the gift. Gerick's Exr. v. Gerick, 158 Ky. 478, 165 S. W. 695.

23. U. S.—Philadelphia Baptist Assn. v. Hart's Exrs., 4 Wheat. 1, 4 L. ed. 499. Cal.—People v. Cogswell, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269. Conn.—Dailey v. New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69. Ill.—People v. Braucher, 258 Ill. 604, 101 N. E. 944, 47 L. R. A. (N. S.) 1015; Attorney-General v. Newberry Library, 150 Ill. 229, 37 N. E. 236; Attorney-General v. Illinois Agricultural College, 85 Ill. 516. Ky.—Attorney-General v. Wallace's Devisees, 7 B. Mon. 611. Mass.—Burbank v. Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748; Attorney-General v. Parker, 126 Mass. 216; Jackson v. Phillips, 14 Allen 539. Mich.—Attorney-General v. Soule, 28 Mich. 153. Neb. In re Creighton's Estate, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128. N. H.—Haynes v. Carr, 70 N. H. 463, 49 Atl. 638; Rolfe & Rumford Asylum v. Lefebvre, 69 N. H. 238, 45 Atl. 1087. N. J.—Quakertown Lakatong Lodge

No. 114 v. Franklin Tp. Board of Education, 84 N. J. Eq. 112, 92 Atl. 870. N. Y.—Sailors' Snug Harbor v. Carmody, 211 N. Y. 286, 105 N. E. 543; Rothschild v. Goldenberg, 58 App. Div. 499, 69 N. Y. Supp. 523; People v. Powers, 83 Hun 449, 8 Misc. 628, 29 N. Y. Supp. 950, 64 N. Y. St. 261. Tenn.—State v. Elliston, 4 Baxt. 99. Can.—Attorney-General v. Oxford, 13 Can. S. C. 294.

See *supra*, I, A, 1.

24. Ark.—Fordyce v. Woman's Christian Nat. Library Assn., 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485. Mass.—Jackson v. Phillips, 14 Allen 539; Harvard College v. Theological Education Soc., 3 Gray 280. N. J. Trustees of Princeton University v. Wilson, 78 N. J. Eq. 1, 78 Atl. 393; Larkin v. Wikoff, 75 N. J. Eq. 462, 72 Atl. 98, 79 Atl. 365; MacKenzie v. Jersey City Presbytery, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

25. Women's Christian Assn. v. Kansas City, 147 Mo. 103, 48 S. W. 960; Harvard College v. Theological Education Soc., 3 Gray (Mass.) 280.

26. See Crawford v. Nies, 220 Mass. 61, 107 N. E. 382.

27. State v. Toledo, 23 Ohio Cir. Ct. 327.

28. Rady v. New Orleans Fire Ins. Patrol, 126 La. 273, 52 So. 491, 139 Am. St. Rep. 511; Coleman v. New Orleans Fire Ins. Patrol, 122 La. 626, 48 So. 130, 21 L. R. A. (N. S.) 810; Chase v. Dickey, 212 Mass. 555, 99 N. E. 410.

[a] When no reverter arises on a breach or violation of a public trust,

forcement of public charities, the bill should conform to the general rules of pleading in suits in equity.²⁹

F. JUDGMENT OR DECREE.³⁰ — Generally, in a case where the trustee is guilty of faulty administration of the trust, the decree should be for specific performance and not for a return of the trust fund to the donor or his heirs.³¹

II. CHARITABLE ORGANIZATIONS. — A. ACTIONS AGAINST.³² An action will lie against a charitable institution to enforce its liability whether arising *ex contractu*,³³ or *ex delicto*.³⁴

B. PROCEEDINGS TO DISSOLVE.³⁵ — Where the statute provides a method for dissolving a charitable organization, that method should

the heirs of the donor are not necessary parties in a suit for directions as to the execution of the trust. *Mo. Sandusky v. Sandusky*, 265 Mo. 219, 177 S. W. 390. *N. H.*—*Glover v. Baker*, 76 N. H. 393, 83 Atl. 916. *N. J.*—*Trustees of Princeton University v. Wilson*, 78 N. J. Eq. 1, 78 Atl. 393.

29. See generally the title "Bills and Answers."

[a] The essential facts should be set forth. *People v. Braucher*, 258 Ill. 604, 101 N. E. 944, 47 L. R. A. (N. S.) 1015; *Attorney-General v. Bedard*, 218 Mass. 378, 105 N. E. 993.

[b] Strict formality in pleading in a proceeding of this kind is not always necessary. *Bliss v. Linden Cemetery Assn.*, 81 N. J. Eq. 394, 87 Atl. 224; *Attorney-General v. Warren*, 2 Swanst. 291, 36 Eng. Reprint 627; *Attorney-General v. Brereton*, 2 Ves. Sen. 425, 28 Eng. Reprint 272.

30. See the titles "Decrees;" "Judgments."

31. *Cal.*—*People v. Cogswell*, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269. *Ga.*—*Huger v. Protestant Episcopal Church*, 137 Ga. 205, 73 S. E. 380. *Mass.*—*Sanderson v. White*, 18 Pick. 328, 29 Am. Dec. 591; *King's Chapel v. Pelham*, 9 Mass. 501. *Mo.*—*Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414; *First Baptist Church v. Robberston*, 71 Mo. 326. *N. Y.*—*Associate Alumni v. General Theological Seminary*, 163 N. Y. 417, 57 N. E. 626. *Pa.*—*Hamilton v. John C. Mercer Home*, 228 Pa. 410, 77 Atl. 630. *R. I.*—*Brice v. All Saints' Memorial Chapel*, 31 R. I. 183, 76 Atl. 774; *Brown v. Meeting St. Baptist Soc.*, 9 R. I. 177. *Va.*—*Emory & Henry College v. Shoemaker College*, 92 Va. 320, 23 S. E. 765.

32. See generally the title "Associations."

33. *Ill.*—*Armstrong v. Wesley Hospital*, 170 Ill. App. 81. *N. Y.*—*Ward v. St. Vincent's Hospital*, 39 App. Div. 624, 57 N. Y. Supp. 784. *Tenn.*—*Hall-Moody Institute v. Copass*, 108 Tenn. 582, 69 S. W. 327.

34. *Cal.*—*Thomas v. German Gen. Benevolent Soc.*, 168 Cal. 183, 141 Pac. 1186. *Minn.*—*McInerny v. St. Luke's Hospital Assn. of Duluth*, 122 Minn. 10, 141 N. W. 837, 46 L. R. A. (N. S.) 548. *N. H.*—*Hewett v. Woman's Hospital Aid Assn.*, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496. *Tex.*—*Armendorez v. Hotel Dieu (Tex. Civ. App.)*, 145 S. W. 1030. *Mich.*—*Gallon v. House of Good Shepherd*, 158 Mich. 361, 122 N. W. 631, 133 Am. St. Rep. 387, 24 L. R. A. (N. S.) 286; *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74. *N. Y.*—*Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406, Ann. Cas. 1913A, 883, 38 L. R. A. (N. S.) 481 (*reversed*, 135 App. Div. 839, 120 N. Y. Supp. 406); *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626, 139 Am. St. Rep. 889, 32 L. R. A. (N. S.) 62 (*reversed*, 131 App. Div. 900, 115 N. Y. Supp. 1125); *Gartland v. N. Y. Zoological Soc.*, 135 App. Div. 163, 120 N. Y. Supp. 24; *Van Ingen v. Jewish Hospital of Brooklyn*, 164 N. Y. Supp. 832. *R. I.*—*Basabo v. Salvation Army*, 35 R. I. 22, 85 Atl. 120, 42 L. R. A. (N. S.) 1144. *Va.*—*Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 81 S. E. 13, 51 L. R. A. (N. S.) 1025.

35. As to dissolution of corporations generally, see the title "Winding Up Corporations."

be strictly followed or its provisions will be unavailable.³⁶ In the absence of statutory authority the organization cannot, as a general rule, by an act of its stockholders or board of directors, dissolve itself,³⁷ but in a proper case a court of equity will decree its dissolution.³⁸

- | | |
|---|---|
| 36. <i>In re</i> Humane Fire Co.'s Appeal, 88 Pa. 389. | of an association are held sufficient evidence of dissolution. |
| 37. Sumner Lodge, No. 180, I. O. O. F. v. Odd Fellows Home, 77 N. J. Eq. 386, 77 Atl. 36. See <i>Penfield v. Skinner</i> , 11 Vt. 296, where certain acts | 38. <i>People v. Dispensary & Hospital Soc.</i> , 7 Lans. (N. Y.) 304, breach of trust. |

PUBLIC DRUNKENNESS

By the Editorial Staff.

I. PROSECUTIONS FOR, GENERALLY, 872

II. INDICTMENT, INFORMATION, OR COMPLAINT, 872

III. TRIAL, 873

CROSS-REFERENCES:

Disorderly Conduct; Intoxicating Liquors;
Nuisance.

For forms, see 9 STANDARD PROC. 1010, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. PROSECUTIONS FOR, GENERALLY.—Public drunkenness, though not an offense at common law unless it amounts to a nuisance,¹ is universally made so by statute, and subjects the offender to a criminal prosecution.²

II. INDICTMENT, INFORMATION, OR COMPLAINT.³ — Every material element of the offense should be charged in substantial compliance with the statute,⁴ and, as in other cases, it is sufficient to follow the language of the statute where every element of the crime

1. See the following cases: **Kan.** State *v. Brown*, 38 Kan. 390, 16 Pac. 259. **N. J.**—State *v. Locker*, 50 N. J. L. 512, 14 Atl. 749. **N. C.**—State *v. Deberry*, 27 N. C. 371. **Tenn.**—Tipton *v. State*, 2 Yerg. 542. 116 Mass. 340. **Mo.**—Gallatin *v. Tarwater*, 143 Mo. 40, 44 S. W. 750; *St. Joseph v. Harris*, 59 Mo. App. 122. **R. I.**—Alexander *v. Card*, 3 R. I. 145. **Vt.** State *v. Austin*, 62 Vt. 291, 19 Atl. 117.

2. **Ind.**—*State v. Sevier*, 117 Ind. 338, 20 N. E. 245; *State v. Waggoner*, 52 Ind. 481. **Kan.**—*State v. Brown*, 38 Kan. 390, 16 Pac. 259. **Mo.**—*St. Joseph v. Harris*, 59 Mo. App. 122. **N. H.** *State v. Stevens*, 36 N. H. 59. **N. C.** *State v. McNinch*, 87 N. C. 567. **Tex.** *Murchison v. State*, 24 Tex. App. 8, 5 S. W. 508.

[a] In England drunkenness became an object of statutory cognizance in the reign of James I, 4 Jac. 1, c. 5.

3. See generally the title "Indictment and Information."

4. Conn.—State *v.* Bromley, 25
Conn. 6. Me.—State *v.* Carville, 14
Atl. 942. Mass.—Com. *v.* McNamara,

116 Mass. 340. **Mo.**—*Gallatin v. Tar-*
water, 143 Mo. 40, 44 S. W. 750; *St.*
Joseph v. Harris, 59 Mo. App. 122. **R. I.**
Alexander v. Card, 3 R. I. 145. **Vt.**
State v. Austin, 62 Vt. 291, 19 Atl.
117.

[a] “Indecently drunk” has been held to be substantially the same as the statute’s terms defining the offense of drunkenness—“intoxicated under such circumstances as amount to a violation of decency.” *Alexander v. Card*, 3 R. I. 145.

[b] **Found Intoxicated.**—Where a statute makes it an offense to be “found intoxicated,” an indictment is not sufficient which merely alleges that the defendant “was drunk and intoxicated” at a certain time and place. *State v. Bromley*, 25 Conn. 6.

[c] **Annoyance of Others.**—When the statute makes it an offense when one is drunk to the annoyance of the

is included therein.⁵ The time⁶ the offense was committed should be charged, as well as facts showing it to have been committed in a public place⁷ within the venue of the court.⁸

A prior conviction of drunkenness where that fact bears on the punishment, should be alleged.⁹

III. TRIAL.¹⁰ **Instructions.**—Under a statute making it an offense to be drunk in a "public place," the court should define the phrase,¹¹ and on undisputed evidence showing the place was in fact a public place, should so instruct the jury.¹²

public, such annoyance must be alleged in the indictment. *St. Joseph v. Harris*, 59 Mo. App. 122.

[d] **Duplicity.**—A complaint which charges the defendant with being drunk "on the streets and sidewalks and in the business houses," under an ordinance prohibiting drunkenness disjunctively in such places, is not duplicitous. *Gallatin v. Tarwater*, 153 Mo. 40, 44 S. W. 750. See 12 STANDARD PROC. 507.

[e] **But averments of non-essentials** are surplusage and should not be made. **Ga.**—*Mathis v. State*, 11 Ga. App. 95, 74 S. E. 713. **Mich.**—*People v. Radley*, 127 Mich. 627, 86 N. W. 1029, holding that "habitual drunkenness" need not be alleged in an indictment for "drunkenness." **Tenn.**—*Tipton v. State*, 2 Yerg. 542, holding the offense need not be alleged as committed *vi et armis*. **Vt.**—*State v. Kelly*, 47 Vt. 294, holding it not necessary to aver the means by which defendant became intoxicated.

5. Ind.—*State v. Welch*, 88 Ind. 308. **Mass.**—*Com. v. Whitney*, 5 Gray 85; *Com. v. Boon*, 2 Gray 74. **Mo.**—*Gallatin v. Tarwater*, 143 Mo. 40, 44 S. W. 750. **R. I.**—*State v. Kelly*, 12 R. I. 535.

See 12 STANDARD PROC. 442.

6. Com. v. Toley, 99 Mass. 499. See 12 STANDARD PROC. 411.

7. Ga.—*Mathis v. State*, 11 Ga. App. 95, 74 S. E. 713; *Burkes v. State*, 7 Ga. App. 39, 65 S. E. 1091. **Ind.**—*State v. Welch*, 88 Ind. 308; *State v. Moriarty*, 74 Ind. 103; *State v. Waggoner*, 52 Ind. 481; *State v. Sowers*, 52 Ind. 311. **Kan.**—*State v. Brown*, 38 Kan. 390, 16 Pac. 259. **Me.**—*State v. McLoon*, 78 Me. 420, 6 Atl. 601. **Tenn.**—*State v. Kelly*, 138 Tenn. 84, 195 S. W. 1126. **Tex.**—*Howard v. State*, 76 Tex. Crim. 297, 174 S. W. 607; *Murrey v. State*, 48 Tex. Crim. 219, 87 S. W. 349.

See generally, 12 STANDARD PROC. 426.

[a] **That it was on a public highway** should be stated when the statute makes it an offense to be intoxicated on a public highway. *Burkes v. State*, 7 Ga. App. 39, 65 S. E. 1091.

[b] **That he was "openly, publicly, commonly, and notoriously drunk,"** sufficient. *State v. Kelly*, 138 Tenn. 84, 195 S. W. 1126.

[c] **"A restaurant to which people commonly resort for the purpose of eating and purchasing refreshments,"** shows a public place in a complaint charging defendant with the offense of drunkenness. *Howard v. State*, 76 Tex. Crim. 297, 174 S. W. 607.

[d] **"A grand jury room, when the grand jury is in session, is a public place."** *Clinton v. State*, 63 Tex. Crim. 446, 142 S. W. 591.

[e] **An insufficient allegation of drunkenness in a public place is illustrated by the averment "In a certain public place, to wit, in the town of Hamilton, and near the Hamilton and Hico public road, at a building known as the 'Old Graves Mill,'"** This allegation charges that the offense was committed at the mill, not in the public road, and to be sufficient would have to aver that the mill was at the time in question a public place and resorted to by the public. *Murrey v. State*, 48 Tex. Crim. 219, 87 S. W. 349.

8. State v. Kelly, 138 Tenn. 84, 195 S. W. 1126; *Howard v. State*, 76 Tex. Crim. 297, 174 S. W. 607. See also *Gallatin v. Tarwater*, 143 Mo. 40, 44 S. W. 750.

9. Com. v. Harrington, 130 Mass. 35; *Com. v. Miller*, 8 Gray (Mass.) 484. See 12 STANDARD PROC. 354.

10. See generally the title "Trial."

11. Ellis v. Archer, 38 S. D. 285, 161 N. W. 192.

12. Ellis v. Archer, 38 S. D. 285, 161 N. W. 192.

Questions for Jury.¹³ — What is a public place, under proper instructions by the court, is generally a question for the jury,¹⁴ as is also the condition of defendant, that is, whether or not he was drunk,¹⁵ and if he became so voluntarily.¹⁶

[a] “Where it is a question of fact and not a matter of law, the court is not authorized or justified in charging the jury that such place is a public place.” *Clinton v. State*, 64 Tex. Crim. 446, 142 S. W. 591. See also *Johnson v. State*, 1 Ga. App. 195, 58 S. E. 265.

13. See generally the title “**Province of Judge and Jury.**”

14. *January v. State*, 66 Tex. Crim. 302, 146 S. W. 555; *Clinton v. State*, 63 Tex. Crim. 446, 142 S. W. 591.

15. **Ark.**—*Brooke v. State*, 86 Ark. 364, 111 S. W. 471. **Ga.**—*Barrentine v. State*, 18 Ga. App. 726, 90 S. E. 372; *Sullivan v. State*, 17 Ga. App. 122,

86 S. E. 287; *Lovett v. State*, 13 Ga. App. 71, 78 S. E. 857; *Haines v. State*, 8 Ga. App. 627, 70 S. E. 84; *Patterson v. State*, 8 Ga. App. 454, 69 S. E. 591. **Neb.**—*Freeburg v. State*, 92 Neb. 346, 138 N. W. 143, Ann. Cas. 1913E, 1101.

[a] **Condition of Accused.**—While the term “drunkenness” has been defined by many courts, it is sometimes said that the word sufficiently describes itself and that the condition of the accused should be determined by the jury from the facts in the case. *Brooke v. State*, 86 Ark. 364, 111 S. W. 471.

16. *Com. v. Hughes*, 133 Mass. 496; *State v. Pratt*, 34 Vt. 322.

PUBLIC LANDS

By the Editorial Staff.

I. FEDERAL LANDS, 876

- A. *Acquisition and Protection of Title to*, 876
 - 1. *Jurisdiction of Land Department*, 876
 - 2. *Civil Proceedings in Courts*, 877
 - a. *Prior to Patent*, 877
 - b. *After Issuance of Patent*, 878
 - (I.) *In General*, 878
 - (II.) *Review of Decisions of Land Department*, 878
 - (A.) *Appeal*, 878
 - (B.) *Bill in Equity*, 878
 - (1.) *In General*, 878
 - (2.) *Conditions Precedent*, 880
 - (3.) *By and Against Whom*, 880
 - (4.) *Jurisdiction*, 882
 - (5.) *Pleading*, 882
 - (C.) *Collateral Attack*, 883
 - (III.) *Action for Value of Lands*, 884
 - 3. *Criminal Prosecutions*, 885
- B. *Remedies for Injuries to Public Lands*, 885
 - 1. *Civil Remedies*, 885
 - a. *In General*, 885
 - b. *Jurisdiction and Venue*, 886
 - c. *Pleading*, 887
 - d. *Trial*, 887
 - 2. *Criminal Prosecutions*, 887
 - a. *In General*, 887
 - b. *Indictment or Information*, 888

II. STATE LANDS, 888

- A. *Acquisition and Protection of Title to*, 888
 - 1. *Suits To Compel Conveyance*, 888
 - 2. *Review of Issuance of Patent*, 889
 - a. *Bill in Equity*, 889
 - (I.) *In General*, 889
 - (II.) *By and Against Whom*, 889
 - (III.) *Conditions Precedent*, 889
 - (IV.) *Pleading*, 890
 - b. *Collateral Attack*, 890
 - 3. *School Lands*, 890
 - a. *Proceedings Upon Purchaser's Default*, 890

- (I.) *Remedies Available*, 890
- (II.) *Parties*, 890
- (III.) *Pleading*, 890
- b. *Lease of School Lands*, 891
- B. *Proceedings for Injuries to State Lands*, 891
 - 1. *Civil Remedies*, 891
 - a. *In General*, 891
 - b. *Pleading*, 891
 - c. *Trial*, 891
 - 2. *Criminal Prosecutions*, 892

CROSS-REFERENCES:

Escheat;	Mines and Minerals;
Indians;	Railroads;
Judgments and Decrees,	Schools and School Districts;
Enforcement of;	United States;
Lands and Land Transfers;	Waters and Watercourses.

As to presumptions, burden of proof and evidence relating to public lands generally, see 10 ENCY. OF EV. 361.

As to levying on interests in public lands, see 15 STANDARD PROC. 846.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. FEDERAL LANDS.—A. ACQUISITION AND PROTECTION OF TITLE TO.—1. **Jurisdiction of Land Department.**—The administration of the public lands is vested in the land department.¹ It has exclusive jurisdiction of matters in reference to the equitable rights to such lands,² and to it has been confided the power to dispose of

1. *Kirwan v. Murphy*, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. ed. 698.
2. **U. S.**—*Lane v. United States ex rel. Mickadiet*, 241 U. S. 201, 36 Sup. Ct. 599, 60 L. ed. 956; *United States ex rel. Knight v. Lane*, 228 U. S. 6, 33 Sup. Ct. 407, 57 L. ed. 709; *Oregon v. Hitchcock*, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. ed. 935; *Humbird v. Avery*, 195 U. S. 480, 25 Sup. Ct. 123, 49 L. ed. 286; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. ed. 1064; *United States v. Bag-nell Timber Co.*, 178 Fed. 795, 102 C. C. A. 243; *Jones v. Hoover*, 144 Fed. 217; *Sage v. United States*, 140 Fed. 65, 71 C. C. A. 404; *Northern Lumber Co. v. O'Brien*, 124 Fed. 819. **Alaska.** *Sheldon v. Seatter*, 4 Alaska 95; *Allen v. Myers*, 1 Alaska 114. **Ariz.**—*War-nekros v. Cowan*, 13 Ariz. 42, 108 Pac. 238. **Ark.**—*Jimmerson v. Fordyce Lumber Co.*, 106 Ark. 127, 152 S. W. 1022. **Cal.**—*Thompson v. Basler*, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321; *Gage v. Gunther*, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; *Brandt v. Wheaton*, 52 Cal. 430. **Dak.**—*Vantongerren v. Heffernan*, 5 Dak. 180, 38 N. W. 52; *Forbes v. Driscoll*, 4 Dak. 336, 31 N. W. 633. **Fla.**—*Smith v. Love*, 49 Fla. 230, 33 So. 376. **Idaho.**—*Le Fevre v. Amon-son*, 11 Idaho 45, 81 Pac. 71. **Ia.** *Wood v. Murray*, 85 Iowa 505, 52 N. W. 356. **La.**—*Marks v. Martin*, 27 La. Ann. 527; *Copley v. Dinkgrave*, 25 La. Ann. 577. **Minn.**—*Sims v. Morri-son*, 92 Minn. 341, 100 N. W. 88; *St. Paul, M. & M. Ry. Co. v. Olson*, 87 Minn. 117, 91 N. W. 294, 94 Am. St. Rep. 693; *Matthews v. O'Brien*, 84 Minn. 505, 88 N. W. 12. **Neb.**—*Mor-ton v. Green*, 2 Neb. 441. **N. M.** *Van Patten v. Boyd*, 20 N. M. 250, 150 Pac. 917. **N. D.**—*Zimmerman v. McCurdy*, 15 N. D. 79, 106 N. W. 125; *Healey v. Forman*, 14 N. D. 449, 105 N. W. 233; *Grandin v. La Bar*, 3

them by patent.³ But after title has passed from the government to another the land department has no jurisdiction to take any action relating thereto,⁴ though it may correct ministerial and clerical errors in the patent,⁵ or recall a patent which has not been accepted.⁶

2. Civil Proceedings in Courts.—a. *Prior to Patent.*—The courts will by mandamus compel the land department to exercise jurisdiction in a proper case,⁷ and will grant appropriate relief to protect the contractual rights of the parties pending a final determination of a controversy before the department.⁸ But they will in no case interfere to control the department in carrying out the powers vested in it.⁹

N. D. 446, 57 N. W. 241. **Okla.** Thompson v. Hill, 48 Okla. 304, 150 Pac. 203; Hamilton v. Foster, 16 Okla. 220, 82 Pac. 821; Jordan v. Smith, 12 Okla. 703, 73 Pac. 308; Adams v. Couch, 1 Okla. 17, 26 Pac. 1009. **Ore.** Frink v. Thomas, 20 Ore. 265, 25 Pac. 717, 12 L. R. A. 239; Moore v. Fields 1 Ore. 317; Pin v. Morris, 1 Ore. 230. **S. D.**—Reservation State Bank v. Holst, 17 S. D. 240, 95 N. W. 931, 70 L. R. A. 799. **Wash.**—Kendall v. Long, 66 Wash. 62, 119 Pac. 9; Gauthier v. Morrison, 62 Wash. 572, 114 Pac. 501. **Wash. Ter.**—Colwell v. Smith, 1 Wash. Ter. 92. **Wis.**—Empey v. Plugert, 64 Wis. 603, 25 N. W. 560.

3. United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. ed. 1074; Smelting Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875; United States v. Fitzgerald, 15 Pet. (U. S.) 407, 10 L. ed. 785.

4. Emblen v. Lincoln Land Co., 184 U. S. 660, 22 Sup. Ct. 523, 46 L. ed. 736; *In re Emblen*, 161 U. S. 52, 16 Sup. Ct. 487, 40 L. ed. 613; Frisbie v. Whitney, 9 Wall. (U. S.) 187, 19 L. ed. 668.

5. Marsh v. Nichols, Shepard & Co., 128 U. S. 605, 9 Sup. Ct. 168, 32 L. ed. 538, where (a necessary signature was endorsed on the patent after its issuance); Bell v. Hearne, 19 How. (U. S.) 252, 15 L. ed. 614, where an error was made in the patentee's name and after issuance of the patent corrected.

6. Maguire v. Tyler, 8 Wall. (U. S.) 650, 19 L. ed. 320.

7. See the title "Mandamus," and particularly 19 STANDARD PROC. 174.

8. U. S.—Turner v. Sawyer, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. ed. 1189; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; Jones v. Hoover, 144

Fed. 217; Northern Lumber Co. v. O'Brien, 124 Fed. 819. **Alaska.** Heine v. Roth, 2 Alaska 416. **Ariz.** Warnekros v. Cowan, 13 Ariz. 42, 108 Pac. 238. **Colo.**—Fulmele v. Camp, 20 Colo. 495, 39 Pac. 407. **Ia.**—Wood v. Murray, 85 Iowa 505, 52 N. W. 356. **Minn.**—Matthews v. O'Brien, 84 Minn. 505, 88 N. W. 12. **N. D.** Zimmerman v. McCurdy, 15 N. D. 79, 106 N. W. 125. **Okla.**—Clack v. Deihl, 5 Okla. 148, 48 Pac. 178; Reaves v. Oliver, 3 Okla. 62, 41 Pac. 353; Sproat v. Durland, 2 Okla. 24, 35 Pac. 682, 886. **Ore.**—Woodsides v. Riekey, 1 Ore. 108. **S. D.**—Reservation State Bank v. Holst, 17 S. D. 240, 95 N. W. 931, 70 L. R. A. 799. **Wash.**—Colwell v. Smith, 1 Wash. Ter. 92. **Wyo.** Laramie Nat. Bank v. Steinhoff, 11 Wyo. 290, 71 Pac. 992, 73 Pac. 209.

[a] **A party's possessory rights** will be protected. Gauthier v. Morrison, 232 U. S. 452, 34 Sup. Ct. 384, 58 L. ed. 680; McQuiston v. Walton, 12 Okla. 130, 69 Pac. 1048; Brown v. Hartshorn, 12 Okla. 121, 69 Pac. 1049; Woodruff v. Wallace, 3 Okla. 355, 41 Pac. 357.

[b] **Preemptor's Right.**—Where one has legally preempted certain public land and dispossession is threatened by another, the courts will entertain an application for an injunction to protect the legally qualified preemptor's right to possession. Jackson v. Jackson, 17 Ore. 110, 19 Pac. 847. See also Spokane Falls & N. R. Co. v. Ziegler, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. ed. 79, and Florida C. & P. R. Co. v. Bell, 87 Fed. 369, 31 C. C. A. 9. But compare King v. Lawson, 84 Fed. 209 (where an injunction was denied a homesteader to protect his possession); Butler v. Shafer, 67 Fed. 161.

9. Kirwan v. Murphy, 189 U. S. 35, 54, 23 Sup. Ct. 599, 47 L. ed. 698;

b. *After Issuance of Patent.*—(I.) *In General.*—After issuance of the patent the courts may compel the head of the land department to perform ministerial acts relating to the patent which he refuses to perform,¹⁰ or to refrain from doing an act which is ultra vires and beyond the scope of his authority,¹¹ and it is likewise the province of the courts to settle any controversy concerning the title acquired through the patent.¹²

(II.) *Review of Decisions of Land Department.*—(A.) *APPEAL.*—No remedy by appeal is available to review the proceedings of the land department.¹³

(B.) *BILL IN EQUITY.*—(1.) *In General.*—Where a patent is obtained

Brown v. Hitchcock, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. ed. 772; *United States v. Schurz*, 102 U. S. 378, 396, 26 L. ed. 167; *Litchfield v. Register & Receiver*, 9 Wall. (U. S.) 575, 19 L. ed. 681.

10. *Brown v. Hitchcock*, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. ed. 772; *United States ex rel. Levey v. Stockslager*, 129 U. S. 470, 9 Sup. Ct. 382, 32 L. ed. 785; *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167; *Collins v. Jenkins*, 44 App. Cas. (D. C.) 182.

[a] *Mandamus.*—In a case where a patent has been duly executed, but the land department refuses to deliver it, mandamus to the secretary of the interior to deliver the patent to the relator should be granted. *United States v. Schurz*, 102 U. S. 378, 26 L. ed. 167.

11. *Germania Iron Co. v. United States*, 165 U. S. 379, 17 Sup. Ct. 337, 41 L. ed. 754; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. ed. 123; *Meador v. Norton*, 11 Wall. (U. S.) 442, 20 L. ed. 184.

[a] *Injunction* to restrain the secretary of the interior from annulling an act of his predecessor, which act operated to give effect to a grant of public lands to a railroad corporation. *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. ed. 123. See also *United States v. Stone*, 2 Wall. (U. S.) 525, 17 L. ed. 765.

12. *U. S.*—*Bockfinger v. Foster*, 190 U. S. 116, 23 Sup. Ct. 836, 47 L. ed. 975; *Iron Silver Mining Co. v. Campbell*, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. ed. 155. *D. C.*—*Lane v. Watts*, 41 App. Cas. 139. *La.*—*Walsh v. Lallande*, 25 La. Ann. 188. *Minn.*—*Sage v. Rudnick*, 91 Minn. 325, 98

N. W. 89, 100 N. W. 106. *Okla.* *Howe v. Parker*, 18 Okla. 282, 90 Pac. 15; *Kirtley v. Dykes*, 10 Okla. 16, 62 Pac. 808. *Wash.*—*Northern Pac. R. Co. v. Spray*, 27 Wash. 1, 67 Pac. 377.

[a] *General Statement.*—“When, by the action of these officers (of the land office) and of the President of the United States, in issuing a patent to a citizen the title to the lands has passed from the government, the question as to the real ownership of them is open in the proper courts to all the considerations appropriate to the case. And this is so, whether the suit is by the United States to set aside the patent and recover back the title so conveyed, . . . or by an individual to cause the title conveyed by the patent to be held in trust for him by the patentee on account of equitable circumstances which entitle the complainant to such relief.” *United States ex rel. McBride v. Schurz*, 102 U. S. 378, 396, 26 L. ed. 167.

[b] *By Bill in Chancery.*—After lands have lost the character of public lands, the only way in which their title can be impeached is by a bill in chancery. The party holding the patent thereto cannot be required to answer to the officials of the land department any question concerning such patent. *Love v. Flahive*, 205 U. S. 195, 27 Sup. Ct. 486, 51 L. ed. 768; *Moore v. Robbins*, 96 U. S. 530, 24 L. ed. 848; *Lindsey v. Hawes*, 2 Black (U. S.) 554, 17 L. ed. 265; *Lytle v. Arkansas*, 22 How. (U. S.) 193, 16 L. ed. 306 (*affirming* 17 Ark. 608); *Bailey v. Sanders*, 177 Fed. 667, 101 C. C. A. 293; *Bozarth v. Mitchells* (Okla.), 157 Pac. 1051.

13. *Quinby v. Conlan*, 104 U. S. 420, 26 L. ed. 800.

through fraud, inadvertence or mistake, a bill in equity,¹⁴ or an information in the nature of a bill in equity¹⁵ will lie to cancel or annul it.¹⁶ Equity will also quiet title to such patent in favor of a rightful claimant and against the patentee,¹⁷ or in a proper case will constitute the patentee a trustee for the claimant.¹⁸

14. U. S.—*Moran v. Horsky*, 178 U. S. 205, 20 Sup. Ct. 856, 44 L. ed. 1038; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. ed. 747; *Maxwell Land Grant Case*, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. ed. 949; *United States v. Stone*, 2 Wall. 525, 17 L. ed. 765; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *United States v. Hughes*, 11 How. 552, 13 L. ed. 809; *Illinois Steel Co. v. Budzisz*, 82 Fed. 160; *Carter v. Thompson*, 65 Fed. 329. **Idaho.**—*Johnson v. Hurst*, 10 Idaho 308, 77 Pac. 784. **Kan.**—*Houck v. Kelsey*, 17 Kan. 333. **Minn.**—*Lamphey v. Mead*, 54 Minn. 290, 55 N. W. 1132, 40 Am. St. Rep. 328; *Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12. **Ohio.**—*Hall v. Prindle*, 2 Ohio Dec. (Reprint) 261. **Utah.**—*Ferry v. Street*, 4 Utah 521, 7 Pac. 712, 11 Pac. 571.

[a] **An accounting may be had in the suit.** *Southern Pac. R. Co. v. United States*, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. ed. 507, *affirming* 133 Fed. 651, 66 C. C. A. 581, 117 Fed. 544.

[b] **Effect of Indictment.**—Where a patent to public land is obtained by fraud, the fact that the guilty party is liable to indictment, or his actual indictment and conviction, does not bar the government from maintaining a bill in equity to vacate the patent. *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. ed. 110.

15. United States v. Hughes, 11 How. (U. S.) 552, 13 L. ed. 809, but while the information in this case was sustained, it was said that the regular bill in equity is better practice.

16. U. S.—*Gonzales v. French*, 164 U. S. 338, 17 Sup. Ct. 102, 41 L. ed. 458; *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. ed. 992; *United States v. Beaman*, 242 Fed. 876, 155 C. C. A. 464; *King v. McAndrews*, 111 Fed. 860, 50 C. C. A. 29; *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476; *Ayers v. United States*, 42 Ct. Cl. 385. **Alaska.**—*Johnson v. Pacific Coast S.*

Co., 2 Alaska 224. **Ia.**—*Arnold v. Grimes*, 2 G. Gr. 77. **Minn.**—*Lamphey v. Mead*, 54 Minn. 290, 55 N. W. 1132, 40 Am. St. Rep. 328; *State v. Bachelder*, 5 Minn. 223, 80 Am. Dec. 410. **Mo.**—*Williams v. Carpenter*, 35 Mo. 52; *Allison v. Hunter*, 9 Mo. 749. **Utah.**—*Ferry v. Street*, 4 Utah 521, 7 Pac. 712, 11 Pac. 571.

17. U. S.—*Duluth & I. R. R. Co. v. Roy*, 173 U. S. 587, 19 Sup. Ct. 549, 43 L. ed. 820 (*affirming* *Roy v. Duluth & I. R. R. Co.*, 69 Minn. 547, 72 N. W. 794); *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. ed. 201; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534; *Johnson v. Towsley*, 13 Wall. 72, 20 L. ed. 485; *Stark v. Starrs*, 6 Wall. 402, 18 L. ed. 925; *Lindsey v. Hawes*, 2 Black 554, 17 L. ed. 265; *Cunningham v. Ashley*, 14 How. 377, 14 L. ed. 462; *Stoddard v. Chambers*, 2 How. 284, 11 L. ed. 269; *United States v. Des Moines Valley R. Co.*, 70 Fed. 435. **Alaska.**—*Gavigan v. Crary*, 2 Alaska 370. **Ark.**—*Branch v. Mitchell*, 24 Ark. 431; *Ashley v. Rector*, 20 Ark. 359. **Cal.**—*Hyde v. Redding*, 74 Cal. 493, 16 Pac. 380; *Boggs v. Merced Min. Co.*, 14 Cal. 279. **Ill.**—*Danforth v. Morrical*, 84 Ill. 456; *McGhee v. Wright*, 16 Ill. 555. **Ia.**—*Sioux City & I. F. Town Lot & L. Co. v. Griffey*, 72 Iowa 505, 34 N. W. 304 (*affirmed*, 143 U. S. 32, 12 Sup. Ct. 362, 36 L. ed. 64); *White v. Chicago, R. I. & P. R. Co.*, 46 Iowa 222. **Kan.**—*Richards v. Griffith*, 57 Kan. 234, 45 Pac. 600, *reversing* 1 Kan. App. 518, 41 Pac. 196. **La.**—*Davis v. Fletcher*, 11 La. Ann. 506.

18. U. S.—*Daniels v. Bernhard*, 237 U. S. 572, 35 Sup. Ct. 749, 59 L. ed. 1115; *Northern Pac. Ry. Co. v. Trodick*, 221 U. S. 208, 31 Sup. Ct. 607, 55 L. ed. 704; *Humbird v. Avery*, 195 U. S. 480, 25 Sup. Ct. 123, 49 L. ed. 286; *Bockfinger v. Foster*, 190 U. S. 116, 23 Sup. Ct. 836, 47 L. ed. 975; *Emblen v. Lincoln Land Co.*, 184 U. S. 660, 22 Sup. Ct. 523, 46 L. ed. 736; *Gildner v. Hall*, 227 Fed. 704; *Howe v. Parker*, 190 Fed. 738, 111 C. C. A. 466. See also *Doepel v. Jones*,

(2.) *Conditions Precedent.* — The purchase price must be returned prior to equitable relief based on mistake,¹⁹ but not where the proceeding is based on fraud,²⁰ or when the patent was issued to a fictitious person.²¹

(3.) *By and Against Whom.* — The government in its own right,²² or for the benefit of another,²³ is entitled to institute the suit through

244 U. S. 305, 37 Sup. Ct. 645, 61 L. ed. 1158. **Ark.**—Green *v.* Clyde, 80

Ark. 391, 97 S. W. 437. **Cal.**—Southern Pac. R. Co. *v.* Arnold, 162 Cal. 726, 124 Pac. 829; Gage *v.* Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Mery *v.* Brodt, 121 Cal. 332, 53 Pac. 818; Plummer *v.* Brown, 70 Cal. 544, 12 Pac. 464. **Fla.**—Smith *v.* Love, 49 Fla. 230, 38 So. 376; Chesser *v.* De Prater, 20 Fla. 691. **Ill.**

Aldrich *v.* Aldrich, 37 Ill. 32; Forbes *v.* Hall, 34 Ill. 159, 85 Am. Dec. 301; Bruner *v.* Manlove, 4 Ill. 339, 36 Am. Dec. 551. **Ind.**—Moyer *v.* McCullough,

1 Ind. 339, Smith 211. **Ia.**—Hunter *v.* Aylworth, 38 Iowa 211. **Kan.**

Janes *v.* Wilkinson, 2 Kan. App. 361, 42 Pac. 735. **La.**—Hennen *v.* Wood,

16 La. Ann. 263; Davis *v.* Fletcher, 11 La. Ann. 506. **Mich.**—Johnson *v.* Lee,

47 Mich. 52, 10 N. W. 76. **Minn.** Hayes *v.* Carroll, 74 Minn. 134, 76

N. W. 1017. **Miss.**—Stark's Heirs *v.* Mather, Walk. 181, 12 Am. Dec. 553. **Mo.**—Hedrick *v.* Beeler, 110

Mo. 91, 19 S. W. 492; Widdicombe *v.* Childers, 84 Mo. 382 (*affirmed*, 124 U. S. 400, 8 Sup. Ct. 517, 31 L. ed. 427);

Sensenderfer *v.* Kemp, 83 Mo. 581. **Nev.**—Rose *v.* Richmond Min. Co., 17

Nev. 25, 27 Pac. 1105. **N. D.**—Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669, *affirmed*,

164 U. S. 89, 17 Sup. Ct. 27, 41 L. ed. 360. **Okla.**—Bozarth *v.* Mitchell,

157 Pac. 1051; Gourley *v.* Countryman, 18 Okla. 220, 90 Pac. 427. **Ore.**—Oregon R. & Nav. Co. *v.* Hertzberg, 26

Ore. 216, 37 Pac. 1019. **Wis.**—McCord *v.* Hill, 111 Wis. 499, 84 N. W. 27,

85 N. W. 145, 87 N. W. 481; Weeks *v.* Milwaukee, L. S. & W. Ry. Co., 78

Wis. 501, 47 N. W. 737; Empey *v.* Plugert, 64 Wis. 603, 25 N. W. 560.

[a] For example, when the consideration for the lands moved from the petitioner and not from the patentee.

Ill.—Franklin *v.* McIntyre, 23 Ill. 91. **Kan.**—Barlow *v.* Barlow, 47 Kan. 676, 28 Pac. 607. **Minn.**—Irvine *v.* Marshall, 7 Minn. 286. **Mo.**—Key *v.* Jennings, 66 Mo. 356.

[b] But where the patent is absolutely void, it has been held that the patentee cannot be decreed a trustee holding in favor of the party entitled to the land. Rose *v.* Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105.

19. United States *v.* Budd, 43 Fed. 630, *affirmed*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. ed. 384.

[a] **Suit in Behalf of Equitable Owner.**—Where the suit by the government is for the purpose of conveying the land in question to one who is equitably entitled to it, a tender of the purchase price to the patentee is not necessary. United States *v.* Laam, 149 Fed. 581; Aiken *v.* Ferry, 6 Sawy. 79, 1 Fed. Cas. No. 112; Hollinshead *v.* Simms, 51 Cal. 158. See also McKenna *v.* Atherton, 160 Fed. 547.

20. Causey *v.* United States, 240 U. S. 399, 36 Sup. Ct. 365, 60 L. ed. 711; United States *v.* Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. ed. 110; Mery *v.* Brodt, 121 Cal. 332; 53 Pac. 818. Compare United States *v.* White, 17 Fed. 561, 9 Sawy. 125, where it was held that since the government had suffered no pecuniary loss by the alleged fraud, it should offer to return the purchase price.

21. Moffat *v.* United States, 112 U. S. 24, 5 Sup. Ct. 10, 28 L. ed. 623.

22. United States *v.* Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. ed. 110; United States *v.* Hughes, 11 How. 552, 13 L. ed. 809; United States *v.* King, 3 How. 773, 11 L. ed. 824.

23. United States *v.* Winona & St. P. R. Co., 165 U. S. 463, 17 Sup. Ct. 368, 41 L. ed. 789; Germania Iron Co. *v.* United States, 165 U. S. 379, 17 Sup. Ct. 337, 41 L. ed. 754; United States *v.* Missouri, K. & T. R. Co., 141 U. S. 358, 12 Sup. Ct. 13, 35 L. ed. 766; United States *v.* Marshall Silver Min. Co., 129 U. S. 579, 9 Sup. Ct. 343, 32 L. ed. 734; United States *v.* Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. ed. 121; Lee *v.* Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. ed. 570; United States *v.* New Orleans Pac. R. Co., 235 Fed. 833, 149 C. C. A. 145.

its attorney general.²⁴

A claimant to the land may also invoke the aid of equity²⁵ where his equities are superior to those of the patentee²⁶ or the government.²⁷ But the remedy is not available to one who has no interest in the land.²⁸ Every one having an interest in the land referred to

24. *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. ed. 121; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. ed. 747; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Hughes v. United States*, 4 Wall. (U. S.) 232, 18 L. ed. 303; *United States v. Hughes*, 11 How. (U. S.) 552, 13 L. ed. 809; *Sawyer v. Gray*, 205 Fed. 160. See also *Western Pac. R. Co. v. United States*, 107 U. S. 526, 108 U. S. 510, 2 Sup. Ct. 802, 27 L. ed. 806.
25. **U. S.**—*United States v. Detroit Timber & Lumb. Co.*, 200 U. S. 321, 26 Sup. Ct. 282, 50 L. ed. 499; *Guaranty Sav. Bank v. Bladow*, 176 U. S. 448, 20 Sup. Ct. 425, 44 L. ed. 540; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800; *Wirth v. Branson*, 98 U. S. 118, 25 L. ed. 86; *Howe v. Parker*, 190 Fed. 738, 111 C. C. A. 466; *Kerns v. Lee*, 142 Fed. 985; *Illinois Steel Co. v. Budzisz*, 82 Fed. 160. **Ala.**—*Goolsbee's Admr. v. Fordham*, 49 Ala. 202. **Alaska.**—*Johnson v. Pacific Coast S. S. Co.*, 2 Alaska 224. **Ark.**—*Chism v. Price*, 54 Ark. 251, 15 S. W. 883, 1031. **Cal.**—*Southern Pac. Co. v. Arnold*, 162 Cal. 726, 124 Pac. 829; *Cucamonga Fruit & Land Co. v. Moir*, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359; *Rosecrans v. Douglass*, 52 Cal. 213. **Colo.**—*Snider v. Ostrander*, 26 Colo. App. 468, 145 Pac. 283. **Fla.**—*Smith v. Love*, 49 Fla. 230, 38 So. 376; *Johnson v. Drew*, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172. **Ill.**—*Danforth v. Morrical*, 84 Ill. 456. **Ind.**—*Moyer v. McCullough*, 1 Ind. 339, Smith 211. **Ia.**—*Harmon v. Steinman*, 9 Iowa 112. **Kan.**—*Houck v. Kelsey*, 17 Kan. 333. **La.**—*Hennen v. Wood*, 16 La. Ann. 263; *Le Blanc v. Ludrique*, 14 La. Ann. 772. **Mich.**—*Johnson v. Lee*, 47 Mich. 52, 10 N. W. 76. **Minn.**—*Corbett v. Wood*, 32 Minn. 509, 21 N. W. 734. **Miss.**—*Hester v. Kembrough*, 12 Smed. & M. 659. **Mo.**—*Carman v. Johnson*, 29 Mo. 84; *Morton v. Blankenship*, 5 Mo. 346. **Mont.**—*Love v. Flahive*, 33 Mont. 348, 83 Pac. 882; *Small v. Rakestraw*, 28 Mont. 413, 72 Pac. 746, 104 Am. St. Rep. 691. **N. M.**—*Van Pat-*
- ten v. Boyd*, 20 N. M. 250, 150 Pac. 917. **Ohio.**—*Strong v. Lehmer*, 10 Ohio St. 93; *Wallace v. Patten*, 14 Ohio 272. **Okla.**—*Johnson v. Riddle*, 41 Okla. 759, 139 Pac. 1143; *Watt v. Amos*, 14 Okla. 178, 79 Pac. 109; *Thornton v. Peery*, 7 Okla. 441, 54 Pac. 649. **Ore.**—*Stewart v. Altstock*, 22 Ore. 182, 29 Pac. 553. **Utah.**—*Kimball v. McIntyre*, 3 Utah 77, 1 Pac. 167. **Wash.**—*Brygger v. Schweitzer*, 5 Wash. 564, 32 Pac. 462, 33 Pac. 388. **Wis.**—*McCord v. Hill*, 111 Wis. 499, 84 N. W. 27, 85 N. W. 145, 87 N. W. 481; *Prickett v. Muck*, 74 Wis. 199, 42 N. W. 256; *Lamont v. Stimson*, 3 Wis. 545, 62 Am. Dec. 696.
- [a] A claimant is not estopped by a former adjudication against the government to which he was not a party. *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. ed. 524.
- [b] A patent merely vests the legal title in the patentee; it does not determine the equitable relations between him and third parties, and the holder must always yield to one who had acquired a prior right from the government in force when his purchase was made. *Widdicombe v. Childers*, 124 U. S. 400, 8 Sup. Ct. 517, 31 L. ed. 427.
26. **U. S.**—*Lyle v. Patterson*, 228 U. S. 211, 33 Sup. Ct. 480, 57 L. ed. 804; *Quinn v. Chapman*, 111 U. S. 445, 4 Sup. Ct. 508, 28 L. ed. 476; *Savage v. Worsham*, 72 Fed. 601. **Cal.**—*Dreyfus v. Badger*, 108 Cal. 58, 41 Pac. 279; *Chapman v. Quinn*, 56 Cal. 266; *Boggs v. Merced Min. Co.*, 14 Cal. 279. **Fla.**—*Johnson v. Drew*, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172. **Mont.**—*Graham v. Great Falls, etc., Co.*, 30 Mont. 393, 76 Pac. 808.
27. *Boggs v. Merced Min. Co.*, 14 Cal. 279.
28. **U. S.**—*Emblen v. Lincoln Land Co.*, 184 U. S. 660, 22 Sup. Ct. 523, 46 L. ed. 736; *Niles v. Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. ed. 171; *Field v. Seabury*, 19 How. 323, 15 L. ed. 650; *Campbell v. Weyerhaeuser*, 161 Fed. 332, 88 C. C. A. 412; *Hartman v. Warren*, 76 Fed.

by the patent must, as a general rule, be made a party to a suit for its cancellation.²⁹

(4.) *Jurisdiction*.—A suit to cancel a patent to public lands by the United States may be brought in the federal district court.³⁰ The state courts generally have jurisdiction of suits to declare a trust in public lands patented in another's name.³¹

(5.) *Pleading*.³²—A bill in equity to annul a patent to public lands should show on its face that it is brought by authority of the attorney general,³³ unless such authority is otherwise made to appear,³⁴ and should set forth all the material facts.³⁵

157, 22 C. C. A. 30. **Ala.**—Crommelin *v.* Minter, 9 Ala. 594. **Ark.**—Chism *v.* Price, 54 Ark. 251, 15 S. W. 883, 1031. **Cal.**—Dreyfus *v.* Badger, 108 Cal. 58, 41 Pac. 279; Cucamonga Fruit & Land Co. *v.* Moir, 83 Cal. 101, 22 Pac. 55, 23 Pac. 359; Burling *v.* Thompson, 77 Cal. 257, 19 Pac. 429. **Fla.**—Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172. **Kan.**—Houck *v.* Kelsey, 17 Kan. 333; Janes *v.* Wilkin-son, 2 Kan. App. 361, 42 Pac. 735. **Minn.**—Dawson *v.* Mayall, 45 Minn. 408, 48 N. W. 12. **Mo.**—Gibson *v.* Chouteau, 39 Mo. 536; Sarpy *v.* Papin, 7 Mo. 503. **Ohio.**—Hall *v.* Prindle, 2 Ohio Dec. (Reprint) 261. **Ore.**—Lee *v.* Summers, 2 Ore. 260. **Wash.**—Brygger *v.* Schweitzer, 5 Wash. 564, 32 Pac. 462, 33 Pac. 388.

29. United States *v.* Exploration Co., 190 Fed. 405; United States *v.* Smith, 181 Fed. 545; United States *v.* Central Pac. R. Co., 11 Fed. 449, 8 Sawy. 81; Lynch *v.* United States, 13 Okla. 142, 73 Pac. 1095.

[a] **Heirs of Patentee**.—Where the patentee dies while the suit is pending his heirs are indispensable parties and must be brought in. Wright, Blodgett & Co. *v.* United States, 203 Fed. 262, 121 C. C. A. 460.

[b] **One who had conveyed his interest** in the land prior to the issuance of the patent, for example, an entryman who has parted with his interest to the defendants, is not generally a necessary party in a suit to annul the patent. United States *v.* Clark, 129 Fed. 241, *affirmed*, 138 Fed. 294, 70 C. C. A. 584, and 200 U. S. 601, 26 Sup. Ct. 340, 50 L. ed. 613. See also United States *v.* Curtner, 26 Fed. 296.

[c] **Bona fide purchasers** (1) holding the legal title to land, under a voidable certificate of the land department, are indispensable parties to a suit in equity by the United States to

annul that title. United States *v.* Winona & St. P. R. Co., 67 Fed. 948, 15 C. C. A. 96. (2) But where the bona fide purchasers are very numerous, a number may be joined as representatives of a class, and where all appear to be bona fide purchasers all their title may be confirmed. Southern Pac. Ry. Co. *v.* United States, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. ed. 507, *affirming* 133 Fed. 651, 66 C. C. A. 581, 117 Fed. 544. See generally the title "Parties."

30. United States *v.* White, 17 Fed. 561, 9 Sawy. 125. See generally the title "United States Courts."

31. **U. S.**—Bagnell *v.* Broderick, 13 Pet. 436, 10 L. ed. 235. **Ind.**—Moyer *v.* McCullough, 1 Ind. 339, Smith 211. **Wis.**—Empey *v.* Plugert, 64 Wis. 603, 25 N. W. 560.

32. See generally the titles "Bills and Answers;" "Equity Jurisdiction and Procedure;" "Pleas in Equity."

33. United States *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93.

34. Mullan *v.* United States, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. ed. 170; Western Pac. R. Co. *v.* United States, 107 U. S. 526, 108 U. S. 510, 2 Sup. Ct. 802, 27 L. ed. 806.

35. Lynch *v.* United States, 13 Okla. 142, 73 Pac. 1095.

[a] **If based on fraud**, the facts constituting the fraud should be alleged. United States *v.* Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. ed. 384; United States *v.* San Jacinto Tin Co., 125 U. S. 273, 8 Sup. Ct. 850, 31 L. ed. 747; United States *v.* Maxwell Land Grant Co., 122 U. S. 365, 7 Sup. Ct. 1271, 30 L. ed. 1211, 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. ed. 949 (*affirming* 26 Fed. 118); United States *v.* Northern Pac. R. Co., 95 Fed. 864, 37 C. C. A. 290 (*affirmed*, 177 U. S. 435, 20 Sup. Ct. 706, 44 L. ed. 836); United States *v.* Mackintosh, 85 Fed.

A bill to declare a trust in lands patented in another's name must aver every fact essential to establish an equitable title superior to the legal title,³⁶ and that such title has moved from the government to the patentee.³⁷ When the proceeding is based upon fraud or mistake, the facts constituting the fraud or mistake must be set out, a general allegation being insufficient;³⁸ and it must appear that the fraud influenced the decision of the land department officials and was the moving cause of the issuance of the patent.³⁹

(C.) COLLATERAL ATTACK. — A patent to public lands⁴⁰ is not subject

333, 29 C. C. A. 176; *Reed v. St. Paul*, etc., R. Co., 234 Fed. 207; *United States v. Barber Lumber Co.*, 172 Fed. 948; *United States v. McGraw*, 12 Fed. 449, 8 Sawy. 156. See generally the title "**Fraud and Deceit.**"

[b] **Allegation of Superior Claim.**

It is not necessary to allege that a superior right to the land exists in favor of another party, in a suit to cancel a patent on the ground of mistake; it is sufficient if the bill shows that such a right might have existed if its determination had not been interrupted by the erroneous issuance of the patent. *Germania Iron Co. v. United States*, 58 Fed. 334, 7 C. C. A. 256; *United States v. Reed*, 53 Fed. 405.

36. **U. S.**—*Duluth & I. R. R. Co. v. Roy*, 173 U. S. 587, 19 Sup. Ct. 549, 43 L. ed. 820 (*affirming Roy v. Duluth & I. R. R. Co.*, 69 Minn. 547, 72 N. W. 794); *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. ed. 570; *Puget Mill Co. v. Brown*, 54 Fed. 987, 59 Fed. 35, 7 C. C. A. 643; *Savage v. Worsham*, 66 Fed. 852, 72 Fed. 601; *Stimson Land Co. v. Rawson*, 62 Fed. 426. **Cal.**—*Hays v. Steiger*, 76 Cal. 555, 18 Pac. 670; *Aurrecoechea v. Sinclair*, 60 Cal. 532; *Quinn v. Kenyon*, 38 Cal. 499. **Dak.**—*Pierce v. Sparks*, 4 Dak. 1, 22 N. W. 491. **Idaho.**—*Piereson v. Loveland*, 16 Idaho 628, 102 Pac. 340. **Ill.**—*McDowell v. Morgan*, 28 Ill. 528. **Minn.**—*Corbett v. Wood*, 32 Minn. 509, 21 N. W. 734. **Mont.**—*Gebo v. Clarke Fork Coal Min. Co.*, 30 Mont. 87, 75 Pac. 859. **Okla.**—*Baldwin v. Keith*, 13 Okla. 624, 75 Pac. 1124. **Ore.**—*Stewart v. Altstock*, 22 Ore. 182, 29 Pac. 553. **Wash.**—*Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398.

37. *Thompson v. Hill*, 48 Okla. 304, 150 Pac. 203; *McCord v. Hill*, 104 Wis. 457, 80 N. W. 735.

38. **U. S.**—*Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 14 Sup. Ct. 1030,

38 L. ed. 992; *Heath v. Wallace*, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. ed. 1063; *Ehrhardt v. Hogaboom*, 115 U. S. 67, 5 Sup. Ct. 1157, 29 L. ed. 346; *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476; *Durango Land & Coal Co. v. Evans*, 80 Fed. 425, 25 C. C. A. 523; *Le Marchel v. Teegarden*, 152 Fed. 662, 133 Fed. 826. **Cal.**—*Sacramento Sav. Bank v. Hynes*, 50 Cal. 195; *Semple v. Hagar*, 27 Cal. 163. **Idaho.**—*Piereson v. Loveland*, 16 Idaho 628, 102 Pac. 340. **Minn.**—*Clearwater County State Bank v. Ricke*, 137 Minn. 438, 163 N. W. 793; *Kelley v. Wallace*, 14 Minn. 236. **Mo.**—*Stucker v. Duncan*, 37 Mo. 160; *Hill v. Miller*, 36 Mo. 182. **Wash.**—*Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398. **Wyo.**—*Caldwell v. Bush*, 6 Wyo. 342, 45 Pac. 488.

39. *Durango Land & Coal Co. v. Evans*, 80 Fed. 425, 25 C. C. A. 523.

40. **U. S.**—*Thompson v. Los Angeles Farming & M. Co.*, 180 U. S. 72, 21 Sup. Ct. 289, 45 L. ed. 432 (*affirming 117 Cal. 594*, 49 Pac. 714); *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. ed. 992; *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. ed. 123; *United States v. Beaman*, 242 Fed. 876, 155 C. C. A. 464; *King v. McAndrews*, 111 Fed. 860, 50 C. C. A. 29 (*reversing 104 Fed. 430*); *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476; *Le Roy v. Clayton*, 2 Sawy. 493, 15 Fed. Cas. No. 8,268. **Ala.**—*Phillips v. Sherman*, 36 Ala. 189; *Bates v. Herron*, 35 Ala. 117; *Masters v. Eastis*, 3 Port. 368. **Cal.**—*Paterson v. Ogden*, 141 Cal. 43, 74 Pac. 443, 99 Am. St. Rep. 31; *Standard Quicksilver Co. v. Habishaw*, 132 Cal. 115, 64 Pac. 113; *Saunders v. La Purisima Gold Min. Co.*, 125 Cal. 159, 57 Pac. 656. **Colo.**—*Aspen v. Aspen Town & L. Co.*, 10 Colo. 191, 15 Pac. 794, 16 Pac. 160; *Poire v. Wells*, 6 Colo. 406. **Ia.**—*Klein's Heirs v. Argenbright*, 26 Iowa 493;

to collateral attack, unless it is void for fraud or want of jurisdiction.⁴¹

(III.) **Action for Value of Lands.** — The government may maintain an action for the value of the land,⁴² whether the patent was issued

Harmon v. Steinman, 9 Iowa 112; *Arnold v. Grimes*, 2 G. Gr. 77. **Ky.** American Assn. *v. Innis*, 109 Ky. 595, 60 S. W. 388. **Mich.**—*Webber v. Pere Marquette Boom Co.*, 62 Mich. 626, 30 N. W. 469; *Bruckner's Lessee v. Lawrence*, 1 Doug. 19. **Miss.**—*Surget v. Doe ex dem. Little*, 24 Miss. 118; *Dixon v. Doe ex dem. Porter*, 23 Miss. 84. **Mo.**—*Frank v. Goddin*, 193 Mo. 390, 91 S. W. 1057, 112 Am. St. Rep. 493; *Williams v. Carpenter*, 35 Mo. 52; *Perry v. O'Hanlon*, 11 Mo. 585, 49 Am. Dec. 100. **Mont.**—*Horsky v. Moran*, 21 Mont. 345, 53 Pac. 1064. **Neb.**—*Green v. Barker*, 47 Neb. 934, 66 N. W. 1032. **N. M.**—*Chavez v. Chavez de Sanchez*, 7 N. M. 58, 32 Pac. 137. **Ore.**—*Warner Valley Stock Co. v. Morrow*, 48 Ore. 258, 86 Pac. 369; *Sanford v. Sanford*, 19 Ore. 3, 13 Pac. 602. **S. D.** Board of Education of *Deadwood v. Mansfield*, 17 S. D. 72, 95 N. W. 286, 106 Am. St. Rep. 771. **Utah.**—*Ketchum Coal Co. v. Pleasant Valley Coal Co.*, 168 Pac. 86; *Ferry v. Street*, 4 Utah 521, 7 Pac. 712, 11 Pac. 571. **Wis.** *Mendota Club v. Anderson*, 101 Wis. 479, 78 N. W. 185; *Parkison v. Bracken*, 1 Pin. 174, 39 Am. Dec. 296.

As to conclusiveness of presumption of validity, see 10 ENCY. OF EV. 372.

41. **U. S.**—*Johnson v. Drew*, 171 U. S. 93, 18 Sup. Ct. 800, 43 L. ed. 88 (*affirming* 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172); *Burfenning v. Chicago, St. P., M. & O. R. Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. ed. 175; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46, 15 Sup. Ct. 1020, 40 L. ed. 71; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. ed. 844; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. ed. 1039; *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875; *United States v. Winona & St. P. R. Co.*, 67 Fed. 948, 15 C. C. A. 96 (*affirmed*, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. ed. 789); *Eastern Oregon Land Co. v. Brosnan*, 147 Fed. 807; *Garrard v. Silver Peak Mines*, 82 Fed. 578, *affirmed*, 94 Fed. 983, 36 C. C. A. 603. **Ala.**—*Bates v. Herron*, 35 Ala. 117; *Iverson v. Dubose*, 27 Ala. 418; *Saltmarsh v. Crommelin*, 24 Ala. 347. **Cal.** *Chapman v. Polack*, 58 Cal. 553; *Carr*

v. Quigley, 57 Cal. 394; *Doll v. Meador*, 16 Cal. 295. **Colo.**—*Poire v. Wells*, 6 Colo. 406. **Fla.**—*Johnson v. Drew*, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172, *affirmed*, 171 U. S. 93, 18 Sup. Ct. 800, 43 L. ed. 88. **Ind.**—*Daggett v. Bonewitz*, 107 Ind. 276, 7 N. E. 900. **Ia.**—*Arnold v. Grimes*, 2 G. Gr. 77. **Ky.**—*American Assn. v. Innis*, 109 Ky. 595, 60 S. W. 388. **La.**—*Marsh v. Gonsoulin*, 16 La. 84; *McGill v. McGill*, 4 La. Ann. 262. **Mich.**—*Crapo v. Troy*, 98 Mich. 635, 57 N. W. 806; *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626, 30 N. W. 469. **Minn.**—*Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670; *State v. Bachelder*, 5 Minn. 223, 80 Am. Dec. 410. **Miss.**—*Dixon v. Doe ex dem. Porter*, 23 Miss. 84; *McAfee's Heirs v. Keirn*, 7 Smed. & M. 780, 45 Am. Dec. 331; *Hit-tuk-ho-mi v. Watts*, 7 Smed. & M. 363, 45 Am. Dec. 308. **Mo.**—*Wright v. Rutgers*, 14 Mo. 585. **Nev.**—*Rose v. Richmond Min. Co.*, 17 Nev. 25, 27 Pac. 1105. **Pa.**—*Gingrich v. Foltz*, 19 Pa. 38, 57 Am. Dec. 631; *Gonzalus v. Hoover*, 6 Serg. & R. 118. **Utah.**—*Kahn v. Old Tel. Min. Co.*, 2 Utah 174. **Wash.**—*Northern Pac. R. Co. v. Miller*, 20 Wash. 21, 54 Pac. 603.

[a] **No title in the government** when the patent issued. *Deweese v. Reinhard*, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. ed. 757; *McCreery v. Haskell*, 119 U. S. 327, 7 Sup. Ct. 176, 30 L. ed. 408; *Whitney v. Morrow*, 112 U. S. 693, 5 Sup. Ct. 333, 28 L. ed. 871 (*affirming* 50 Wis. 197, 6 N. W. 494); *People's Water Co. v. Perkins*, 34 Cal. App. 513, 168 Pac. 154.

[b] **The land not subject to entry and sale.** *Beley v. Naphtaly*, 169 U. S. 353, 18 Sup. Ct. 354, 42 L. ed. 775; *Marsh v. Nichols, S. & Co.*, 128 U. S. 605, 9 Sup. Ct. 168, 32 L. ed. 538; *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L. ed. 665; *Steel v. St. Louis Smelting & Ref. Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. ed. 226.

42. 24 U. S. St. at L. 557; U. S. Comp. St., 1916, §4898; 6 Fed. St. Ann. 436.

through mistake⁴³ or fraud.⁴⁴

3. Criminal Prosecutions.—An indictment will lie against any one guilty of fraud in connection with the disposal of public lands,⁴⁵ *e. g.*, against parties engaging in a conspiracy to defraud the government,⁴⁶ or against any one guilty of false swearing in a land contest relating to a homestead entry before a local land office.⁴⁷

B. REMEDIES FOR INJURIES TO PUBLIC LANDS.—1. Civil Remedies.

a. In General.—Injunction is available to the government or other injured party to prevent a continuous trespass upon,⁴⁸ or an unlawful enclosure of,⁴⁹ public lands, and the government may in an action for use and occupation recover the value of the use of the lands during any unlawful occupancy.⁵⁰ One who unlawfully incloses the public domain cannot maintain trespass in respect thereto,⁵¹ nor en-

[a] **Irrespective of the statute** the federal government has a right to sue a railroad company to recover the value of lands erroneously patented to such company, and sold by it to bona fide purchasers. *Southern Pac. R. Co. v. United States*, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. ed. 507.

43. *Southern Pac. R. Co. v. United States*, 228 U. S. 618, 33 Sup. Ct. 717, 57 L. ed. 993, *modifying* 186 Fed. 737, 108 C. C. A. 607, 157 Fed. 96.

[a] **In the case of erroneous railroad grants**, sold to bona fide purchasers, the United States may, upon a confirmation of such purchaser's titles, sue the original patentee for the value thereof, an amount equal to the government price of similar lands. *Southern Pac. R. Co. v. United States*, 228 U. S. 618, 33 Sup. Ct. 717, 57 L. ed. 993, *modifying* 186 Fed. 737, 108 C. C. A. 607, 157 Fed. 96.

44. *Pitan v. United States*, 241 Fed. 364, 154 C. C. A. 244.

45. *Dimond v. Shine*, 199 U. S. 88, 25 Sup. Ct. 766, 50 L. ed. 99.

46. *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. ed. 90.

[a] **Pecuniary Loss Unnecessary.** In the prosecution of a case of conspiracy to defraud the government in the disposal of certain public lands, it is immaterial that the government received a consideration therefor and suffered no pecuniary loss. *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. ed. 90.

47. *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. ed. 415; *Myers v. Croft*, 13 Wall. (U. S.) 291, 20 L. ed. 562.

[a] **Perjury.**—False swearing in a land contest case before a local land

office is perjury. *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. ed. 415.

48. *Chicago, M. & St. P. R. Co. v. United States*, 244 U. S. 351, 37 Sup. Ct. 625, 61 L. ed. 1158; *Shannon v. United States*, 160 Fed. 870, 88 C. C. A. 52.

[a] **Pasturage** on forest reservations may be enjoined when the use of such lands for that purpose would injure the forest or watershed. *Light v. United States*, 220 U. S. 523, 31 Sup. Ct. 485, 55 L. ed. 570; *Dastervignes v. United States*, 122 Fed. 30, 58 C. C. A. 346; *United States v. Hodges*, 218 Fed. 87.

[b] **The cutting and removal of growing timber** may be restrained at the instance of a claimant. *Arment v. Hensel*, 5 Wash. 152, 31 Pac. 464.

49. *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. ed. 260; *United States v. Bernard*, 202 Fed. 728, 121 C. C. A. 190; *United States v. Goleonda Cattle Co.*, 196 Fed. 240; *United States v. Brighton Rancho Co.*, 26 Fed. 218.

50. *Utah Power & L. Co. v. United States*, 230 Fed. 328, 144 C. C. A. 470.

[a] **Unoccupied Lands.**—The fact that the lands trespassed upon were unoccupied, and would perhaps have remained so had the defendant not gone upon them, and the additional fact that his occupancy of them did not injure them in any way, does not affect the right of the government to maintain an action for use and occupation. *Utah Power & L. Co. v. United States*, 230 Fed. 328, 144 C. C. A. 470.

51. *Mackay v. Uinta Development Co.*, 219 Fed. 116, 135 C. C. A. 18.

join another from depasturing the enclosure.⁵²

The unlawful cutting or removing of timber from public lands may be enjoined,⁵³ or the government or other injured party may replevy the timber,⁵⁴ recover damages for the trespass,⁵⁵ or sue in trover for the value of the property,⁵⁶ but a suit in equity for an accounting of the profits made by defendant cannot be maintained.⁵⁷

b. *Jurisdiction and Venue.*—The general rules which control the venue of all civil actions apply to actions by the United States for the recovery of timber or its value when unlawfully cut or removed from federal lands,⁵⁸ so that an action for the value of the timber, being transitory in its nature, may be brought in any jurisdiction where the defendant may be found,⁵⁹ but when the trespass is the

52. *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. ed. 618; *Clemmons v. Gillette*, 33 Mont. 321, 83 Pac. 879, 114 Am. St. Rep. 814.

53. *Arment v. Hensel*, 5 Wash. 152, 31 Pac. 464.

54. *Handford v. United States*, 92 Fed. 881, 35 C. C. A. 75; *Bly v. United States*, 4 Dill. 464, 3 Fed. Cas. No. 1,581.

[a] **A preemptor** before he has perfected his claim or right to the land cannot maintain replevin. *Bower v. Higbee*, 9 Mo. 259.

55. *United States v. Humphries*, 149 U. S. 277, 13 Sup. Ct. 850, 37 L. ed. 734; *United States v. Bitter Root Development Co.*, 133 Fed. 274, 66 C. C. A. 653 (*affirmed*, 200 U. S. 451, 26 Sup. Ct. 318, 50 L. ed. 550); *United States v. Taylor*, 35 Fed. 484; *United States v. Smith*, 11 Fed. 487, 8 Sawy. 100; *Nickelson v. Cameron Lumber Co.*, 39 Wash. 569, 81 Pac. 1059.

[a] **Appropriation by Railroad.** Where a railroad company enters upon the public domain and wrongfully cuts and removes timber therefrom, a recovery may be had by the government as in a similar case against an individual. *Denver & R. G. Ry. Co. v. United States*, 9 N. M. 382, 54 Pac. 241; *United States v. Chaplin*, 31 Fed. 890, 12 Sawy. 605.

56. *United States v. Montana Lumber & Mfg. Co.*, 196 U. S. 573, 25 Sup. Ct. 367, 49 L. ed. 604; *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. ed. 260; *Bolles Wooden Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. ed. 230; *United States v. Birdseye*, 137 Fed. 516, 70 C. C. A. 100; *United States v. Bitter Root Development Co.*, 133 Fed. 274, 66 C. C. A. 652 (*affirmed*, 200 U. S. 451, 26 Sup. Ct. 318, 50 L.

ed. 550); *English v. United States*, 116 Fed. 625, 54 C. C. A. 81 (*affirming* 107 Fed. 867); *United States v. Inman-Poulsen Lumber Co.*, 211 Fed. 679; *United States v. Bonner's Ferry Lumber Co.*, 184 Fed. 187; *United States v. Scott*, 39 Fed. 900; *Bly v. United States*, 4 Dill. 464, 3 Fed. Cas. No. 1,581.

[a] **Title or right of possession** in the government at the time the timber is cut is essential to the maintenance of the action. *United States v. Inman-Poulsen Lumber Co.*, 211 Fed. 679.

[b] **An entryman** may recover the value of timber cut by a trespasser after his entry, when his title to the land is perfected. *Teller v. United States*, 117 Fed. 577, 54 C. C. A. 349.

[c] **A compromise of criminal liability** does not relieve one of the civil obligation to pay for the timber cut and removed. *United States v. Scott*, 39 Fed. 900.

57. *United States v. Bitter Root Development Co.*, 133 Fed. 274, 66 C. C. A. 653 (*affirmed*, 200 U. S. 451, 26 Sup. Ct. 318, 50 L. ed. 550); *United States v. Van Winkle*, 113 Fed. 903, 51 C. C. A. 533; *United States v. Northern Pac. R. Co.*, 6 Mont. 351, 12 Pac. 769.

58. See generally the title "**Venue.**"

59. *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127.

[a] **Reason for the Rule.**—"If a suit like this (for the value of the timber, in the district where defendant was found) cannot be maintained, then persons depredating on the public lands may escape civil liability by simply removing from the state in which the depredation occurred; whereby the government would be compelled to rely altogether upon a criminal prosecution in which it could not succeed except

gravamen of the action it must be brought in the district where the land is situated.⁶⁰

c. *Pleading*.—The declaration in an action to recover for cutting and removing timber from federal lands should state, in accordance with the general rules of pleading, the essential elements of the cause of action.⁶¹ Where the defense is title in another and license to the defendant, the latter, showing the good faith of the defendant, is a partial but distinct defense from that of title and should be separately stated.⁶² A general allegation of good faith is not, as a rule, sufficient, and where one relies upon a license as a defense he should set out all the facts relating thereto which are necessary to support it.⁶³

d. *Trial*.—Whether a homesteader, who abandons the land after removing timber to which he was entitled as a homesteader, intended to defraud the government is generally a question for the jury.⁶⁴ Instructions in an action of trespass for unlawfully cutting and removing timber from public lands should, as in other cases, be based on the law applicable to the case.⁶⁵

2. **Criminal Prosecutions.**—a. *In General*.—The federal statutes authorize a criminal prosecution against any one who unlawfully cuts or removes the timber on government lands,⁶⁶ or who, without right, either incloses such lands, asserts an exclusive title thereto,

by proving the guilt of the defendant beyond all reasonable doubt." *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127.

60. *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913. See generally the title "**Trespass**."

61. *United States v. Williams*, 6 Mont. 379, 12 Pac. 851.

[a] *Illustration*.—"The mere allegation in the complaint that the defendant had cut 28,000 cords of wood from timber growing upon the public lands, and alleging the value of the wood, and other formal matters, would be sufficient to put the defendants on their defense." *United States v. Williams*, 6 Mont. 379, 12 Pac. 851.

62. *United States v. Ordway*, 30 Fed. 30.

63. *United States v. Mullan Fuel Co.*, 118 Fed. 663; *United States v. Williams*, 6 Mont. 379, 12 Pac. 851.

64. *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127, *affirming* 64 Fed. 667, 12 C. C. A. 451.

65. *United States v. Mock*, 149 U. S. 273, 13 Sup. Ct. 848, 37 L. ed. 732; *Sauntry v. United States*, 117 Fed. 132, 55 C. C. A. 148. See generally the title "**Instructions**."

[a] **Land Department Rules**.—When

license to cut and remove timber is pleaded as a defense, it is proper to include in the instructions a copy of the land department's rules relating thereto. *United States v. Gumm*, 9 N. M. 611, 58 Pac. 398.

66. U. S. Rev. St., 1878, §§2461, 5388; U. S. Comp. St., 1916, §4980; 7 Fed. St. Ann. 290, 296, 304; *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. ed. 231; *United States v. Briggs*, 9 How. (U. S.) 351, 13 L. ed. 170; *United States v. Stone*, 49 Fed. 848; *Orrell v. Bay Mfg. Co.*, 83 Miss. 800, 36 So. 561, 70 L. R. A. 881.

[a] **Boxing trees**, while formerly not within the statute, is now a criminal offense. *Union Naval Stores Co. v. United States*, 240 U. S. 284, 36 Sup. Ct. 308, 60 L. ed. 644; *United States v. Water-Pierce Oil Co.*, 196 Fed. 767, 116 C. C. A. 391, 39 L. R. A. (N. S.) 1.

[b] **A compromise of criminal liability**, is permitted except when the cutting and removal is for exportation, by the payment of two dollars and fifty cents per acre for all land on which the offense was committed. 20 U. S. St. at L. 90; U. S. Comp. St., 1916, §4988; 7 Fed. St. Ann. 305; *Morgan v. United States*, 148 Fed. 189, 78 C. C. A. 323; *United States v. Scott*, 39 Fed. 900.

or obstructs passage over them.⁶⁷

b. *Indictment or Information*.—In accordance with the general rules elsewhere treated,⁶⁸ it is permissible to include several offenses in one indictment provided they are set out in different counts.⁶⁹ The indictment or information should be drawn in accordance with the general rules as to charging the essential elements of the offense,⁷⁰ and negating exceptions,⁷¹ and defenses.⁷² Where the prosecution is for cutting or removing timber, the land upon which the offense was committed, when surveyed, should be specifically described according to the public survey.⁷³

II. STATE LANDS.—A. ACQUISITION AND PROTECTION OF TITLE TO.—1. **Suits To Compel Conveyance.**—In a suit against a state to compel the conveyance of school lands, the officer whose duty it is to issue patents is not a necessary party.⁷⁴

67. 23 U. S. St. at L. 321, 322; U. S. Comp. St., 1916, §§4997, 4999; 6 Fed. St. Ann. 533, 536; *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. ed. 260; *Clemmons v. Gillette*, 33 Mont. 321, 83 Pac. 879, 114 Am. L. Rep. 814.

[a] **Intent of Parties Immaterial.** An inclosure of public lands is within the statute no matter what the intent of the parties may be. *Golconda Cattle Co. v. United States*, 201 Fed. 281, 118 C. C. A. 519.

[b] **Bona Fide Claimant.**—The statute does not apply to one who claims the land in good faith under color of title. *Cameron v. United States*, 148 U. S. 301, 13 Sup. Ct. 595, 37 L. ed. 459.

68. See the title "**Indictment and Information**," and particularly 12 STANDARD PROC. 499, et seq.

69. *Krause v. United States*, 147 Fed. 442, 78 C. C. A. 642. See also *Carroll v. United States*, 154 Fed. 425, 83 C. C. A. 245.

70. See generally 12 STANDARD PROC. 294.

[a] **Removal from the land** "where it was grown and cut," is not an essential or material averment in an indictment for the unlawful removal of timber from public lands and need not be alleged. *United States v. Schuler*, 6 McLean 28, 27 Fed. Cas. No. 16,234.

[b] **The class of lands** upon which the trespass was committed need not be alleged. *United States v. Thompson*, 6 McLean 56, 28 Fed. Cas. No. 16,490.

[c] **Description of Timber.**—It is not necessary to describe every kind of timber cut, "walnut and other trees" being a sufficient allegation.

United States v. Redy, 5 McLean 358, 27 Fed. Cas. No. 16,133.

[d] **The use made of the timber** is not essential to be alleged. *United States v. Stone*, 49 Fed. 848.

[e] **Intent.**—(1) An indictment for cutting or removing timber need not charge intent, for the offense is committed when the timber is unlawfully cut or removed. *United States v. Reder*, 69 Fed. 965; *United States v. Murphy*, 32 Fed. 376; *United States v. Schuler*, 6 McLean 28, 27 Fed. Cas. No. 16,234. See also *United States v. Darton*, 6 McLean 46, 25 Fed. Cas. No. 14,919. (2) But when the charge is the unlawful cutting and removing of timber to be used or disposed of in a way or for purposes prohibited by the statute, the intent to so use or dispose of it must be alleged. *United States v. Hacker*, 73 Fed. 292; *United States v. Garretson*, 42 Fed. 22.

71. See 12 STANDARD PROC. 458.

[a] **An indictment for unlawful enclosure** must show that the defendant does not come within any exception of the statute, such as a claim or color of title made or acquired in good faith, permitting the enclosure. *United States v. Churchill*, 101 Fed. 443; *United States v. Felderward*, 36 Fed. 490, 13 Sawy. 513.

72. See 12 STANDARD PROC. 350.

[a] **That the cutting or removal was not justified** under any statute, rule, or regulation of the land department need not be alleged. *United States v. Stone*, 49 Fed. 848.

73. *United States v. Schuler*, 6 McLean 28, 27 Fed. Cas. No. 16,234.

74. *Romine v. State*, 7 Wash. 215, 34 Pac. 924.

2. Review of Issuance of Patent.—a. *Bill in Equity.*—(I.) In General.—The proper remedy to assail a patent issued through fraud or mistake is by bill in equity to have it cancelled or annulled.⁷⁵

(II.) *By and Against Whom.*—The state is usually the petitioner for such relief,⁷⁶ but a prior claimant or other interested party is entitled to maintain the bill.⁷⁷

(III.) *Conditions Precedent.*⁷⁸—When fraud is the basis of the suit the purchase price need not be tendered as a prerequisite to recovery,⁷⁹

75. La.—Bowman-Hicks Lumber Co. v. Industrial Lumber Co., 127 La. 1057, 54 So. 349; Smith v. Crandall, 118 La. 1052, 43 So. 699. **Minn.**—See State v. Bachelder, 5 Minn. 223, 80 Am. Dec. 410. **N. Y.**—Brady v. Begun, 36 Barb. 533. **Tex.**—Campbell v. Elliott (Tex. Civ. App.), 151 S. W. 1180; Maney v. Eyres, 33 Tex. Civ. App. 497, 77 S. W. 428, 969; Hamilton v. Votaw, 31 Tex. Civ. App. 684, 73 S. W. 1091. See Day Land & C. Co. v. State, 68 Tex. 526, 4 S. W. 865.

As to federal patents, see supra, I, A, 2, b, (II), (B).

76. Cal.—See People v. Stratton, 25 Cal. 242. **Ga.**—Calhoun v. Cawley, 104 Ga. 335, 30 S. E. 773; Parker v. Hughes, 25 Ga. 374. **Md.**—Singery v. Attorney-General, 2 Har. & J. 487. **Minn.**—State v. Bachelder, 5 Minn. 223, 80 Am. Dec. 410; Brady v. Begun, 36 Barb. 533; People v. Schermerhorn, 19 Barb. 540; Jackson *ex dem.* Mancius v. Lawton, 10 Johns. 23. **Ore.**—Wilson v. Shiveley, 11 Ore. 215, 4 Pac. 324. **Va.** White v. Jones, 4 Call (8 Va.) 253, 1 Am. Dec. 564.

[a] **The state is a necessary party** to a suit to vacate or annul a state patent to school lands. Powers v. Webster, 47 Wash. 99, 91 Pac. 569.

[b] **State Must Be Interested.**—It has been held that a state may maintain a suit to cancel its patent to state lands only to protect its own interests and not those of a private party. People v. Stratton, 25 Cal. 242; State v. Warner Valley Stock Co., 48 Ore. 378, 86 Pac. 780.

[c] **Misdescription of Lands.**—The state alone may maintain an action to cancel a patent to school lands on the ground of a misdescription of the lands in the original application. Gunnels v. Cartledge, 26 Tex. Civ. App. 623, 64 S. W. 806.

77. Ark.—Rozell v. Chicago Mill & Lumb. Co., 76 Ark. 525, 89 S. W. 469. **Cal.**—Edwards v. Rolley, 96 Cal. 408,

31 Pac. 267, 31 Am. St. Rep. 234. **Ga.**—Williamson v. Matthews, 32 Ga. 524. **La.**—Telle v. St. Tammany School Board, 44 La. Ann. 365, 10 So. 801. **N. C.**—Stewart v. Keener, 131 N. C. 486, 42 S. E. 935. **Tenn.**—Dodson v. Cocke, 1 Overt. 314, 3 Am. Dec. 757. **Tex.**—Williamson v. Miller-Vidor Lumber Co. (Tex. Civ. App.), 178 S. W. 800; Williams v. Barnes (Tex. Civ. App.), 111 S. W. 432; Thomson v. Hubbard, 22 Tex. Civ. App. 101, 53 S. W. 841. **Wis.**—Burrows v. Rutledge, 76 Wis. 22, 44 N. W. 847.

[a] **Party Must Be Interested.**—Ark. Brown v. Toler, 66 Ark. 361, 50 S. W. 696. **Tex.**—Murphy v. Terrell, 100 Tex. 397, 100 S. W. 130. **Wash.**—Powers v. Webster, 47 Wash. 99, 91 Pac. 569.

[b] **By Residents or Taxpayers.** Where title to certain school lands is vested in the residents and taxpayers of the township, they may maintain an action to annul an illegal sale thereof. Telle v. St. Tammany School Bd., 44 La. Ann. 365, 10 So. 801.

78. To suit to cancel or annul federal patent, see supra, I, A, 2, b, (II), (B), (2).

79. Ark.—State v. Morgan, 52 Ark. 150, 12 S. W. 243. **Kan.**—State v. Cross, 38 Kan. 696, 17 Pac. 190. **La.** State v. Hackley, 124 La. 854, 50 So. 772. **Tex.**—Randolph v. State, 73 Tex. 485, 11 S. W. 487; State v. Rhomberg, 69 Tex. 212, 7 S. W. 195; State v. Snyder, 66 Tex. 687, 18 S. W. 106; State v. Burnett (Tex. Civ. App.), 59 S. W. 599.

[a] **Innocent Purchaser.**—One who furnishes the money used for the purchase of school lands, afterwards taking a deed to same or a part thereof in payment, is not an innocent purchaser and in a suit against him by the state to annul the patent on the ground of fraud practiced by the patentee the purchase money need not be returned. State v. Burnett (Tex. Civ. App.), 59 S. W. 599.

but it is otherwise, as a rule, when the suit is based on an innocent mistake.⁸⁰ When the right to annul resides in persons other than the state, which holds the purchase price, no obligation rests upon such persons to secure its return.⁸¹

(IV.) **Pleading.**⁸² — In a suit to annul a patent to state lands, where fraud is alleged, the facts constituting the fraud must be set out in the bill.⁸³

b. *Collateral Attack.* — A patent to state lands is to the same extent as one to federal lands,⁸⁴ immune from collateral impeachment,⁸⁵ except where it is absolutely void.⁸⁶

3. **School Lands.** — a. *Proceedings Upon Purchaser's Default.* (I.) **Remedies Available.** — An action for the purchase price is maintainable against a defaulting purchaser of school lands,⁸⁷ unless the statute provides for an absolute forfeiture upon default in payment.⁸⁸

Forfeiture of the contract results, in some states, from the purchaser's default alone,⁸⁹ while in others forfeiture can only be enforced by appropriate proceedings⁹⁰ had upon due notice.⁹¹

(II.) **Parties.** — A suit to recover school lands forfeited to the state should generally be in the name of the state,⁹² by or under the authority of the attorney general,⁹³ but in some jurisdictions, when purchase price notes are made payable to the state treasurer, he may sue to rescind the sale upon a default in payment.⁹⁴

(III.) **Pleading.** — In an action for the purchase price of school lands,

80. *People v. Morris*, 77 Cal. 204, 19 Pac. 378; *People v. Bryan*, 73 Cal. 376, 14 Pac. 893; *State v. Garlander*, 39 Kan. 655, 18 Pac. 818; *State v. Williams*, 39 Kan. 517, 18 Pac. 727; *State v. Dennis*, 39 Kan. 509, 18 Pac. 723.

81. *Telle v. St. Tammany School Board*, 44 La. Ann. 365, 10 So. 801, residents and taxpayers of township.

82. See generally the title "**Bills and Answers.**"

83. *State v. Dennis*, 39 Kan. 509, 18 Pac. 723; *State v. Williams*, 39 Kan. 517, 18 Pac. 727; *State v. Garlander*, 39 Kan. 655, 18 Pac. 818. See generally the title "**Fraud and Deceit.**"

84. See *supra*, I, A, 2, b, c.

85. **U. S.**—*Dodge v. Perez*, 2 Sawy. 645, 7 Fed. Cas. No. 3,953. **Ark.**—*State v. Morgan*, 52 Ark. 150, 12 S. W. 243. **Cal.**—*Churchill v. Anderson*, 56 Cal. 55. **Ill.**—*Chicago Sanitary Dist. v. Adam*, 179 Ill. 406, 53 N. E. 743.

86. *State v. Morgan*, 52 Ark. 150, 12 S. W. 243; *Churchill v. Anderson*, 56 Cal. 55.

87. *Orr v. State*, 56 Ark. 107, 19 S. W. 319; *Seeley v. Thomas*, 31 Ohio St. 301. See also *St. Joseph v. State*, 120 Ind. 442, 22 N. E. 339.

88. *State University v. Winston*, 5

Stew. & P. (Ala.) 17; *School Comrs. v. Aikin*, 5 Port. (Ala.) 169.

89. *State University v. Winston*, 5 *Stew. & P. (Ala.)* 17; *Schlibrede v. State Land Board*, 46 Ore. 615, 618, 81 Pac. 702.

90. *State v. Clark*, 39 Neb. 899, 58 N. W. 585; *State v. Graham*, 21 Neb. 329, 32 N. W. 142; *Richardson v. Pratt*, 20 Neb. 196, 29 N. W. 382.

91. **Ark.**—*Orr v. State*, 56 Ark. 107, 19 S. W. 319. **Kan.**—*Phares v. Gleason*, 73 Kan. 604, 85 Pac. 572; *Hansen v. Wilson*, 40 Kan. 211, 19 Pac. 717. **Neb.** *Smith v. White*, 5 Neb. 405.

92. *Duncan v. State*, 28 Tex. Civ. App. 447, 67 S. W. 903.

93. *Duncan v. State*, 28 Tex. Civ. App. 447, 67 S. W. 903.

[a] **Not by Unauthorized County Attorney.**—Under a statute authorizing the attorney-general to institute suits in the name of the state for the recovery of lands forfeited to the state, a county attorney, not being directed or authorized to do so, cannot maintain an action, or intervene, in the name of the state, for the forfeiture of school lands. *Duncan v. State*, 28 Tex. Civ. App. 447, 67 S. W. 903.

94. *Hunter v. Williams*, 16 La. Ann. 129.

a plea of cancellation with the consent of the voters of the district, need not state the reason which induced the voters' action.⁹⁵

b. *Lease of School Lands*.—The remedies available to lessor or lessee of state school lands are generally the same as in any other case of landlord and tenant.⁹⁶

B. PROCEEDINGS FOR INJURIES TO STATE LANDS.—1. **Civil Remedies**.—a. *In General*.—The state cannot maintain ejectment against a trespasser on state lands, because the sovereign cannot be disseized;⁹⁷ but an information for intrusion, which is an action in the nature of trespass quare clausum fregit, has been used.⁹⁸ The state may enjoin the unlawful cutting or removing of timber from its lands,⁹⁹ or it may sue in trespass for damages,¹ or in replevin for the property,² or maintain an action for the statutory penalty.³

b. *Pleading*.—When the action is to recover a penalty under a statute allowing a penalty for each tree destroyed, the complaint may properly contain in one count an allegation of all the trees destroyed.⁴

c. *Trial*.—Trial in this class of cases is governed by general rules elsewhere treated.⁵

95. *Lewis v. Montgomery Branch Bank*, 6 Ala. 496.

96. See generally the title "**Landlord and Tenant**," and the following: **U. S.**—*Forest Products Co. v. Russell*, 161 Fed. 1004. **Ill.**—*Rosenthal v. Board of Education*, 270 Ill. 380, 110 N. E. 579. **Miss.**—*Moss Point Lumber Co. v. Harrison County*, 89 Miss. 448, 42 So. 290, 873; *Cole v. Harman*, 8 Smed. & M. 562.

[a] **Sale of Timber**.—Where school lands have been leased without making any exception as to the operation of the lease with respect to timber growing thereon, the state commissioner of lands cannot sell same, and if he does the purchaser may be restrained from cutting and removing the timber by the lessee. *Tansel v. Storm*, 40 Okla. 363, 138 Pac. 168.

97. *State v. Arledge*, 1 Bailey (S. C.) 551.

98. *State v. Arledge*, 1 Bailey (S. C.) 551; *Com. v. Hite*, 6 Leigh (33 Va.) 588, 29 Am. Dec. 226.

[a] **Process on Information for Intrusion**.—A warrant should be issued against the defendant upon the filing of an information for intrusion the same as if it were an indictment. *State v. Arledge*, 1 Bailey (S. C.) 551.

99. *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119.

1. **Me.**—*State v. Mullen*, 97 Me. 331, 54 Atl. 841; *State v. Cutler*, 16 Me. 349. **Minn.**—*State v. Shevlin-Carpen-*

ter Co., 102 Minn. 470, 113 N. W. 634, 114 N. W. 738. **N. Y.**—*Newcomb v. Butterfield*, 8 Johns. 342; *People v. Bennett*, 56 Misc. 160, 107 N. Y. Supp. 406. **Pa.**—*Graham v. Moore*, 4 Serg. & R. 467.

[a] **Where public lands of the United States have been granted to a state** the title to the timber thereon belongs to the state and the state may maintain an action for the wrongful removal or conversion thereof, and such action cannot be maintained by the federal government. So where timber was wrongfully cut and removed from land which had been granted to the state, but which after the conversion was forfeited and reverted to the United States, the latter could not maintain an action for the value of such timber. *United States v. Loughrey*, 172 U. S. 206, 19 Sup. Ct. 153, 43 L. ed. 420.

2. *Schulenburg v. Harriman*, 21 Wall. (U. S.) 44, 22 L. ed. 551, affirming 2 Dill. 398, 21 Fed. Cas. No. 12,486.

3. *People v. McFadden*, 13 Wend. (N. Y.) 396; *People v. Bennett*, 56 Misc. 160, 107 N. Y. Supp. 406.

4. *People v. McFadden*, 13 Wend. (N. Y.) 396. See the title "**Penalties, Forfeitures and Fines**."

5. See the title "**Trial**" and the cross-references there found.

[a] **Questions of Law and Fact**.—Under conflicting evidence the question whether the timber was cut by the

2. Criminal Prosecutions.—Certain trespasses upon state lands will under some statutes subject the offender to a criminal prosecution.⁶ An indictment for unlawfully destroying or removing timber from state public lands should be drawn in accordance with the general rules relating to indictments.⁷

defendant, or by another without authorization from defendant, is for the jury. *People v. Turner*, 49 Hun 466, 2 N. Y. Supp. 253, *affirmed* in 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498. See the title "**Province of Judge and Jury.**"

[b] **Instructions.**—When the evidence shows that defendant assisted in committing the trespass, an instruction eliminating that question from the consideration of the jury is erroneous. *People v. Holmes*, 166 N. Y. 540, 60 N. E. 249. See the title "**Instructions.**"

6. *Broward v. State*, 9 Fla. 422.

[a] **Unlawful enclosure** of state lands. *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119.

[b] **Cutting or Removing of Timber.**—*Mich.*—*People v. Christian*, 144 Mich. 247, 107 N. W. 919. *Minn.*

State v. Shevlin-Carpenter Co., 99 Minn. 158, 108 N. W. 935. *Pa.*—*Com. v. La Bar*, 32 Pa. Super. 228; *Com. v. Texter*, 2 Browne 247. *S. D.*—*State v. Dorman*, 9 S. D. 528, 70 N. W. 848.

7. See generally 12 STANDARD PROC. 294.

[a] **Surplusage.**—Under a statute which prohibits the "removal" of timber from state public lands, an indictment is not vitiated by the needless use of the word "cut," the allegation being "did cut and remove," *State v. Dorman*, 9 S. D. 528, 70 N. W. 848.

[b] **Intent.**—Generally a criminal intent is not an essential element of the offense and therefore need not be alleged in an indictment for cutting and removing timber from state lands. *People v. Christian*, 144 Mich. 247, 107 N. W. 919; *Com. v. Le Bar*, 32 Pa. Super. 228.

PUBLIC OFFICERS. — See Officers.

PUBLIC SCHOOLS. — See Schools and School Districts.

PUBLIC SERVICE CORPORATIONS

By the Editorial Staff.

I. FRANCHISES, 895

- A. *Grant and Issuance*, 895
- B. *Use, Protection and Enjoyment*, 895
- C. *Forfeiture*, 898

II. ENFORCING PERFORMANCE OF PUBLIC DUTIES, 898

III. ACTIONS FOR DAMAGES FOR FAILURE TO PERFORM PUBLIC DUTIES, 902

IV. ACTIONS FOR FINES OR PENALTIES, 903

V. REGULATION OF RATES, 903

- A. *Remedies for Determining Reasonableness of Rates*, 903
- B. *Recovery of Overcharge*, 904

VI. DISCRIMINATION, 905

VII. ENJOINING UNLAWFUL OPERATION, 906

VIII. ENJOINING ENFORCEMENT OF CRIMINAL STATUTES AND ORDINANCES, 906

IX. ACQUIREMENT AND OPERATION OF PUBLIC UTILITIES BY MUNICIPALITIES, 907

X. PUBLIC SERVICE COMMISSIONS, 907

- A. *Nature and Functions*, 907
- B. *Attacking Constitutionality of Statutes*, 908
- C. *Jurisdiction and Powers*, 908
 - 1. *In General*, 908
 - 2. *General Jurisdictional Limitations*, 912
 - 3. *Eminent Domain Proceedings*, 912
 - 4. *Determination of Jurisdiction*, 913
- D. *Notice of Hearings*, 913
- E. *Preventing Action by Commission*, 914

- F. *Enforcing Action by Commissions*, 915
- G. *Compelling Resort to Commissions*, 915
- H. *Conditions Precedent to Action by Commission*, 917
- I. *Procedure Before Commission*, 917
 - 1. *In General*, 917
 - 2. *Parties*, 919
 - 3. *Pleadings*, 920
 - 4. *Evidence*, 921
 - 5. *Hearing or Trial*, 924
 - a. *In General*, 924
 - b. *Continuances and Discontinuances*, 925
 - 6. *Rehearings*, 926
- J. *Findings and Orders*, 926
 - 1. *Findings*, 926
 - 2. *Orders*, 927
 - a. *Form and Sufficiency*, 927
 - b. *Conclusiveness*, 929
 - c. *Enforcement of Orders*, 930
 - (I.) *In General*, 930
 - (II.) *By Action*, 930
 - (A.) *In General*, 930
 - (B.) *Matters Reviewable*, 931
 - (III.) *By Mandamus*, 931
 - (A.) *In General*, 931
 - (B.) *Matters Reviewable*, 932
 - (IV.) *Other Remedies*, 932
 - (V.) *Actions To Recover Fines or Penalties*, 933
 - (A.) *In General*, 933
 - (B.) *Pleadings*, 934
 - (C.) *Scope of Review*, 934
- K. *Review and Appeal*, 935
 - 1. *In General*, 935
 - 2. *Orders Reviewable*, 937
 - 3. *Jurisdiction of the Courts*, 938
 - 4. *Conditions Precedent*, 938
 - 5. *Supersedeas or Stay of Proceedings*, 939
 - 6. *Taking and Perfecting the Appeal*, 939
 - 7. *Parties*, 939
 - 8. *Record or Pleadings*, 940
 - 9. *Hearing and Determination*, 940
 - a. *Generally*, 940
 - b. *Nature and Scope of Review*, 940
 - (I.) *In General*, 940
 - (II.) *Sufficiency of Pleadings*, 945
 - (III.) *On Certiorari*, 945

- c. *Evidence*, 946
 - (I.) *In General*, 946
 - (II.) *Burden of Proof*, 946
 - (III.) *Sufficiency of Evidence*, 947
- 10. *Judgment or Determination*, 951
- L. *Suits in Equity*, 952
 - 1. *In General*, 952
 - 2. *Conditions Precedent*, 953
 - 3. *In State or Federal Court*, 953
 - 4. *Parties*, 955
 - 5. *Pleadings*, 955
 - 6. *Interlocutory Injunctions*, 956
 - 7. *Evidence*, 957
 - 8. *Hearing or Trial*, 957
 - 9. *Decree or Judgment*, 958

CROSS-REFERENCES:

Eminent Domain;	Municipal Corporations;
Highways, Streets and Bridges;	Quo Warranto;
Interstate Commerce;	Railroads;
Mandamus;	Ships and Shipping;
Monopolies;	Street Railroads;
Telegraphs and Telephones.	

For forms, see 9 STANDARD PROC. 1011.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. FRANCHISES. — A. GRANT AND ISSUANCE. — If a clear right to a franchise exists, its issuance by the proper authorities may be compelled by mandamus.¹ But where the grant or issuance is a matter of legislative discretion, mandamus will not lie.²

B. USE, PROTECTION AND ENJOYMENT. — Where a franchise has been granted, threatened interference with its lawful exercise will be enjoined,³ and the issuance of a permit or other authorization to enable a public service corporation to prosecute its business under the franchise will be enforced by mandamus,⁴ or a mandatory injunction.⁵

1. *Pereria v. Wallace*, 129 Cal. 397, 62 Pac. 61; *Christian-Todd Tel. Co. v. Com.*, 156 Ky. 557, 161 S. W. 543.

2. *Ouachita Power Co. v. Donaghey*, 106 Ark. 48, 152 S. W. 1012, Ann. Cas. 1915A, 447; *Bastin Tel. Co. v. Davidson*, 176 Ky. 23, 195 S. W. 148. See generally the title "**Mandamus**."

3. III.—*Quincy v. Bull*, 106 Ill. 337. Kan.—*La Harpe v. Elm Township G. F. & P. Co.*, 69 Kan. 97, 76 Pac. 448. N. C.—*Asheville St. Ry. Co. v. Asheville*, 109 N. C. 688, 14 S. E. 316.

4. Del.—*Wilmington v. Addicks*, 47 Atl. 366. La.—*State v. Bell*, 49 La. Ann. 676, 21 So. 724. Md.—*State v.*

A privilege granted by a franchise is necessarily exclusive as against all persons who do not possess a similar franchise,⁶ and a court of equity will enjoin an unlawful invasion of the right by another person.⁷ The existence of the franchise right must be clearly established in order to entitle plaintiff to relief.⁸ One utility corporation cannot by suit for injunction question the validity of the franchise of a competitor,⁹ the remedy in such a case being *quo warranto*.¹⁰ But where two or more public service companies each have a franchise, one company cannot enjoin another from operating because of non-compliance with the terms or conditions of its franchise.¹¹ A franchise, which has been accepted and acted upon, constitutes a contract;¹² and a repeal of the ordinance granting the franchise,¹³ a

Latrobe, 81 Md. 222, 31 Atl. 788. **Mo.** State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113. **Mont.** State *v.* Red Lodge, 30 Mont. 338, 76 Pac. 758. **N. Y.**—Nassau Elec. R. Co. *v.* White, 12 Misc. 631, 34 N. Y. Supp. 960, 69 N. Y. St. 128.

5. Gadsden *v.* Mitchell, 145 Ala. 137, 40 So. 557, 117 Am. St. Rep. 20, 6 L. R. A. (N. S.) 781.

6. Millville Gas Light Co. *v.* Vineland Light & P. Co., 72 N. J. Eq. 305, 65 Atl. 504.

7. **N. J.**—Millville Gas Light Co. *v.* Vineland Light & P. Co., 72 N. J. Eq. 305, 65 Atl. 504. **Tenn.**—Memphis St. R. Co. *v.* Rapid Transit Co., 133 Tenn. 99, 179 S. W. 635, Ann. Cas. 1917C, 1045, P. U. R. 1916A, 834. **Tex.**—Tugwell *v.* Eagle Pass Ferry Co., 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

[a] Although complainant is not in the actual enjoyment of the franchise and its right and title to the franchise is denied, jurisdiction will be exercised by a court of equity, since a franchise right is an intangible property right the protection of which involves questions analogous to those invoked when the existence of a private nuisance is alleged, and in this class of cases equity will act although complainant's legal title is denied. Millville Gas Light Co. *v.* Vineland Light & P. Co., 72 N. J. Eq. 305, 65 Atl. 504.

[b] A street railway, although not having an exclusive franchise to use city streets, does have the exclusive right to operate in the streets as against all persons who have not acquired the right from the proper authorities and it may enjoin their unauthorized use of the streets. Memphis St. R. Co. *v.* Rapid Transit Co.,

133 Tenn. 99, 179 S. W. 635, Ann. Cas. 1917C, 1045, P. U. R. 1916A, 834; Lindsley *v.* Dallas Consol. St. Ry. Co. (Tex. Civ. App.), 200 S. W. 207.

8. **N. J.**—Millville Gas Light Co. *v.* Vineland Light & P. Co., 72 N. J. Eq. 305, 65 Atl. 504. **Pa.**—Myersdale & S. St. R. Co. *v.* Pennsylvania & M. St. R. Co., 219 Pa. 558, 69 Atl. 92. **Tenn.**—Memphis St. R. Co. *v.* Rapid Transit Co., 133 Tenn. 99, 179 S. W. 635, Ann. Cas. 1917C, 1045, P. U. R. 1916A, 834.

9. Baxter Tel. Co. *v.* Cherokee Co. Mut. Tel. Assn., 94 Kan. 159, 146 Pac. 324, L. R. A. 1916B, 1083.

10. Myersdale & S. St. R. Co. *v.* Pennsylvania & M. St. R. Co., 219 Pa. 558, 69 Atl. 92; Memphis St. R. Co. *v.* Rapid Transit Co., 133 Tenn. 99, 179 S. W. 635, Ann. Cas. 1917C, 1045, P. U. R. 1916A, 834. See the title "*Quo Warranto*."

11. North Shore Elec. L. & P. Co. *v.* Port Jefferson Elec. L. Co., 151 App. Div. 63, 135 N. Y. Supp. 824, failure to obtain consent of public service commission is not a ground for an injunction.

12. Asbury Park & S. G. R. Co. *v.* Township Committee, 73 N. J. Eq. 323, 67 Atl. 790.

13. Asbury Park & S. G. R. Co. *v.* Township Committee, 73 N. J. Eq. 323, 67 Atl. 790.

[a] **Franchises To Lay Tracks in City Streets.**—Asbury Park & S. G. R. Co. *v.* Township Committee, 73 N. J. Eq. 323, 67 Atl. 790; Paterson & P. H. R. Co. *v.* Mayor, 24 N. J. Eq. 158.

[b] The threatened injury to or removal of plaintiff's property, must be alleged in the complaint. Cape May & S. L. R. Co. *v.* Cape May, 35 N. J. Eq. 419.

threatened unlawful forfeiture of the franchise,¹⁴ or an attempted modification by the governmental body of mutual rights under the franchise, without the consent and over the objection of the public utility,¹⁵ will be enjoined.¹⁶ On the other hand, the public utility will be restrained by a court of equity from violating or abusing the terms of its franchise.¹⁷ The action may be maintained by the state or municipality granting the franchise.¹⁸ Mandamus will also lie to compel a compliance by the utility with the terms of its franchise,¹⁹

14. *Knickerbocker Trust Co. v. Kalamazoo*, 182 Fed. 865; *North Jersey St. Ry. Co. v. Inhabitants of South Orange*, 58 N. J. Eq. 83, 43 Atl. 53.

15. *Cincinnati v. Cincinnati & Hamilton Tr. Co.*, 245 U. S. 446, 38 Sup. Ct. 153, 62 L. ed. —; *City of Bessemer v. Bessemer City Waterworks*, 152 Ala. 391, 44 So. 663.

[a] **Construction of a municipal plant** in violation of the terms of the franchise will be enjoined. *Memphis Elec. L. H. & P. Co. v. Memphis*, 271 Mo. 488, 196 S. W. 1113.

[b] **Where rates for public service have been fixed by an ordinance**, acted upon and accepted by a public utility, enforcement of an ordinance which attempts to reduce the rates will be enjoined. *City of Bessemer v. Bessemer City Waterworks*, 152 Ala. 391, 44 So. 663.

16. See cases in preceding notes.

[a] **The theory** is not that the court will enjoin the commission of a crime in the violation of an ordinance but that it will protect complainant against an invasion of its vested rights. *City of Bessemer v. Bessemer City Waterworks*, 152 Ala. 391, 44 So. 663.

[b] "If there is doubt as to the right claimed by the company, or if it is uncertain whether the acts complained of are infractions of it, a court of equity should not interfere." *City of Bessemer v. Bessemer City Waterworks*, 152 Ala. 391, 44 So. 663.

[c] **A trustee, as mortgagee**, may maintain the action in his own right. *Knickerbocker Trust Co. v. Kalamazoo*, 182 Fed. 865.

[d] **Federal courts** have jurisdiction of such an action as it involves the impairment of the obligation of a contract and the taking of property without due process of law. *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500.

17. **Ky.**—*Louisville v. Louisville Home Tel. Co.*, 149 Ky. 234, 148 S. W.

13, Ann. Cas. 1914A, 1240. **Minn.**—*Red Wing v. Wisconsin-Minnesota L. & P. Co.*, 166 N. W. 175. **N. H.**—*State v. Boston & M. R. R.*, 75 N. H. 327, 74 Atl. 542.

[a] **Injunction the Proper Remedy.** "The injury resulting from appellee's violation of the ordinance of the city, was an injury to the municipality and its inhabitants of a permanent continuing and irreparable nature; and also such in character as is not susceptible of accurate pecuniary estimation. Moreover, where the remedy at law is, as here, manifestly inadequate it is a well recognized rule that a court of equity may at the suit of the state or municipality granting a franchise, by injunction compel a recalcitrant public service corporation to which it was granted to abide by its terms, although no actual injury result to the state or municipality from the corporation's violation of the franchise. This is so, because in such case the corporation's breach of the contract, especially if it arises out of the doing of an act which the contract declares shall not be done, will presumptively result in the oppression of the citizens." *Louisville v. Louisville Home Tel. Co.*, 149 Ky. 234, 148 S. W. 13, Ann. Cas. 1914A, 1240. And see *City of Wheeling v. Natural Gas Co.*, 74 W. Va. 372, 82 S. E. 345.

18. *Red Wing v. Wisconsin-Minnesota L. & P. Co.* (Minn.), 166 N. W. 175; *City of Wheeling v. Natural Gas Co.*, 74 W. Va. 372, 82 S. E. 345 (consumers are not necessary parties); *City of St. Mary's v. Hope Natural Gas Co.*, 71 W. Va. 76, 76 S. E. 841, 43 L. R. A. (N. S.) 994.

19. **U. S.**—*State ex rel. Seattle v. Puget Sound Tr. L. & P. Co.*, 243 Fed. 748. **Ind.**—*State ex rel. Vincennes v. Vincennes Traction Co.*, 117 N. E. 961; *Seymour Water Co. v. Seymour*, 163 Ind. 120, 70 N. E. 514. **Ia.**—*State v. Ottumwa Ry. & L. Co.*, 178 Iowa 961,

and this proceeding may also be maintained by a municipality in its own name.²⁰

C. **FORFEITURE.**—Where the terms of a statute or ordinance providing for the forfeiture of a franchise are self-executing, noncompliance with such terms works a forfeiture of the franchise.²¹ Ordinarily, however, a forfeiture of a franchise can be declared only by the courts,²² and in a proceeding by or in the nature of quo warranto, brought directly for that purpose by the body which granted the franchise,²³ or by the attorney general of the state.²⁴ A court of equity will not ordinarily enforce a forfeiture of a franchise,²⁵ and it will enjoin the attempted but unauthorized forfeiture of a franchise by a legislative body.²⁶

II. ENFORCING PERFORMANCE OF PUBLIC DUTIES.—Performance of the public duties of a public service corporation will be enforced by the courts, and to obtain relief a writ of mandate may be employed.²⁷ Thus, a public utility will be compelled to give ade-

160 N. W. 336. **Okla.**—Oklahoma v. Oklahoma R. Co., 20 Okla. 1, 93 Pac. 48, 16 L. R. A. (N. S.) 651.

[a] **Paving a street** as required by the terms of a franchise granted to a street railway company may be enforced by mandamus. **Fla.**—State v. Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590. **Ind.**—State *ex rel.* Vincennes v. Vincennes Tr. Co., 117 N. E. 961. **Mich.**—Lansing v. Lansing City Elec. Ry. Co., 109 Mich. 123, 66 N. W. 949. **N. J.**—Rutherford v. Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84.

Enforcing performance of public duties generally, see *infra*, II.

20. **Ind.**—State v. Marion L. & H. Co., 174 Ind. 622, 92 N. E. 731. **Okla.** Bartlesville Water Co. v. Bartlesville, 48 Okla. 344, 150 Pac. 118. **Tex.**—International Water Co. v. El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816.

21. Los Angeles Ry. Co. v. Los Angeles, 152 Cal. 242, 92 Pac. 490, 125 Am. St. Rep. 54, 15 L. R. A. (N. S.) 1269.

22. Knickerbocker Trust Co. v. Kalamazoo, 182 Fed. 865; Kavanaugh v. St. Louis, 220 Mo. 496, 119 S. W. 552.

23. People v. Bleecker St. & F. F. R. Co., 140 App. Div. 611, 125 N. Y. Supp. 1045; Fredonia v. Fredonia Nat. Gas L. Co., 149 N. Y. Supp. 964, *affirmed*, 167 App. Div. 955, 152 N. Y. Supp. 1147; Spencer v. City of Palestine (Tex. Civ. App.), 116 S. W. 857. See the title "**Quo Warranto.**"

[a] **The alleged forfeiture cannot be declared in mandamus proceedings**

instituted to compel the performance of its public duties. People v. Illinois Cent. R. Co., 241 Ill. 471, 89 N. E. 744.

24. New York v. Montague, 145 App. Div. 172, 129 N. Y. Supp. 1084.

25. Kavanaugh v. St. Louis, 220 Mo. 496, 119 S. W. 552.

26. See *supra*, I, B.

[a] **An ordinance decreeing a forfeiture and sale is judicial and not legislative in character and equity has jurisdiction as in other cases to relieve against the forfeiture.** North Jersey St. Ry. Co. v. Inhabitants of South Orange, 58 N. J. Eq. 83, 43 Atl. 53.

27. **Cal.**—Lukrawka v. Spring Valley Water Co., 146 Cal. 318, 146 Pac. 640, P. U. R. 1915B, 331. **Fla.**—State *ex rel.* Ellis v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320. **N. J.**—Bridgeton v. Bridgeton & M. Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837. **Okla.**—Oklahoma v. Oklahoma R. Co., 20 Okla. 1, 93 Pac. 48, 16 L. R. A. (N. S.) 651. **Tex.**—San Antonio St. Ry. Co. v. State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662.

[a] **Mandamus will not lie to compel the acceptance of the provisions of a statute, by an existing corporation, the effect of which would be to create and at the same time enforce duties as a public utility.** Oklahoma Nat. Gas Co. v. State, 47 Okla. 601, 150 Pac. 475, P. U. R. 1915F, 731.

[b] **The fact that the relator refuses**

quate service to the public,²⁸ to continue in the rendition of such service,²⁹ to maintain its property in a reasonable state of repair and usefulness,³⁰ and with due consideration to the rights of others,³¹ to

to agree not to patronize another and competing utility, or that he has made but broken such an agreement, does not prevent the issuance of a writ of mandate. *State v. Citizens Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

[c] **The removal of an original proceeding in mandamus from a state to a federal court is unauthorized.** *State ex rel. Seattle v. Puget Sound Tr. L. & P. Co.*, 243 Fed. 748. See generally the title "Removal of Causes."

[d] **Renewal of application after denial of writ**, see *Winchester & S. R. Co. v. Com.*, 106 Va. 264, 55 S. E. 692 (where the original writ was denied because of inability of the court to enforce its order), and 19 STANDARD PROC. 265, 280.

Procedure in mandamus generally, see the title "Mandamus."

28. *Ark.*—*Rowland v. Saline River Ry. Co.*, 177 S. W. 896. *Fla.*—*State ex rel. Ellis v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320. *Neb.*—*State v. Republican Valley R. Co.*, 17 Neb. 647, 24 N. W. 329, 52 Am. Rep. 424. *Utah.* *State ex rel. Skeen v. Ogden Rapid Transit Co.*, 38 Utah 242, 112 Pac. 120.

Compelling rendition of service by railroads, see the titles "Railroads;" "Street Railroads."

Enforcing telegraph and telephone service, see the title "Telegraphs and Telephones."

[a] **Enforcing light, heat and power service**, see *Ind.*—*State v. Consumers' Gas Trust Co.*, 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245. *La.*—*State v. New Orleans Gaslight Co.*, 108 La. 67, 32 So. 179. *Minn.*—*State ex rel. Mason v. Consumers' Power Co.*, 119 Minn. 225, 137 N. W. 1104, Ann. Cas. 1914B, 19, 41 L. R. A. (N. S.) 1181. *N. J.* *Johnson v. Atlantic City Gas & W. Co.*, 65 N. J. Eq. 129, 56 Atl. 550.

[b] **Enforcing express service**, see *Southern Express Co. v. Rose Co.*, 124 Ga. 581, 53 S. E. 185, 5 L. R. A. (N. S.) 619.

[c] **Enforcing the supplying of water**, see *Ala.*—*Weatherby v. Capital City Water Co.*, 115 Ala. 156, 22 So. 140. *Ga.*—*Camilla v. Norris*, 134 Ga.

351, 67 S. E. 940, by a municipality. *Ind.*—*Seymour Water Co. v. Seymour*, 163 Ind. 120, 70 N. E. 514. *Me.*—*Robbins v. Bangor R. & Elec. Co.*, 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963. *Mont.*—*State v. Butte City Water Co.*, 18 Mont. 199, 44 Pac. 966, 56 Am. St. Rep. 574, 32 L. R. A. 697. *Neb.* *American Waterworks Co. v. State*, 46 Neb. 194, 64 N. W. 711, 50 Am. St. Rep. 610, 30 L. R. A. 447. *N. Y.* *People ex rel. Hammerstein v. Monroe*, 41 Misc. 198, 83 N. Y. Supp. 995. *Ore.* *Haugen v. Albina Light, etc. Co.*, 21 Ore. 411, 28 Pac. 244, 14 L. R. A. 424. See the title "Waters and Water-courses."

[d] **The writ will not direct the service to be rendered in any particular manner**, this being left to the discretion of the public utility. *State ex rel. Mason v. Consumers' Power Co.*, 119 Minn. 225, 137 N. W. 1104, Ann. Cas. 1914B, 19, 41 L. R. A. (N. S.) 1181.

29. *State v. Sugarland Ry. Co.* (Tex. Civ. App.), 163 S. W. 1047.

[a] **The purchaser of a public utility will be compelled to continue to render service.** *State ex rel. Howie v. Benson*, 108 Miss. 779, 67 So. 214, L. R. A. 1918A, 264.

[b] **Compelling the operation of a railroad**, see *State ex rel. Little v. Dodge City, M. & T. R. Co.*, 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564, and the title "Railroads."

Right to enjoin the discontinuance of service, see *infra*, this section.

30. *State ex rel. West v. Florida Coast Line Canal & T. Co.* (Fla.), 75 So. 582 (a canal company); *State ex rel. Ellis v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320.

31. See *infra*, this note.

[a] **Drainage of property**, as a sanitary measure, may be required. *Chesapeake & O. Ry. Co. v. Catlett* (Va.), 94 S. E. 934.

[b] **A telegraph or telephone company will be compelled to remove from the streets, poles which constitute a nuisance or obstruction.** *County Court v. White*, 79 W. Va. 475, 91 S. E. 350.

make reasonable extensions of service to new territory,³² or to comply with any duty owing to the public or to individual citizens by reason of its exercise of public functions.³³

Duties of a public service corporation arising wholly from contract and not imposed upon it by its charter, will also be enforced by mandamus, in some states,³⁴ but not in others.³⁵ A general course of conduct and a long series of continuous acts will not be enforced by mandamus,³⁶ nor will service be required to be given in furtherance of an unlawful business or enterprise.³⁷

Mandamus proceedings may be brought by the attorney general,³⁸ or by or on the relation of any individual citizen entitled to receive the service.³⁹

An injunction will issue to prevent the threatened discontinuance of service,⁴⁰ and in some jurisdictions a mandatory injunction will issue to require the continuance of or to restore service by a public utility.⁴¹ An injunction is also the proper remedy where a continuing

32. *Lukrawka v. Spring Valley Water Co.*, 146 Cal. 318, 146 Pac. 640, P. U. R. 1915B, 331, by a water company.

33. *Kan.*—*Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312. *Neb.*—*State ex rel. Strever v. Dawson County Irr. Co.*, 165 N. W. 882, construction of a bridge over an irrigation ditch was required. *N. J.*—*Borough of Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227, 63 Atl. 84. *Okla.*—*Oklahoma v. Oklahoma R. Co.*, 20 Okla. 1, 93 Pac. 48, 16 L. R. A. (N. S.) 651.

34. *Independent School Dist. v. Le Mars City Water & L. Co.*, 131 Iowa 14, 107 N. W. 944, 10 L. R. A. (N. S.) 859; *Oklahoma City v. Oklahoma R. Co.*, 20 Okla. 1, 93 Pac. 48, 16 L. R. A. (N. S.) 651.

35. *Chicago v. Chicago Tel. Co.*, 230 Ill. 157, 82 N. E. 607, 13 L. R. A. (N. S.) 1084. And see *supra*, I, B.

36. *State ex rel. West v. Florida Coast Line Canal & T. Co.* (Fla.), 75 So. 582; *Oklahoma Nat. Gas Co. v. State*, 47 Okla. 601, 150 Pac. 475, P. U. R. 1915F, 731. And see generally the title "Mandamus."

37. *Western Union Tel. Co. v. State ex rel. Hammond Elev. Co.*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153 (delivery of market quotation to a bucket house not enforced); *Godwin v. Carolina Tel. & T. Co.*, 136 N. C. 258, 48 S. E. 636, 103 Am. St. Rep. 941, 67 L. R. A. 251, a telephone need not be installed in a bawdy house.

38. *Fla.*—*State ex rel. Ellis v. Atlan-*

tie Coast Line R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 320. *Kan.* *State v. Missouri Pac. R. Co.*, 33 Kan. 176, 5 Pac. 772. *Pa.*—*Loraine v. Pittsburgh, J. E. & E. R. Co.*, 205 Pa. 132, 54 Atl. 580, 61 L. R. A. 502.

39. *Plainfield-Union Water Co. v. Inhabitants of City of Plainfield*, 83 N. J. L. 332, 85 Atl. 321. But see 19 STANDARD PROC. 248.

40. *U. S.*—*Royal Brewing Co. v. Missouri, K. & T. Ry. Co.*, 217 Fed. 146, refusal to accept freight for carriage. *Colo.*—*Colorado Tel. Co. v. Wilmore*, 53 Colo. 585, 129 Pac. 204; *Seaton Mountain Elec. L. H. & P. Co. v. Idaho Springs Inv. Co.*, 49 Colo. 122, 111 Pac. 834, 33 L. R. A. (N. S.) 1078. *Ind.*—*Mooreland Rural Tel. Co. v. Mouch*, 48 Ind. App. 521, 96 N. E. 193. *N. D.*—*Great Northern R. Co. v. Shyenenne Tel. Co.*, 27 N. D. 256, 145 N. W. 1062.

[a] Discontinuance of operation of a branch street railway line will not be enjoined when its continued operation would result in such a loss as would endanger the entire system. *Vicksburg Traction Co. v. Warren County*, 100 Miss. 442, 56 So. 607.

[b] A Municipality May Maintain the Proceeding.—*Gainesville v. Gainesville Gas & Elec. P. Co.*, 65 Fla. 404, 62 So. 919.

41. *Ky.*—*Louisville & N. R. Co. v. Pittsburgh & K. Coal Co.*, 111 Ky. 960, 64 S. W. 969, 98 Am. St. Rep. 447, 55 L. R. A. 601. *Pa.*—*Whiteman v. Fayette Fuel-Gas Co.*, 139 Pa. 492, 20 Atl. 1062. *Vt.*—*Bourke v. Olcott Water*

refusal of service, giving rise to a multiplicity of actions, is threatened,⁴² or where persecution or intimidation of an individual consumer is charged.⁴³ An individual will be enjoined from enforcing his claim of right to service by his own acts where he can only do so by repeated breaches of the peace.⁴⁴ Other remedies are open to the public in some jurisdictions for the enforcement of rights against public service corporations.⁴⁵ Where enforcement of a right involves the taking of the property of a public utility, eminent domain proceedings may be resorted to.⁴⁶ Contracts between public utilities, in furtherance of the performance of their public duties will be required to be specifically performed,⁴⁷ or will be enforced by mandamus.⁴⁸ Jurisdiction of matters involving the performance of their public duties by public utilities is now, in most states, conferred upon the various public service commissions.⁴⁹ Where this is the case, the courts will not, ordinarily, act in advance of a determination of the question by the commission.⁵⁰ Private or public contracts will, however, be enforced by mandamus,⁵¹ or their continuing breach will be enjoined,⁵² unless and until such contracts have been superseded by

Co., 84 Vt. 121, 78 Atl. 715, Ann. Cas. 1912D, 108, 33 L. R. A. (N. S.) 1015.

42. *Hogan v. Nashville Interurban R. Co.*, 131 Tenn. 244, 174 S. W. 1118, Ann. Cas. 1916C, 1162, L. R. A. 1915E, 788.

43. *Hogan v. Nashville Interurban R. Co.*, 131 Tenn. 244, 174 S. W. 1118, Ann. Cas. 1916C, 1162, L. R. A. 1915E, 788.

[a] **Rule Stated.**—"It is alleged that the carrier's refusal to accept complainant for carriage is a persecution of complainant for having brought a suit for damages against the company and an attempted intimidation. This would, if established, evidence a palpable abuse of a public franchise that a court of equity should not hesitate to restrain by the exercise of its highest prerogative with promptitude." *Hogan v. Nashville Interurban R. Co.*, 131 Tenn. 244, 174 S. W. 1118, Ann. Cas. 1916C, 1162, L. R. A. 1915E, 788.

44. *Western Union Tel. Co. v. Ulrich*, 120 Mo. App. 177, 97 S. W. 191, repeated attempts to connect with a telephone system.

45. See the statutes.

[a] In *Massachusetts* a street railway may be compelled to resume abandoned service by a petition in the supreme judicial court. *Selectmen of Amesbury v. Citizens' Elect. St. R. Co.*, 199 Mass. 394, 85 N. E. 419, 19 L. R. A. (N. S.) 865.

46. *Billings Mut. Tel. Co. v. Rocky*

Mt. B. Tel. Co., 155 Fed. 207, physical connection of telephone systems.

47. *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, rehearing *denied*, 89 N. E. 319, contract for physical connection of telephone exchanges.

48. *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, rehearing *denied*, 89 N. E. 319.

[a] Where refusal to continue the contract is due to a mere dispute as to an indebtedness due under it, mandamus will be refused, as the remedy at law to recover the payment, if it is made under protest, is adequate. *State v. Cadwallader*, 172 Ind. 679, 87 N. E. 644, rehearing *denied*, 89 N. E. 319.

49. See *infra*, X, C, 1.

50. See *infra*, X, G.

51. *Monroe v. Detroit, M. & T. S. L. Ry.*, 187 Mich. 364, 153 N. W. 669, P. U. R. 1915E, 235, requiring operation of number of cars specified in franchise.

52. *Cal.*—*Southern Pacific Co. v. Spring Valley Water Co.*, 173 Cal. 291, 159 Pac. 865, L. R. A. 1917E, 680. *Mich.*—*Traverse City v. Citizens' Tel. Co.*, 195 Mich. 373, 161 N. W. 983, enjoining increase of telephone rates above franchise rates. *Neb.*—*Herpolsheimer Co. v. Lincoln Traction Co.*, 96 Neb. 154, 147 N. W. 206, 1114, enjoining discontinuance of street railway service under a franchise. *N. Y.* *Murray v. New York Tel. Co.*, 81 Misc. 636, 143 N. Y. Supp. 534; *Wackenhut*

orders of a commission, having jurisdiction over the matter regularly and properly made.⁵³

III. ACTIONS FOR DAMAGES FOR FAILURE TO PERFORM PUBLIC DUTIES.—An action for damages may be maintained for failure of a public utility to render services to the plaintiff as a member of the public,⁵⁴ even though a public service commission has been created and is given general control over public utilities.⁵⁵ A public

v. Empire Gas & Elec. Co., 166 N. Y. Supp. 29.

[a] **An individual consumer** may enforce a contract made by a city with a gas company in regard to rates to be charged. *Wackenhut v. Empire Gas & Elec. Co.*, 166 N. Y. Supp. 29.

[b] **Removal of a station** in violation of a covenant in a deed, will be enjoined. *San Antonio & A. P. Ry. Co. v. Mosel* (Tex. Civ. App.), 195 S. W. 621; *Mosel v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 177 S. W. 1048.

[c] **Pendency of proceedings before a public service commission**, to fix rates, will not prevent the issuance of the injunction. *Wackenhut v. Empire Gas & Elec. Co.*, 166 N. Y. Supp. 29.

53. Cal.—*Pinney & B. Co. v. Los Angeles Gas & Elec. Co.*, 168 Cal. 12, 141 Pac. 620, Ann. Cas. 1915D, 471, L. R. A. 1915C, 282. **Neb.**—*McCook Irr. & Water Power Co. v. Burtless*, 98 Neb. 141, 152 N. W. 334, L. R. A. (N. S.) 1915D, 1205, P. U. R. 1915C, 587, contracts of irrigation company. **Ore.**—*Woodburn v. Public Service Com.*, 82 Ore. 114, 161 Pac. 391, Ann. Cas. 1917E, 996, L. R. A. 1917C, 98, P. U. R. 1917B, 967.

[a] **The basis of the right of the commissions** to make orders affecting such contracts, is that the contracts are entered into subject to the exercise by the state of its police power. **Colo.** *Denver & S. P. R. Co. v. Englewood*, 62 Colo. 229, 161 Pac. 151, P. U. R. 1916E, 134. **Ill.**—*Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210. **Mass.** *Western Union Tel. Co. v. Foster*, 224 Mass. 365, 113 N. E. 192, P. U. R. 1916F, 176. **N. J.**—*Borough of North Wildwood v. Board of Public Utility Comrs.*, 88 N. J. L. 81, 95 Atl. 749, P. U. R. 1916B, 77. **Wash.**—*Raymond Lumb. Co. v. Raymond L. & P. Co.*, 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574, P. U. R. 1916F, 437. **W. Va.**—*Benwood v. Public Service Com.*, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261. **Wis.**

Duluth St. R. Co. v. Railroad Com., 161 Wis. 245, 152 N. W. 887, P. U. R. 1915D, 192.

[b] **A decree restraining the breach of a contract to maintain a station**, would not prevent obedience to a subsequent order of a commission, requiring its removal. *San Antonio & A. P. Ry. Co. v. Mosel* (Tex. Civ. App.), 195 S. W. 621.

[c] **A rate fixed by the terms of an ordinance granting a franchise** may be altered by a public service commission. *Woodburn v. Public Service Com.*, 82 Ore. 114, 161 Pac. 391, Ann. Cas. 1917E, 996, L. R. A. 1917C, 98, P. U. R. 1917B, 967; *Borough of Mt. Union v. Mt. Union Water Co.*, 256 Pa. 516, 100 Atl. 968, affirming 63 Pa. Super. 337.

[d] **In obedience to an order that discrimination in rates shall cease** the utility may proceed in one of two ways, either by bringing an action seeking cancellation of the contract or by serving notice that service would no longer be furnished at the contract price but under the tariff established by the commission. *Raymond Lumb. Co. v. Raymond L. & P. Co.*, 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574, P. U. R. 1916F, 437.

54. *Birmingham Ry. L. & P. Co. v. Pratt*, 187 Ala. 511, 65 So. 533, L. R. A. 1915A, 1208; *Anderson v. Seattle Lighting Co.*, 71 Wash. 155, 127 Pac. 1108.

[a] **The complaint must allege facts** showing that it was defendant's duty to furnish the service. *Birmingham Ry. L. & P. Co. v. Pratt*, 187 Ala. 511, 65 So. 533, L. R. A. 1915A, 1208, it should be alleged that plaintiff was ready, able, and willing to pay for the service.

[b] **Actions for failure to accept plaintiff as a passenger**, see *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052; *Kibler v. Southern R. R.*, 64 S. C. 242, 41 S. E. 977.

55. *Johnson v. Pacific Power & L. Co.*, 90 Wash. 492, 156 Pac. 530, P. U.

service corporation is also bound to treat with consideration and respect the members of the public dealing with it, and damages may be recovered for its failure to do so.⁵⁶

IV. ACTIONS FOR FINES OR PENALTIES.—Statutes frequently confer upon a person to whom service has been wrongfully refused by a public service company,⁵⁷ or as to whom service has been wrongfully discontinued,⁵⁸ the right to recover by action, a fine or penalty created by the statute.⁵⁹

V. REGULATION OF RATES.—**A. REMEDIES FOR DETERMINING REASONABLENESS OF RATES.**—Prescribing or regulating rates for service rendered by public utilities is a matter which falls within the domain of the legislative rather than the judicial branch of the government.⁶⁰ A suit in equity is the appropriate method to determine the reasonableness of a rate, whether fixed by statute or ordinance or by the commission.⁶¹ The unreasonableness of the rates may also be pleaded as a defense to an action to recover statutory penalties for a violation of the rates as fixed.⁶² An injunction will issue at the instance of the public to prevent the collection of rates in excess of those fixed by statute or ordinance.⁶³ The consumer of a commodity furnished by a public utility cannot attack in the courts, the reasonableness of rates so long as they do not exceed the maximum fixed by the legislative body which established them.⁶⁴ But where

R. 1916D, 548, action for cutting off water supply on refusal of customer to pay an alleged wrongful charge.

56. *Dunn v. Western Union Tel. Co.*, 2 Ga. App. 845, 59 S. E. 189.

57. *Fair v. Home Gas & Elec. Co.*, 15 Cal. App. 705, 115 Pac. 754.

58. *Hollander v. Westchester Lighting Co.*, 79 Misc. 646, 140 N. Y. Supp. 544.

[a] The complaint need not allege that the plaintiff's premises are within the distance entitling him to demand service as an original proposition. *Hollander v. Westchester Lighting Co.*, 79 Misc. 646, 140 N. Y. Supp. 544.

59. See generally the title "Penalties, Forfeitures and Fines."

Recovery of penalties for improper rates and charges, see *infra*, V, B; for wrongful discrimination, see *infra*, VI.

Recovery of penalty for disobedience of order of public service commission, see *infra*, X, J, 2, c, (V).

Forfeiture of franchises, see *supra*, I, C.

60. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371; *St. Paul Book & S. Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N. W. 262, Ann. Cas. 1916B, 286,

L. R. A. 1918A, 384, P. U. R. 1915D, 474.

Power of court in its judgment to fix a rate, see *infra*, X, L, 9.

61. See *infra*, X, L, 1.

62. *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567.

63. *Neb.—State v. Adams Express Co.*, 85 Neb. 25, 122 N. W. 691, 42 L. R. A. (N. S.) 396; *State v. Pacific Express Co.*, 80 Neb. 823, 115 N. W. 619, 18 L. R. A. (N. S.) 664. *N. H. State v. Boston & M. R. R.*, 75 N. H. 327, 74 Atl. 542. *Wis.—Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425.

[a] Quo warranto proceedings do not constitute an adequate remedy. *State v. Boston & M. R. R.*, 75 N. H. 327, 74 Atl. 542.

Proceedings to enforce orders of public service commissions, see *infra*, X, J, 2, c.

64. *St. Paul Book & S. Co. v. St. Paul Gaslight Co.*, 136 Minn. 71, 153 N. W. 262, Ann. Cas. 1916B, 286, L. R. A. 1918A, 384, P. U. R. 1915D, 474; *Rogers Locomotive & Mach. Works v. Erie Ry. Co.*, 20 N. J. Eq. 379.

[a] "The remedy of the public is by appeal to the rate fixing body or, if necessary, by a change in its mem-

rates have been fixed by a contract between the public utility and a public corporation, an injunction will issue to prevent a breach of the contract,⁶⁵ and the suit may be maintained by any inhabitant of the city or town.⁶⁶

B. RECOVERY OF OVERCHARGE.⁶⁷ — Charges collected by a public utility in excess of the amount to which it is legally entitled under a statute or ordinance may be recovered by action,⁶⁸ unless payment of the charge made was voluntary on the part of the plaintiff.⁶⁹ An action to recover an overcharge must be maintained by the consumer and not by the municipality in which he resides.⁷⁰ Under some statutes a penalty may be recovered for overcharges made by a public utility, in an action brought under and based upon the statute.⁷¹ State statutes creating new remedies for the recovery of overcharges are held, in some jurisdictions to be merely cumulative,⁷² in others, to supersede the common law right of action.⁷³ Under some statutes⁷⁴

bership." *St. Paul Book & S. Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N. W. 262, Ann. Cas. 1916B, 286, L. R. A. 1918A, 384, P. U. R. 1915D, 474.

65. *Farnsworth v. Boro Oil & Gas Co.*, 76 Misc. 37, 134 N. Y. Supp. 348. And see *supra*, II.

66. *Farnsworth v. Boro Oil & Gas Co.*, 76 Misc. 37, 134 N. Y. Supp. 348.

67. On interstate commerce, see the title "Interstate Commerce."

68. **U. S.**—*Southern Pac. Co. v. California Adj. Co.*, 237 Fed. 954, 150 C. C. A. 604, P. U. R. 1917C, 489, where a greater proportionate charge for a shorter than for a longer haul was made. **Ala.**—*Mobile & M. Ry. Co. v. Steiner, McGehee & Co.*, 61 Ala. 559. **Ia.**—*Paine v. Chicago, R. I. & P. R. Co.*, 45 Iowa 569. **Ky.**—*Louisville & N. R. Co. v. Walker*, 110 Ky. 961, 63 S. W. 20. **N. C.**—*Mt. Pleasant Mfg. Co. v. Cape Fear & Y. V. R. Co.*, 106 N. C. 207, 10 S. E. 1046.

[a] An application to a state commission for a reparation order is a condition precedent to a right of action only in "instances where the question whether the carrier had charged an excessive or discriminatory rate is dependent upon facts to be ascertained upon evidence taken by the commission." *Southern Pac. Co. v. California Adj. Co.*, 237 Fed. 954, 150 C. C. A. 604, P. U. R. 1917C, 489; *Southern Pac. Co. v. Superior Court*, 27 Cal. App. 240, 150 Pac. 397, 404, P. U. R. 1915F, 673.

69. *Monongahela Nav. Co. v. Wood*, 194 Pa. 47, 45 Atl. 73.

[a] As to when a payment will be considered voluntarily made, see *Illinois Glass Co. v. Chicago Tel. Co.*, 234 Ill. 535, 85 N. E. 200, 18 L. R. A. (N. S.) 124.

70. See *infra*, this note.

[a] The municipality is not the real party in interest nor is a contract rate fixed by ordinance a contract by the city for the benefit of the consumer entitling the city to maintain the action for his benefit. *Newport v. Municipal Light Co.*, 147 Ky. 776, 145 S. W. 1107.

71. *McGrew v. Missouri Pac. Ry. Co.*, 114 Mo. 210, 21 S. W. 463; *Norfolk & W. R. Co. v. Pendleton*, 86 Va. 1004, 11 S. E. 1062.

72. *La Floridienne, J. B. & Co. Societe Anonyme v. Atlantic Coast L. R. Co.*, 63 Fla. 208, 58 So. 185; *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa 187.

73. **U. S.**—*Winsor Coal Co. v. Chicago & A. R. Co.*, 52 Fed. 716. **N. C.**—*State v. Southern R. Co.*, 145 N. C. 495, 59 S. E. 570, 13 L. R. A. (N. S.) 966. **Wis.**—*Frank A. Graham Ice Co. v. Chicago, M. & St. P. R. Co.*, 153 Wis. 145, 140 N. W. 1097.

74. **Ky.**—*Illinois Central R. Co. v. Paducah Brewery Co.*, 157 Ky. 357, 163 S. W. 239. **Ohio.**—*McIlfresh v. Hocking Valley R. Co.* (Ohio P. U. C.), P. U. R. 1916D, 140. **Okla.**—*Pioneer Tel. & Tel. Co. v. State*, 40 Okla. 417, 138 Pac. 1033. **S. D.**—*Turner Creamery Co. v. Chicago, M. & S. P. R. Co.*, 36 S. D. 310, 154 N. W. 819, P. U. R. 1916A, 1083. **Wis.**—*Minneapolis, St. P. & S. M. R. Co. v. Railroad Com.*, 158 Wis. 102, 147 N. W. 366.

public service commissions have power to award reparation for excessive charges: under others, such power does not exist.⁷⁵

VI. DISCRIMINATION.—An action at common law may be maintained by the person injured to recover from the public utility guilty of making a discrimination in rates, the amount unlawfully allowed by it to a favored shipper or consumer, or to recover the damages arising from the discrimination.⁷⁶ But the remedy given by statutes prohibiting discrimination is held to be exclusive.⁷⁷

The complaint must allege facts showing that the discrimination was unfair and unjust,⁷⁸ and how it operated to the injury of plaintiff.⁷⁹ Ordinarily an injunction against discrimination in rates charged or service rendered will not issue,⁸⁰ as the remedy at law for the recovery of damages is considered to be an adequate one;⁸¹ though where a multiplicity of suits is threatened or the remedy at law is inadequate,⁸² a court of equity will take jurisdiction of the matter.⁸³ Man-

[a] **A trial by jury is not required.** *Pioneer Tel. & Tel. Co. v. State*, 40 Okla. 417, 138 Pac. 1033.

Application for reparation order as condition precedent to action, see *supra*, V, B, note 68.

75. *Texas & P. R. Co. v. Railroad Com.*, 137 La. 1059, 69 So. 837, P. U. R. 1916A, 334; *Santa Fe Gold & C. Min. Co. v. Atchison, T. & S. F. Ry. Co.*, 21 N. M. 496, 155 Pac. 1093.

76. *Louisville, E. & St. L. Con. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; *Sullivan v. Minneapolis & R. R. Co.*, 121 Minn. 488, 142 N. W. 3, 45 L. R. A. (N. S.) 612, *affirmed*, 127 Minn. 180, 149 N. W. 134.

77. **U. S.**—*Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. ed. 1446, Ann. Cas. 1915A, 315, amount allowed as a rebate cannot be recovered as such although the damages suffered may be recovered. **Kan.**—*Beadle v. Kansas City, Ft. S. & M. R. Co.*, 51 Kan. 248, 32 Pac. 910. **Wis.**—*Frank A. Graham Ice Co. v. Chicago, M. & St. P. R. Co.*, 153 Wis. 145, 140 N. W. 1097.

But see *Sullivan v. Minneapolis & R. R. Co.*, 121 Minn. 488, 142 N. W. 3, 45 L. R. A. (N. S.) 612, *affirmed*, 127 Minn. 180, 149 N. W. 134.

78. *Chas. H. Lilly Co. v. Northern Pac. R. Co.*, 64 Wash. 589, 117 Pac. 401.

79. *Cohn v. St. Louis, I. M. & S. Ry. Co.*, 181 Mo. 30, 79 S. W. 961.

80. *Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197; *St. Paul Book &*

S. Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262, Ann. Cas. 1916B, 286, L. R. A. 1918A, 384, P. U. R. 1915D, 474.

81. *Cooper v. De Vall*, 81 Ark. 314, 98 S. W. 976, 8 L. R. A. (N. S.) 1027.

82. **U. S.**—*Interstate Stockyards Co. v. Indianapolis U. Ry. Co.*, 99 Fed. 472. **N. H.**—*McDuffee v. Portland & R. R. Co.*, 52 N. H. 430, 13 Am. Rep. 72. **Ohio.**—*Scofield v. Lake Shore & M. S. Ry. Co.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846.

83. *Hart v. Atlanta Terminal Co.*, 128 Ga. 754, 58 S. E. 452 (enjoining exclusive rental of space in baggage room to one person); *Scofield v. Lake Shore & M. S. Ry. Co.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846.

[a] **Complaint.**—(1) The facts showing the alleged discrimination must be pleaded and a general allegation of discrimination is insufficient. *St. Paul Book & S. Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N. W. 262, Ann. Cas. 1916B, 286, L. R. A. 1918A, 384, P. U. R. 1915D, 474. (2) It should be alleged that the complainant has paid a stated amount as demanded by the utility and that the same service was rendered to others at a less rate. *St. Paul Book & S. Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N. W. 262, Ann. Cas. 1916B, 286, L. R. A. 1918A, 384, P. U. R. 1915D, 474.

[b] **A temporary injunction** (1) may be granted pending the determination of the suit (*Postal Cable Tel. Co. v. Cumberland Tel. & Tel. Co.*, 177 Fed. 726) and (2) upon such terms as may seem desirable. *Postal Cable Tel.*

damus will lie to compel a public utility to furnish to a member of the public, service wrongfully withheld from him but furnished to others.⁸⁴ Where penalties are imposed for discrimination, they must be recovered in an appropriate action based on the statute.⁸⁵ Whether a discrimination exists, or whether, if it exists, it is unreasonable, is ordinarily a question of fact,⁸⁶ although, when there is no dispute in regard to the facts, the question becomes one of law for the judge.⁸⁷

VII. ENJOINING UNLAWFUL OPERATION.⁸⁸—The unauthorized operation of a public utility, in violation of an express law may be enjoined,⁸⁹ at the suit of any person suffering a special injury.⁹⁰

VIII. ENJOINING ENFORCEMENT OF CRIMINAL STATUTES AND ORDINANCES.⁹¹—An injunction will not ordinarily be granted to stay or prevent criminal proceedings for violation of a statute or ordinance affecting a public utility;⁹² but in order to

Co. v. Cumberland Tel. & Tel. Co., 177 Fed. 726.

[c] Where a municipality in the operation of a public utility unjustly discriminates between citizens in the matter of rates and service, an injunction will lie. *Mobile v. Bienville Water Supp. Co.*, 130 Ala. 379, 30 So. 445; *Butler v. Karb* (Ohio St.), 117 N. E. 953.

[d] A water company may sue to restrain a city from unjust discrimination against its customers as to rates for sewer service. *Mobile v. Bienville Water Supply Co.*, 130 Ala. 379, 30 So. 445.

84. *State ex rel. Ellis v. Atlantic Coast Line R. Co.*, 51 Fla. 578, 40 So. 875, 52 Fla. 646, 41 So. 705, 12 L. R. A. (N. S.) 506; *State v. Ogden Rapid Transit Co.*, 38 Utah 242, 112 Pac. 120.

85. *Ark.*—*Alexander v. Capps*, 100 Ark. 488, 140 S. W. 722; *Yancey v. Batesville Telephone Co.*, 81 Ark. 486, 99 S. W. 679, containing form of complaint for discrimination in telephone service. *Ind.*—*Adams Express Co. v. State*, 161 Ind. 328, 67 N. E. 1033. *Ia.*—*Blair v. Sioux City & P. Ry. Co.*, 109 Iowa 369, 80 N. W. 673. *Mo.* *Reynolds v. Chicago & A. R. Co.*, 85 Mo. 90.

See generally the title "Penalties, Forfeitures and Fines."

[a] The action must be in the courts of the state in which the statute was enacted. *Langdon v. New York, etc. R. Co.*, 58 Hun 122, 11 N. Y. Supp. 514.

86. *Ia.*—*Hopper v. Chicago, M. & St. P. Ry. Co.*, 91 Iowa 639, 60 N. W.

487. *N. Y.*—*New York Tel. Co. v. Siegel-Cooper Co.*, 202 N. Y. 502, 96 N. E. 109, 36 L. R. A. (N. S.) 560. *Vt.*—*State v. Central Vermont R. Co.*, 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

87. *McGrew v. Missouri Pac. R. Co.*, 230 Mo. 496, 132 S. W. 1076.

88. Enjoining discrimination, see *supra*, VI.

89. See *infra*, this note.

[a] A public nuisance is created by the unauthorized use of streets and highways by jitney service. *Memphis St. R. Co. v. Rapid Transit Co.*, 133 Tenn. 99, 179 S. W. 635, Ann. Cas. 1917C 1045, P. U. R. 1916A, 834.

90. See *infra*, this note.

[a] A street railway may enjoin the operation of a jitney service. *Memphis St. R. Co. v. Rapid Transit Co.*, 133 Tenn. 99, 179 S. W. 635, Ann. Cas. 1917C, 1045, P. U. R. 1916A, 834.

Right of holder of franchise to protection in its use and enjoyment, see *supra*, I, B.

91. Enjoining orders of public service commission, see *infra*, X, L.

92. *Norfolk Southern R. Co. v. Morehead City*, 167 N. C. 118, 83 S. E. 259; *Auto Transit Co. v. Ft. Worth* (Tex. Civ. App.), 182 S. W. 685, P. U. R. 1916C, 565.

[a] A federal court (1) cannot enjoin a prosecution for violation of a state statute (*State v. Southern R. Co.*, 145 N. C. 495, 59 S. E. 570, 13 L. R. A. [N. S.] 966), unless (2) it has already acquired jurisdiction of the subject matter through an action pending before it. *Ex parte Young*, 209 U. S.

prevent irreparable injury,⁹³ or a multiplicity of suits,⁹⁴ an injunction will issue to prevent the enforcement of a statute or ordinance where its validity is involved.⁹⁵

IX. ACQUIREMENT AND OPERATION OF PUBLIC UTILITIES BY MUNICIPALITIES.—A municipality, having power to acquire and operate public utilities for the benefit of its citizens, may acquire the property and facilities of existing utilities by the exercise of the power of eminent domain.⁹⁶ Specific performance of a contract to purchase and sell a public utility will be enforced by the courts under the general principles applicable to the specific performance of contracts.⁹⁷

X. PUBLIC SERVICE COMMISSIONS.—A. NATURE AND FUNCTIONS.—Public service commissions are legal, administrative bodies, having subordinate legislative powers and clothed with some quasi-judicial functions;⁹⁸ they are not, properly speaking, courts.⁹⁹

123, 161, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932.

93. *Minneapolis General Elec. Co. v. Minneapolis*, 194 Fed. 215, ordinance requiring installation of electric service upon demand.

94. **U. S.**—*Jewel Tea Co. v. Lee's Summit*, 189 Fed. 280; *Mills v. Chicago*, 127 Fed. 731. **Ind.**—*Rushville v. Rushville Nat. Gas Co.*, 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321. **Tex.** *Lindsley v. Dallas Consol. St. Ry. Co.* (Tex. Civ. App.), 200 S. W. 207.

95. *Ex parte Young*, 209 U. S. 123, 161, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932; *Atchison, T. & S. F. R. Co. v. Shawnee*, 183 Fed. 85, 105 C. C. A. 377; *Seaboard Air Line Ry. Co. v. Raleigh*, 219 Fed. 573; *Kansas City Gas Co. v. Kansas*, 198 Fed. 500; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, *affirmed*, 177 U. S. 558, 20 Sup. Ct. 736, 44 L. ed. 886; *Pennsylvania R. Co. v. Ewing*, 241 Pa. 581, 88 Atl. 775, *Ann. Cas.* 1915B, 157, 49 L. R. A. (N. S.) 977.

[a] **Rule Stated.**—"An injunction will be granted to avoid a multiplicity of suits, to avoid irreparable injury, and [on the ground] that there is no adequate remedy at law where repeated prosecutions will seriously impair or destroy property rights." *Auto Transit Co. v. Ft. Worth* (Tex. Civ. App.), 182 S. W. 685, P. U. R. 1916C, 565, enjoining enforcement of a jitney ordinance.

96. **U. S.**—*Long Island Water-Supply Co. v. Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. ed. 1165. **N. J.** *Brady v. Atlantic City*, 53 N. J. Eq.

440, 32 Atl. 271. **N. Y.**—*In re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

Proceedings in eminent domain, see 8 STANDARD PROC. 256.

Determination of value by public service commission, see *infra*, X, C, 3.

97. See *Bremerton v. Bremerton W. & P. Co.*, 88 Wash. 362, 153 Pac. 372, P. U. R. 1916B, 120.

[a] **A decree awarding specific performance cannot order a municipality to hold a bond election to raise the purchase price, but the court will take judicial notice that that method is ordinarily adopted and will direct a tender of payment by the city at such a time as will enable the city to hold a bond election prior thereto.** *Bremerton v. Bremerton W. & P. Co.*, 88 Wash. 362, 153 Pac. 372, P. U. R. 1916B, 120.

98. **Ala.**—*Railroad Commission v. Alabama Northern R. Co.*, 182 Ala. 357, 62 So. 749. **N. Y.**—*People ex rel. New York Tel. Co. v. Public Service Com.*, 157 App. Div. 156, 141 N. Y. Supp. 1018. **Vt.**—*Bessette v. Goddard*, 87 Vt. 77, 88 Atl. 1.

[a] **Quo warranto cannot be maintained to determine the right of a member of the commission to act as its chairman.** *State ex rel. Boyle v. Hall*, 53 Mont. 595, 165 Pac. 757, P. U. R. 1917F, 337, the chairmanship is not a public office.

99. **U. S.**—*Mississippi R. Com. v. Illinois Central R. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. ed. 209; *Central Vermont Ry. Co. v. Redmond*, 189 Fed. 683. **Ill.**—*People v. Peoria & P. U. R. Co.*, 273 Ill. 440, 113 N. E. 68, P. U.

B. ATTACKING CONSTITUTIONALITY OF STATUTES. — Injunctive relief against the enforcement of a statute creating a public service commission or conferring unwarranted powers upon it, and claimed to be unconstitutional, may be obtained upon a showing of irreparable injury, multiplicity of suits, or the inadequacy of the remedy at law.¹ The constitutionality of a statute cannot be determined by quo warranto proceedings brought against the members of a commission.²

C. JURISDICTION AND POWERS. — 1. In General. — Public service commissions are statutory bodies and have only such powers as are expressly conferred upon them by the statute creating them,³ or are necessary and convenient, to the exercise of the specific power conferred,⁴ though statutes conferring jurisdiction will be fairly and

R. 1916E, 795. Mo.—*Macon v. Atkinson*, 266 Mo. 484, 181 S. W. 396.

[a] In California the state railroad commission is both a court and an administrative tribunal. *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652.

[b] In North Carolina the railroad commission has some of the attributes of a court. *State ex rel. Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554, 61 Am. St. Rep. 672.

1. *Merchants' Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565.

[a] The mere fact that a violation of the statute would subject a person to various criminal prosecutions is insufficient to warrant relief in equity. *Merchants' Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565.

[b] The facts showing the nature of the threatened irreparable injury should be alleged. *Merchants' Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565.

[c] A complaint based upon a multiplicity of actions should state whether civil or criminal proceedings are threatened. *Merchants' Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565.

Enjoining enforcement of statute generally, see *supra*, VIII.

2. *State Railroad Com. v. People*, 44 Colo. 345, 98 Pac. 7, 22 L. R. A. (N. S.) 810.

3. Fla.—*Atlantic Coast Line R. Co. v. State*, 74 So. 595; *State ex rel. Burr v. Jacksonville Terminal Co.*, 71 Fla. 295, 71 So. 474. Ill.—*State Public Utilities Com. v. Atchison, T. & S. F. R. Co.*, 278 Ill. 58, 115 N. E. 904; *State Public Utilities Com. v. Illinois Cent. R. Co.*, 274 Ill. 36, 113 N. E. 162. Ind.—*Wabash R. Co. v. Railroad*,

Com., 176 Ind. 428, 95 N. E. 673. Md.—*Pennsylvania R. Co. v. Towers*, 126 Md. 59, 94 Atl. 330, Ann. Cas. 1917B, 1144, P. U. R. 1915D, 398; *Northern Central R. Co. v. Public Service Com.*, 124 Md. 141, 91 Atl. 768, Ann. Cas. 1916D, 1030. Mich.—*Grand Rapids & I. R. Co. v. Michigan R. Co.*, 183 Mich. 383, 150 N. W. 154. Miss.—*Gulf & S. I. R. Co. v. Railroad Com.*, 94 Miss. 124, 49 So. 118. Mo.—*State ex rel. St. Joseph, etc. Co. v. Public Service Com.*, 272 Mo. 645, 199 S. W. 999. N. Y.—*People ex rel. Erie R. Co. v. Public Service Com.*, 176 App. Div. 28, 162 N. Y. Supp. 520. Ohio.—*Cincinnati v. Public Utilities Com.*, 117 N. E. 381. Ore.—*State v. Corvallis & E. R. Co.*, 59 Ore. 450, 117 Pac. 980; *Railroad Comrs. v. Oregon Ry. & Nav. Co.*, 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195. Tex.—*State v. Sugarland Ry. Co.* (Tex. Civ. App.), 163 S. W. 1047; *Gulf, C. & S. F. R. Co. v. State*, 56 Tex. Civ. App. 353, 120 S. W. 1028.

[a] A public service commission "must be classed with other bodies exercising special and limited statutory powers not according to the course of the common law, as to which nothing will be presumed in favor of their jurisdiction, but the facts necessary to confer it must affirmatively appear, and the exercise of jurisdiction does not imply a previous ascertainment of those facts." *Bessette v. Goddard*, 87 Vt. 77, 88 Atl. 1.

4. U. S.—*Siler v. Illinois Central R. Co.*, 213 U. S. 199, 29 Sup. Ct. 458, 53 L. ed. 760. Cal.—*Palermo Land & W. Co. v. Railroad Com.*, 173 Cal. 380, 160 Pac. 228, P. U. R. 1917A, 447. Fla.—*State ex rel. R. R. Comrs. v. Atlantic Coast Line R. Co.*, 60 Fla. 465, 54 So. 394; *State v. Atlantic Coast Line*

reasonably construed.⁵ Under earlier statutes public service commissions were sometimes clothed with merely advisory powers.⁶

It is not within the scope of this work to deal in detail with the jurisdiction and extent of the powers of the various public service commissions, but in the notes will be found some authorities bearing upon these matters with reference to such subjects as railroads,⁷

R. Co., 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639. **Ga.**—Zuber v. Southern R. Co., 9 Ga. App. 539, 71 S. E. 937. **Kan.**—State v. Kansas Postal Tel. Cable Co., 96 Kan. 298, 150 Pac. 544. **N. Y.**—People ex rel. New York Rys. Co. v. Public Service Com. (App. Div.), 168 N. Y. Supp. 760. **Okla.**—Atchison, T. & S. F. Ry. Co. v. Corporation Com., 170 Pac. 1156. **S. C.** Jones v. Southern Ry., 76 S. C. 67, 56 S. E. 666. **W. Va.**—State ex rel. Public Service Com. v. Baltimore & O. R. Co., 76 W. Va. 399, 85 S. E. 714, P. U. R. 1915D, 558.

5. Siler v. Louisville & N. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. ed. 753; Root v. New Britain Gas Light Co., 91 Conn. 134, 99 Atl. 559, P. U. R. 1917C, 102.

[a] The use of the singular number in the phraseology of a statute will not limit the jurisdiction of a commission to cases of individual discrimination. Root v. New Britain Gas Light Co., 91 Conn. 134, 99 Atl. 559, P. U. R. 1917C, 102.

6. Nashville, C. & St. L. Ry. Co. v. State, 137 Ala. 439, 34 So. 401.

7. See also the title "Railroads."

[a] As to Location of Track.—Chicago & N. W. Ry. Co. v. Daugherty (S. D.), 163 N. W. 715. And see People ex rel. New York, etc. R. Co. v. Public Service Com., 171 App. Div. 366, 156 N. Y. Supp. 1023, P. U. R. 1916C, 219.

[b] A re-location of a part of a railroad line may be ordered. In re Public Service Com., 177 App. Div. 444, 164 N. Y. Supp. 310. And see Chicago, B. & Q. R. Co. v. Cavanaugh, 278 Ill. 609, 116 N. E. 128.

[c] Jurisdiction to compel construction of new lines does not exist. Atchison, T. & S. F. R. Co. v. Railroad Com., 173 Cal. 577, 160 Pac. 828, P. U. R. 1917B, 336.

[d] Jurisdiction to compel continued operation of branch lines, see: Colorado & S. R. Co. v. State Railroad Com., 54 Colo. 64, 129 Pac. 506.

[e] Jurisdiction to order elimina-

tion of grade crossings, see: Ill.—Chicago, B. & Q. R. Co. v. Cavanaugh, 278 Ill. 609, 116 N. E. 128; Cleveland C. & St. L. R. Co. v. State Public Utilities Com., 273 Ill. 210, 112 N. E. 689; Alton & S. R. Co. v. Vandalia R. Co., 268 Ill. 68, 108 N. E. 800, P. U. R. 1915D, 941. **Mass.**—Davis v. County Comrs., 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750. **Mo.**—State ex rel. Mo., etc. R. Co. v. Public Service Com., 271 Mo. 270, 197 S. W. 56. **Vt.** Sayers v. Montpelier & W. R. R., 90 Vt. 201, 97 Atl. 660, Ann. Cas. 1918B, 1050, P. U. R. 1917E, 1022; Bessette v. Goddard, 87 Vt. 77, 83 Atl. 1.

[f] Jurisdiction over connecting railroad crossings, see: Ind.—Pittsburgh, C. & St. L. Ry. Co. v. Hunt, 171 Ind. 189, 86 N. E. 328. **Miss.** Mississippi R. R. Com. v. Yazoo & M. V. R. Co., 100 Miss. 595, 56 So. 668. **S. C.**—Atlantic Coast Line R. R. v. Railroad Com., 89 S. C. 472, 72 S. E. 18. **Va.**—Louisville & N. R. Co. v. Interstate R. Co., 107 Va. 225, 57 S. E. 654, jurisdiction is not limited to allowing a single crossing. **Wash.**—State ex rel. Ore. R. & Nav. Co. v. Railroad Com., 52 Wash. 17, 100 Pac. 179. **Wis.** State v. Railroad Com., 140 Wis. 145, 121 N. W. 919.

And see the title "Railroads."

[g] Jurisdiction to order installation of safety devices at intersecting railroad crossings, see: State v. Public Utilities Com. v. Illinois Cent. R. Co., 274 Ill. 36, 113 N. E. 162.

[h] Jurisdiction to order interchange of traffic, see: **U. S.**—Michigan C. R. Co. v. Michigan R. Co., 236 U. S. 615, 35 Sup. Ct. 422, 59 L. ed. 750, P. U. R. 1915C, 263; Pennsylvania Co. v. United States, 236 U. S. 351, 35 Sup. Ct. 370, 59 L. ed. 616, P. U. R. 1915B, 261; Seaboard Air Line Ry. v. Railroad Com., 206 Fed. 181. **Ind.**—Vandalia R. Co. v. Public Service Com., 182 Ind. 297, 106 N. E. 371. **Va.**—Louisville & N. R. Co. v. Interstate R. Co., 107 Va. 225, 57 S. E. 654.

street railroads,⁸ telephone and telegraph companies,⁹ gas companies,¹⁰ light and power companies,¹¹ and waterworks and irrigation companies.¹² The grant of power to fix rates, after a hearing, vested in a commission, is not invalid as giving to an administrative body judicial

[i] **Jurisdiction to order construction of fences**, see: *Colorado State Board of Stock Inspection v. Atchison, T. & S. F. Ry. Co.* (Colo. P. U. C.), P. U. R. 1916D, 751. And see the title "Railroads."

[j] **Jurisdiction to approve of railroad leases**, see: *West Jersey & S. R. Co. v. Board of Public Utility Comrs.*, 87 N. J. L. 170, 94 Atl. 57, P. U. R. 1915D, 847. See also *Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 539, 94 Atl. 193, P. U. R. 1915C, 1064.

Jurisdiction to award reparation for excessive charges, see *supra*, V, B.

8. **Conn.**—Appeal of Connecticut Co., 89 Conn. 528, 94 Atl. 992, P. U. R. 1915E, 490. **Ill.**—State Public Utilities Com. v. Chicago & W. T. R. Co., 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50, P. U. R. 1917B, 1046. **Neb.** *Herpolsheimer Co. v. Lincoln Traction Co.*, 96 Neb. 154, 147 N. W. 206, 1114. **N. Y.**—*People ex rel. Coney Island, etc. Co. v. Public Service Com.*, 157 App. Div. 698, 142 N. Y. Supp. 942. **Ohio.** *Cincinnati v. Public Utilities Com.*, 91 Ohio St. 331, 110 N. E. 461, Ann. Cas. 1916E, 1081, P. U. R. 1916A, 1057. **Vt.**—*Western Union Tel. Co. v. Burlington Traction Co.*, 90 Vt. 506, 99 Atl. 4, Ann. Cas. 1918B, 841, P. U. R. 1917C, 320.

See the title "Street Railroads."

[a] **The removal of a high tension line from proximity to the line of a telegraph company may be ordered.** *Western Union Tel. Co. v. Burlington Traction Co.*, 90 Vt. 506, 99 Atl. 4, Ann. Cas. 1918B, 841, P. U. R. 1917C, 320.

[b] **The apportionment (1) between a city and a street railway, of the cost of repairs already made is not within the jurisdiction of a public service commission.** *Augusta v. Lewiston, A. & W. St. Ry.*, 114 Me. 24, 95 Atl. 267, P. U. R. 1915F, 260. (2) Although the apportionment of the cost of proposed improvements is frequently within its jurisdiction. *Appeal of Norwalk*, 89 Conn. 537, 94 Atl. 988, P. U. R. 1915E, 294.

[c] **Jurisdiction to order extensions**, see: *Towers v. United Rys. & E. Co.*,

126 Md. 478, 95 Atl. 170, P. U. R. 1915F, 474.

9. **Idaho.**—*Coeur d'Alene v. Public Utilities Com.*, 29 Idaho 508, 160 Pac. 751, P. U. R. 1917B, 348. **Ill.**—*State Public Utilities Com. v. Okaw Valley Mut. Tel. Assn.*, 282 Ill. 336, 118 N. E. 760; *State Public Utilities Com. v. Bethany Mut. Tel. Assn.*, 270 Ill. 183, 110 N. E. 334, Ann. Cas. 1917B, 495, mutual telephone company. **Miss.** *Cumberland Tel. & Tel. Co. v. State*, 99 Miss. 1, 54 So. 446. **Okla.**—*Twin Valley Tel. Co. v. Mitchell*, 27 Okla. 388, 113 Pac. 914, Ann. Cas. 1912C, 582, 38 L. R. A. (N. S.) 235 (mutual, rural telephone company); *Hine v. Wadlington*, 26 Okla. 389, 109 Pac. 301, company owned entirely by an individual.

[a] **Power to order physical connection of two separate systems**, see: **U. S.**—*Pacific Tel. & Tel. Co. v. Wright-Dickinson Hotel Co.*, 214 Fed. 666. **Cal.** *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652, denying the power. **Mich.**—*Michigan State Tel. Co. v. Michigan Railroad Com.*, 193 Mich. 515, 161 N. W. 240, P. U. R. 1917C, 355, upholding the power. **Neb.**—*Hoopier Tel. Co. v. Nebraska Tel. Co.*, 96 Neb. 245, 147 N. W. 674. **S. D.**—*Milbank v. Dakota Central Tel. Co.*, 37 S. D. 504, 159 N. W. 99, P. U. R. 1916F, 562, any person interested may institute the proceedings. **Wash.**—*State ex rel. Public Serv. Com. v. Skagit River Tel. & Tel. Co.*, 89 Wash. 625, 155 Pac. 144. **Wis.**—*Wisconsin Tel. Co. v. Railroad Com.*, 162 Wis. 383, 156 N. W. 614, P. U. R. 1916D, 212.

10. *Guthrie Gas, L. F. & Imp. Co. v. Board of Education (Okla.)*, 166 Pac. 128.

11. *State ex rel. Public Serv. Com. v. Spokane & I. E. R. Co.*, 89 Wash. 599, 154 Pac. 1110, P. U. R. 1916D, 469.

12. *McCook Irr. & Water Power Co. v. Burtless*, 98 Neb. 141, 152 N. W. 334, L. R. A. (N. S.) 1915D, 1205, P. U. R. 1915C, 587.

powers and functions.¹³ The power to prescribe reasonable rules and regulations governing the conduct of public utilities is incidental to the exercise of administrative functions,¹⁴ but if a commission is neither by constitution nor statute, given authority to exercise judicial functions as an incident to the exercise of its primary administrative functions, it cannot, by the adoption of rules requiring and regulating hearings before it, clothe itself with judicial functions.¹⁵ The fact that no power is given a commission to enforce its orders¹⁶ does not affect its jurisdiction to issue orders as granted by statute.¹⁷ Jurisdiction of a commission is not necessarily exhausted by a single exercise of its power over the subject matter.¹⁸

Jurisdiction will, in some states, be exercised over public utilities in the hands of a receiver,¹⁹ in other states a contrary practice prevails.²⁰

Under some statutes, public service commissions are given power to review the orders of municipal bodies affecting public utilities.²¹ Duties imposed upon public utilities by statute,²² or municipal ordinances,²³ may be enforced by commissions. If a court, having jurisdiction of the subject matter, has rendered a judgment the adjudication is final in so far as the commission is concerned and it cannot assume jurisdiction over the matters involved.²⁴ And if an order has been made with the consent of the public utility affected, it will

13. *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. ed. 229, affirming *Louisville & N. R. Co. v. Siler*, 186 Fed. 176; *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.

14. *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639.

Power to make rules as to procedure before commission, see *infra*, X, I, 1.

15. *State v. Public Service Com.*, 94 Wash. 274, 162 Pac. 523, P. U. R. 1917C, 631.

16. See *infra*, X, J, 2, c, (I).

17. *Turner Creamery Co. v. Chicago, M. & St. P. R. Co.*, 36 S. D. 310, 154 N. W. 819, P. U. R. 1916A, 1083.

18. *Pennsylvania R. Co. v. Towers*, 126 Md. 59, 94 Atl. 330, Ann. Cas. 1917B, 1144, P. U. R. 1915D, 398; *Louisville & N. R. Co. v. Interstate R. Co.*, 107 Va. 225, 57 S. E. 654.

Power of the commission to modify or alter its orders, see *infra*, X, J, 2, b.

19. *Ala.*—*Railroad Com. v. Alabama G. S. R. Co.*, 185 Ala. 354, 64 So. 13, L. R. A. 1915D, 98. *Colo.* *Colorado State Board of Stock Inspection v. Atchison, T. & S. F. Ry. Co.* (Colo. P. U. C.), P. U. R. 1916D, 751.

Kan.—*State v. Flannelly*, 96 Kan. 372, 152 Pac. 22. *Mo.*—*State ex rel. Mo., etc. R. Co. v. Public Service Com.*, 271 Mo. 270, 197 S. W. 56; *Webb City Com. Club v. St. Louis & S. F. R. Co.*, 1 Mo. P. S. C. R. 334, P. U. R. 1917E, 367. *Okla.*—*Jordan v. St. Louis & S. F. R. Co.* (Okla. C. C. R.), P. U. R. 1917A, 182.

[a] Previous leave of court to maintain the proceeding need not be obtained. *Colorado State Board of Stock Inspection v. Atchison, T. & S. F. Ry. Co.* (Colo. P. U. C.), P. U. R. 1916D, 751.

20. *Village of Girard v. Girard Water Co.* (Ohio P. U. C.), P. U. R. 1917E, 366.

21. *Cincinnati v. Public Utilities Com.*, 91 Ohio St. 331, 110 N. E. 461, Ann. Cas. 1916E, 1081, P. U. R. 1916A, 1057. And see *Troy v. United Traction Co.*, 202 N. Y. 333, 95 N. E. 759.

22. *State Public Utilities Com. v. Toledo, St. L. & W. R. Co.*, 267 Ill. 93, 107 N. E. 774, P. U. R. 1915B, 879.

23. *Milbank v. Dakota Central Tel. Co.* (S. D. Bd. R. C. R.), P. U. R. 1917C, 808.

24. *People v. Peoria & P. U. R. Co.*, 273 Ill. 440, 113 N. E. 68, P. U. R. 1916E, 795.

be estopped from thereafter asserting a want of power in the commission to make the order.²⁵

2. General Jurisdictional Limitations.—Proceedings cannot be maintained for the sole purpose of determining whether a corporation is a public utility and as such subject to the jurisdiction of the commission,²⁶ nor will the commission attempt to pass upon the constitutionality or validity of the statute under which it operates.²⁷ Injunctions cannot be issued.²⁸ The construction and enforcement of contracts is not one of the commission's functions,²⁹ nor can disputed property rights be investigated and settled.³⁰ No power of control over public utilities in the exercise of their private rights as owners of property exists.³¹

3. Eminent Domain Proceedings.—The power of a public service commission in matters involving the acquirement of property by condemnation varies considerably under the different statutes.³² Thus in some states it has power to determine the public necessity and to institute the necessary proceedings in court,³³ and in others, also the power to ascertain and determine the value of the property of a public utility which is sought to be taken.³⁴ But in other states, the

25. *Public Service R. Co. v. Board of Public Utility Comrs.*, 87 N. J. L. 250, 93 Atl. 585.

26. *Holabird v. Railroad Com.*, 171 Cal. 691, 154 Pac. 831, P. U. R. 1916C, 458.

27. *In re Marin Municipal Water Dist.* (Cal. R. C.), P. U. R. 1915C, 433; *In re Marysville L. & W. Co.* (Ohio P. U. C.), P. U. R. 1915D, 374.

28. *Gilliam Tel. Co. v. Alton-Slater W. Co.* (Mo. P. S. C.), P. U. R. 1917A, 351.

[a] Such control is retained by a commission over the subject matter of its orders that it can by cancelling or modifying them prevent action inimical to public interests, although it cannot issue an injunction. *Gilliam Tel. Co. v. Alton-Slater Water Co.* (Mo. P. S. C.), P. U. R. 1917A, 351.

29. *Atchison, T. & S. F. R. Co. v. Railroad Com.*, 173 Cal. 577, 160 Pac. 828, P. U. R. 1917B, 336; *Hanlon v. Eshleman*, 169 Cal. 200, 146 Pac. 656, P. U. R. 1915B, 842; *People v. Peoria & P. U. R. Co.*, 273 Ill. 440, 113 N. E. 68, P. U. R. 1916E, 795.

[a] The respective rights of a shipper and a railroad in and over a private track, under a contract, is a judicial question for the courts to determine. *People v. Peoria & P. U. R. Co.*, 273 Ill. 440, 113 N. E. 68, P. U. R. 1916E, 795.

[b] Whether a contract is in restraint of trade and void cannot be de-

termined. *Athens County Home Tel. Co. v. Jackson County Home Tel. Co.* (Ohio P. U. C.), P. U. R. 1915A, 312.

[c] Specific performance of contracts (1) is a matter not within the power of a public service commission. *Public Service Elec. Co. v. Board of Public Utility Comrs.*, 88 N. J. L. 603, 96 Atl. 1013, P. U. R. 1916D, 107. (2) But a utility may be ordered to take such steps as may be necessary to enforce a contract of a third person with it, where the rendition of adequate service depends upon the performance of the contract. *Municipal Council v. Manila R. Co.* (Phil. Isl. Bd. P. U. C.), P. U. R. 1916C, 433.

[d] A contract created by ordinance cannot be construed or enforced by a commission. *Caruthersville v. Southwestern Tel. & Tel. Co.* (Mo. P. S. C.), P. U. R. 1915F, 1.

30. *McCook Irr. & Water Power Co. v. Burtless*, 98 Neb. 141, 152 N. W. 334, L. R. A. (N. S.) 1915D, 1205, P. U. R. 1915C, 587; *Union Lime Co. v. Railroad Com.*, 144 Wis. 523, 129 N. W. 605, title to land cannot be tried.

31. *Danville & W. R. Co. v. Lybrook*, 111 Va. 623, 69 S. E. 1066, Ann. Cas. 1912A, 175.

32. See the statutes.

33. *In re Public Service Com.*, 217 N. Y. 61, 111 N. E. 658, P. U. R. 1916C, 547.

34. See *In re Marin Municipal*

commission either has no power of this character or power of a very limited nature.³⁵

4. **Determination of Jurisdiction.**—A commission has power to determine the existence or non-existence of facts essential to the exercise of its jurisdiction.³⁶ A court, in passing upon the commission's jurisdiction, will consider whether the commission has authority to make any order in the premises rather than the evidentiary and collateral matters set forth in the complaint.³⁷ Whether it has exceeded its jurisdiction will be determined by a consideration of the order actually made rather than the relief prayed for.³⁸

A writ of prohibition will issue to prevent a commission with proceeding with a matter beyond its jurisdiction,³⁹ but this remedy cannot be employed to prevent or correct an erroneous exercise of power.⁴⁰

D. NOTICE OF HEARINGS.—The constitutional provision of due process of law, requiring notice of hearings, applies to proceedings before an administrative board or commission.⁴¹ The requirements of the particular statute with reference to the giving of notice of a hear-

Water District (Cal. R. C.), P. U. R. 1915C, 433; Oshkosh Waterworks Co. v. Railroad Com., 161 Wis. 122, 152 N. W. 859, P. U. R. 1915D, 336.

[a] In California, where the commission is clothed with true judicial functions, it has broad powers over proceedings of this character. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652; Marin Municipal Water Dist. v. Marin Water & Power Co., 55 Cal. Dec. 793.

35. Louisville & N. R. Co. v. Interstate R. Co., 107 Va. 225, 57 S. E. 654.

36. Palermo L. & W. Co. v. Railroad Com., 173 Cal. 380, 160 Pac. 228.

[a] The existence of rights in property may be determined by a commission for the purpose of exercise of its jurisdiction to regulate a public utility by fixing its rates. Limoneira Co. v. Railroad Com., 174 Cal. 232, 162 Pac. 1033.

37. Chicago & N. W. Ry. Co. v. Dougherty (S. D.), 163 N. W. 715.

[a] "A broad distinction exists between the question of the sufficiency of the facts pleaded or alleged in the petition filed with the board to authorize the relief prayed for and the question of the jurisdiction of the board to grant the same relief upon another or different state of facts." Chicago & N. W. Ry. Co. v. Dougherty, 39 S. D. 147, 163 N. W. 715.

[b] The fact that any order made by the commission could not be en-

forced by the courts is not decisive of the question of jurisdiction. Chicago & N. W. Ry. Co. v. Dougherty, 39 S. D. 147, 163 N. W. 715.

38. Atchison, T. & S. F. R. Co. v. State, 47 Okla. 645, 150 Pac. 108, P. U. R. 1915E, 265; St. Louis & S. F. R. Co. v. Williams, 25 Okla. 662, 107 Pac. 428.

[a] If an order relates only to intrastate commerce the fact that the petition may have asked for relief affecting interstate commerce is immaterial. St. Louis & S. F. R. Co. v. Williams, 25 Okla. 662, 107 Pac. 428.

39. State v. Stutsman, 24 N. D. 68, 139 N. W. 83, Ann. Cas. 1914D, 776; Atchison, T. & S. F. Ry. Co. v. Corporation Com. (Okla.), 170 Pac. 1156.

40. Chicago & N. W. Ry. Co. v. Dougherty, 39 S. D. 147, 163 N. W. 715. See generally the title "Prohibition."

41. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 457, 10 Sup. Ct. 462, 33 L. ed. 970; Caldwell v. Pierson, 37 S. D. 546, 159 N. W. 124. And see Chicago & N. W. Ry. Co. v. Dougherty, 39 S. D. 147, 163 N. W. 715.

[a] It is sufficiently complied with if the person affected has reasonably sufficient notice and an opportunity to be heard. Vandalia R. Co. v. Public Service Comm., 242 U. S. 255, 37 Sup. Ct. 255, 61 L. ed. 276, P. U. R. 1917B, 1004; State Public Utilities Com. v. Chicago & W. T. R. Co., 275 Ill. 555,

ing must be fully complied with.⁴² The notice must inform the defendant of the nature of the relief which is asked for.⁴³ A public utility which has not been injuriously affected thereby cannot complain of failure to notify other interested persons.⁴⁴ A person who will be only indirectly affected by the order of the commission need not be given notice of the proceedings,⁴⁵ and notice is not required of hearings upon matters where no new burden is to be imposed upon the utility.⁴⁶

E. PREVENTING ACTION BY COMMISSION.—The courts will not, in advance of action by a commission, prevent⁴⁷ or enjoin such action.⁴⁸

114 N. E. 325, Ann. Cas. 1917C, 50, P. U. R. 1917B, 1046.

42. *Hine v. Wadlington*, 27 Okla. 285, 111 Pac. 543; *In re Cameron Light & P. Co.* (Wis. R. C.), P. U. R. 1915B, 472.

[a] **Rule Stated.**—"Statutory requirements as to notice must be complied with at least substantially, or its [the commission's] proceedings and orders may be treated as nullities upon appeal or application for enforcement. The statutory requirements as to the notice and hearing are a sufficient compliance with the due process clauses of both the state and federal constitution." *Chicago & N. W. Ry. Co. v. Dougherty*, 39 S. D. 147, 163 N. W. 715.

[b] **Where the complaint is to be forwarded to the carrier** which is to be called upon to satisfy it or to answer it in writing within a specified time, it is not enough for the commission to merely send a copy of the complaint to the carrier without demanding action on its part. *State v. Chicago, M. & St. P. Ry. Co.*, 16 S. D. 517, 94 N. W. 406.

[c] **Receivers.**—Notice served upon an agent of a railroad designated by it under a statute as a proper person upon whom process might be served is sufficient after the railroad has passed into the hands of a receiver. *Lusk v. State*, 47 Okla. 648, 150 Pac. 151.

[d] **Unless the defendant has been misled** by the statements in the notice or hampered in presenting its defense, a defect in the notice will be disregarded. *St. Louis & S. F. R. Co. v. Williams*, 25 Okla. 662, 107 Pac. 428.

43. *Woody v. Denver & R. G. R. Co.*, 17 N. M. 686, 132 Pac. 250, 47 L. R. A. (N. S.) 974.

44. *Chicago, M. & St. P. R. Co. v. State Public Utilities Com.*, 267 Ill.

544, 108 N. E. 737, P. U. R. 1915D, 141.

45. *Raymond Lumb. Co. v. Raymond L. & P. Co.*, 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574, P. U. R. 1916F, 437.

[a] **A bondholder** need not be given notice of the hearing of an application for leave to issue additional bonds. *Shiebler v. Suffolk Gas & Elec. L. Co.* (N. Y. P. S. C. 2nd Dist.), P. U. R. 1916C, 70.

46. See *infra*, this note.

[a] **Where the performance of a duty already enjoined by law** is the object sought by proceedings before a commission and no new burden is to be placed upon the utility, the notice specified by statute to be given of hearings before the commission, need not be given. *In re Centralia Tel. Co.* (Kan. P. U. C.), P. U. R. 1916C, 421.

[b] **Orders suspending a proposed increase in rates**, pending a hearing, are not within the operation of statutory provisions requiring notice to be given of hearings. *Trenton & M. Co. Tr. Corp. v. Inhabitants of Trenton*, 227 Fed. 502.

47. *State v. Railroad Com. v. People*, 44 Colo. 345, 98 Pac. 7, 22 L. R. A. (N. S.) 810, by quo warranto proceedings.

48. *Southern Pac. Co. v. Bartine*, 170 Fed. 725; *Chicago, B. & Q. R. Co. v. Winnett*, 162 Fed. 242, 89 C. C. A. 222.

[a] **A commission will not be enjoined from acting on matters within its jurisdiction** on the ground that a party's constitutional rights will be invaded by the order to be made. *Trenton & M. Co. Tr. Corp. v. Inhabitants of Trenton*, 227 Fed. 502; *Dalton Adding Mach. Co. v. State Corp. Com.*, 213 Fed. 889, *affirmed*, 236 U. S. 699, 35 Sup. Ct. 480, 59 L. ed. 797.

[b] **Action by a commission which**

A commission may, however, be enjoined from enforcing its orders made in accordance with the provisions of a statute which is unconstitutional.⁴⁹

F. ENFORCING ACTION BY COMMISSIONS. — If a public service commission refuses to consider or pass upon a matter within its jurisdiction, action upon its part may be enforced by a writ of mandate,⁵⁰ though where it is clothed with discretionary power, the court cannot control, by mandamus, the action which it shall take.⁵¹

G. COMPELLING RESORT TO COMMISSIONS.⁵² — The courts quite generally interpret the statutes creating public service commissions as intending to confer upon such commissions primary and original jurisdiction over the subject matters of which they are given control,⁵³ and accordingly they will not ordinarily issue their injunctions, either prohibitory or mandatory,⁵⁴ or grant writs of mandate,⁵⁵ to prevent

is not of a final nature will not serve as the basis for an injunction. *Southern Pac. Co. v. California R. Comrs.*, 78 Fed. 236.

49. See *infra*, X, L, 6.

Enjoining enforcement of criminal statutes, see *supra*, VIII.

50. *Brooks v. Hatch*, 265 Ill. 346, 106 N. E. 956 (levying an assessment by levee commissioners); *West Jersey & S. R. Co. v. Board of Public Utility Comrs.*, 87 N. J. L. 170, 94 Atl. 57, P. U. R. 1915D, 847. See the title "Mandamus."

[a] "A duty is none the less ministerial because the person who is required to perform it may have to satisfy himself of the existence of a state of facts under which he is given his right or warrant to perform the required duty." *Public Service Com. v. State*, 184 Ind. 273, 111 N. E. 10, P. U. R. 1916C, 42.

[b] Granting of an application to issue securities may be required. *Public Service Com. v. State*, 184 Ind. 273, 111 N. E. 10, P. U. R. 1916C, 42.

51. Cal.—*Jacobs v. Board of Supervisors*, 100 Cal. 121, 34 Pac. 630. Ind.—*Public Service Com. v. State*, 184 Ind. 273, 111 N. E. 10, P. U. R. 1916C, 42. N. D.—*State v. Stutsman*, 24 N. D. 68, 139 N. W. 83, Ann. Cas. 1914D, 776. N. J.—*West Jersey & S. R. Co. v. Board of Public Utility Comrs.*, 87 N. J. L. 170, 94 Atl. 57, P. U. R. 1915D, 847 (approval of lease by railroad); *Public Service Gas Co. v. Public Utility Comrs.*, 84 N. J. L. 463, 87 Atl. 651.

[a] "In dealing with such agencies the court is controlled by the same principles that govern it with relation

to the exercise of its supervision over inferior judicial tribunals; i. e., it will compel them to proceed to judgment but will never direct the character of the judgments to be rendered by them." *West Jersey & S. R. Co. v. Board of Public Utility Comrs.*, 87 N. J. L. 170, 94 Atl. 57, P. U. R. 1915D, 847. See the title "Mandamus."

[b] Where a commission in its return to the writ states the reason for the position taken by it, the question presented is whether the reasons given show an arbitrary caprice and an abuse of discretion. *State v. Stutsman*, 24 N. D. 68, 139 N. W. 83, Ann. Cas. 1914D, 776.

[c] Where an application has been heard and denied, further consideration by the commission cannot be required. *Atlantic Coast Line R. R. v. Railroad Com.*, 89 S. C. 472, 72 S. E. 18.

52. Compelling resort to interstate commerce commission, see the title "Interstate Commerce."

53. *City of Cadillac v. Citizens' Tel. Co.*, 195 Mich. 538, 161 N. W. 989.

54. Ala.—*Horton v. Southern R. Co.*, 173 Ala. 231, 55 So. 531, to prevent change in location of a station. Mich.—*Cadillac v. Citizens' Tel. Co.*, 195 Mich. 538, 161 N. W. 989. Ore.—*First Nat. Bank v. Pacific Tel. & Tel. Co.*, 81 Ore. 307, 159 Pac. 561, P. U. R. 1917A, 90; *Ford v. Oregon E. R. Co.*, 60 Ore. 278, 117 Pac. 809, Ann. Cas. 1911A, 280, 36 L. R. A. (N. S.) 358.

Jurisdiction of courts to protect contract rights, see *supra*, II.

55. Kan.—*Scammon v. American Gas Co.*, 98 Kan. 812, 160 Pac. 316, P. U. R. 1917A, 531. Tex.—*Crosbyton-Southplains R. Co. v. Railroad Com.*

the discontinuance of existing service, the restoration of abandoned service, or the extension of service, until application has been made to the commission for relief, even if for any reason, the petitioner cannot compel the commission to act on his petition.⁵⁶ Nor will a court take jurisdiction in the first instance over the matter of alleged discrimination in rates or service,⁵⁷ or of the reasonableness of existing rates,⁵⁸ rules,⁵⁹ or service.⁶⁰ In some states, however, application to the commission prior to a resort to the courts is not required.⁶¹ And where the reasonableness of the rate or service is not questioned but it is claimed that plaintiff was damaged or discriminated against in the manner in which a rule or rate has been enforced, or service rendered, the courts have jurisdiction of the action.⁶²

(Tex. Civ. App.), 169 S. W. 1038. Wis.—State *ex rel.* Superior *v.* Duluth St. R. Co., 153 Wis. 650, 142 N. W. 184, to compel service where a street railway's employees were on strike.

[a] The writ to compel restoration of service will sometimes be withheld temporarily and a reasonable time given the utility within which to obtain the consent of the commission to the desired change. State *v.* Landon, 100 Kan. 593, 165 Pac. 1111, P. U. R. 1917F, 739; State *v.* Kansas Postal Tel. Cable Co., 96 Kan. 298, 150 Pac. 544.

56. State *ex rel.* Goss *v.* Metaline Falls L. & P. Co., 80 Wash. 652, 141 Pac. 1142.

57. State *ex rel.* Goss *v.* Metaline Falls L. & P. Co., 80 Wash. 652, 141 Pac. 1142.

58. Neb.—Nebraska Tel. Co. *v.* State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113. Okla.—Atchison, T. & S. F. R. Co. *v.* Foster Lumb. Co., 31 Okla. 661, 122 Pac. 139. Wash.—State *v.* Hoquiam Water Co., 70 Wash. 682, 127 Pac. 304. W. Va.—State *ex rel.* Public Service Com. *v.* Baltimore & O. R. Co., 76 W. Va. 399, 85 S. E. 714, P. U. R. 1915D, 558.

[a] Where the question involved is as to the right of the utility to make any charge at all, the courts will exercise original jurisdiction. State *ex rel.* Hodgdon *v.* Hoquiam Water Co., 70 Wash. 682, 127 Pac. 304.

59. Metzger *v.* New York State Railways, 168 App. Div. 187, 154 N. Y. Supp. 789, P. U. R. 1915F, 727.

[a] The reasonableness of a rule requiring payment of an excess amount by a passenger tendering cash instead of a ticket must be determined by the commission. Metzger *v.* New York State Railways, 168 App. Div. 187, 154

N. Y. Supp. 789, P. U. R. 1915F, 727.

60. Morrisdale Coal Co. *v.* Pennsylvania R. Co., 230 U. S. 304, 33 Sup. Ct. 938, 57 L. ed. 1494 (the reasonableness of a rule allotting cars to shippers is a question for the commission); State *ex rel.* Caster *v.* Flannelly, 96 Kan. 833, 154 Pac. 235, P. U. R. 1916C, 56.

61. Lukrawka *v.* Spring Valley Water Co., 169 Cal. 318, 146 Pac. 640, P. U. R. 1915B, 331.

62. Pennsylvania R. Co. *v.* Puritan Coal M. Co., 237 U. S. 121, 35 Sup. Ct. 484, 59 L. ed. 867.

[a] Statement of the Rule.—“It must be borne in mind that there are two kinds of discrimination—one in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or dis-unfair enforcement of a reasonable rule. In a suit where the rule of practice is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. . . . But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated

Action taken by a public utility without the required consent of the commission, is ineffectual,⁶³ and the commission may order the utility to refrain from it,⁶⁴ or they may apply to the attorney general to prosecute the corporation for doing business in violation of the law,⁶⁵ or may ask the courts to enjoin the taking of the contemplated action.⁶⁶ The commission may also maintain mandamus proceedings to require a public utility to allow the commission to exercise over it such powers as have been conferred by law.⁶⁷

H. CONDITIONS PRECEDENT TO ACTION BY COMMISSION. — Any conditions created by the statute as a prerequisite to the action of the commission must be complied with.⁶⁸

I. PROCEDURE BEFORE COMMISSION. — 1. In General. — The method of procedure before the various state commissions is largely regulated by specific statutory provisions which must be followed in essential particulars.⁶⁹ Proceedings may, under many statutes, be instituted by the commission of its own motion.⁷⁰ A hearing, in accordance with the statutory provisions and the general rules governing due process

the rule to plaintiff's damage." *Pennsylvania R. Co. v. Puritan Coal M. Co.*, 237 U. S. 121, 131, 35 Sup. Ct. 484, 59 L. ed. 867.

63. *Davies v. Watertown Nat. Bank* (Tex. Civ. App.), 178 S. W. 593, P. U. R. 1915E, 531, issuance of securities.

64. See the statutes.

[a] **The pendency of an appeal** from an order requiring a utility to desist from operating without a certificate of public convenience is no defense to a proceeding upon a subsequent similar order. *Citizens' Elec. Illum. Co. v. Consumers' Elec. Co.* (Pa. P. S. C.), P. U. R. 1916D, 711.

No power to issue injunctions, see *supra*, X, C, 2.

65. *Oklahoma Nat. Gas Co. v. State*, 47 Okla. 601, 150 Pac. 475, P. U. R. 1915F, 731, such a remedy is adequate and justifies the refusal of a writ of mandate.

66. *State ex rel. Atty. Gen. v. Louisville & N. R. Co.*, 197 Ala. 203, 72 So. 494.

[a] **Conflicting Inter and Intra State Rates.**—While a suit to enjoin an interstate rate fixed by the interstate commerce commission cannot be maintained in a state court, the state court does have jurisdiction of a suit to enjoin an increase in intrastate rates, not properly covered by an order of the interstate commerce commission requiring a removal of discrimination between existing inter and intra state rates. *American Express Co. v. South Dakota ex rel. Caldwell*, 244 U. S. 617,

37 Sup. Ct. 656, 61 L. ed. 1352; *modifying s. c.*, 38 S. D. 227, 161 N. W. 132.

67. See *infra*, this note.

[a] **The right to make an examination of the property of the utility** may be enforced by mandamus, but not by a mandatory injunction. *State v. Elizabethtown Water Co.*, 83 N. J. Eq. 216, 89 Atl. 1039.

[b] **Submission of plans to the commission** for the construction of a union depot or other improvement may be required by mandamus. *Gulf, C. & S. F. Ry. Co. v. State* (Tex. Civ. App.), 167 S. W. 192.

68. See the statutes.

[a] **Where the commissioner of health is required to approve of plans** for furnishing a municipality with a water supply, the commission will not pass upon an application for the issuance of a certificate of public convenience until the commissioner of health has acted. *In re Borough of Nescopeek* (Pa. P. S. C.), P. U. R. 1917D, 145.

69. See the statutes.

70. **U. S.**—*Manufacturers' L. & H. Co. v. Ott*, 215 Fed. 940, construing the West Virginia statute. Fla.—*State ex rel. R. R. Comrs. v. Louisville & N. R. Co.*, 62 Fla. 315, 57 So. 175. Ia.—*State v. Chicago, M. & St. P. R. Co.*, 86 Iowa 641, 53 N. W. 323. N. Y.—*In re Public Service Com.*, 177 App. Div. 444, 164 N. Y. Supp. 310. Wash.—*State v. Public Service Com.*, 76 Wash. 492, 136 Pac. 850; *State ex rel. Railroad Com.*

of law, is essential to the validity of any order by the commission.⁷¹ The hearing must be open to the public,⁷² an opportunity must be given interested parties to be present and introduce evidence, and cross examine witnesses,⁷³ and at the hearing there must be some evidence presented if the order of the commission is to be valid.⁷⁴ A record should be kept of all proceedings.⁷⁵ The proceedings, in order to be valid, are not required to be conducted with all of the formalities common to strictly judicial proceedings.⁷⁶

The commission may adopt such reasonable rules and regulations governing the procedure before it as seem best suited to its convenience.⁷⁷

The evidence may be heard before one of the commissioners,⁷⁸

v. Oregon R. & N. Co., 68 Wash. 160, 123 Pac. 3.

[a] If a complaint is defective the commission may proceed with the investigation of its own motion. *In re Milwaukee Elec. Ry. & L. Co.* (Wis. R. C. R.), P. U. R. 1916E, 113.

71. U. S. — Interstate Commerce Comm. *v. Louisville & N. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431. *Ala.*—*Railroad Com. v. Louisville & N. R. Co.*, 197 Ala. 161, 72 So. 397, P. U. R. 1916F, 356. *Ill.*—*Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.*, 266 Ill. 567, 107 N. E. 841, P. U. R. 1915B, 872.

Notice of hearing, see *supra*, X, D.

72. *Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.*, 266 Ill. 567, 107 N. E. 841, P. U. R. 1915B, 872.

73. *Interstate Commerce Comm. v. Louisville & N. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431; *Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.*, 266 Ill. 567, 107 N. E. 841, P. U. R. 1915B, 872. See *Winchester & S. R. Co. v. Com.*, 106 Va. 264, 55 S. E. 692.

74. *Railroad Com. v. Louisville & N. R. Co.*, 197 Ala. 161, 72 So. 397, P. U. R. 1916F, 356.

Right of the commission to act upon its own knowledge in general, see *infra*, X, I, 4.

Sufficiency of evidence to support an order, see *infra*, X, K, 9, c, (III).

75. *Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.*, 266 Ill. 567, 107 N. E. 841, P. U. R. 1915B, 872; *St. Louis & S. F. R. Co. v. Miller*, 31 Okla. 801, 123 Pac. 1047.

[a] All testimony should be taken down by a stenographer. *Farmers' Elevator Co. v. Chicago, R. I. & P. R.*

Co., 266 Ill. 567, 107 N. E. 841, P. U. R. 1915B, 872.

76. *St. Louis & S. F. R. Co. v. Williams*, 25 Okla. 662, 107 Pac. 428.

[a] Irregularities and informalities in the proceedings will not, under the express provisions of many statutes, invalidate any order made by the commission. *Southern Pac. Co. v. State (Ariz.)*, 165 Pac. 303, P. U. R. 1917F, 938, failure to file formal complaint or swear witnesses.

[b] Due process of law will be afforded even if the pleadings are informal, where parties are permitted to raise such issues and introduce such evidence as they desire and do not suffer from the lack of compulsory process against witnesses. *Louisville & N. R. Co. v. Finn*, 235 U. S. 601, 604, 607, 35 Sup. Ct. 146, 59 L. ed. 379, P. U. R. 1915A, 121.

[c] Protests though of a very informal nature will be regarded and investigated in all matters in which the public is directly interested. *In re Oxford Elec. Co. (Me. P. U. C.)*, P. U. R. 1916D, 519.

77. *Atlantic Express Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393. And see *supra*, X, C.

[a] Rule regulating the notice to be given of the hearing of a case does not apply to a formal "application." *In re Bell Water Co. (Cal. R. C. R.)*, P. U. R. 1916D, 166.

[b] Rules made for the benefit of a commission cannot be invoked by a party. *In re Bell Water Co. (Cal. R. C. R.)*, P. U. R. 1916D, 166.

78. *St. Louis & S. F. R. Co. v. Miller*, 31 Okla. 801, 123 Pac. 1047, at least where there are no closely controverted questions of fact.

though a quorum of the commissioners must participate in considering the evidence and making the order,⁷⁹ and the action of a majority of the board becomes the action of the board.⁸⁰

2. **Parties.**⁸¹ — While the matter of parties to proceedings before public service commissions is usually regulated by the particular statute involved,⁸² it may be stated as a general rule, that any person interested in the matter may apply to or petition the commission for relief.⁸³ If an order is, under the express terms of a statute, to remain effective for a specified time and thereafter until modified,⁸⁴ an application for its modification may be made by any person interested.⁸⁵ Every public utility the interests of which would be affected by the order of the commission should be made a party to the proceeding and given an opportunity to appear and be heard.⁸⁶ Bond-

79. *Mayor of Worcester v. Railroad Comrs.*, 113 Mass. 161; *St. Louis & S. F. R. Co. v. Miller*, 31 Okla. 801, 123 Pac. 1047.

80. *Railroad Com. v. Louisville & N. R. Co.*, 140 Ga. 817, 80 S. E. 327, Ann. Cas. 1915A, 1018, L. R. A. 1915E, 902.

[a] **Rule Stated.**—"When a grant of power is made to several persons or to a board consisting of several persons, the power is to be exercised by a majority of those persons, unless the power is otherwise limited by the grant itself." *Jacobs v. Board of Supervisors*, 100 Cal. 121, 34 Pac. 630.

81. **Institution of proceedings by commission of its own motion**, see *supra*, X, I, 1.

82. See the statutes.

[a] Where a statute specifically declares who shall institute proceedings, they cannot be instituted by any other person. *Wisconsin Traction, L. H. & P. Co. v. Menasha* (Wis. R. C. R.), P. U. R. 1916A, 482, proceedings to apportion cost of rebuilding a bridge.

[b] **Application for leave to lease or sell** must be made by the seller and not by the intending purchaser. *Hanlon v. Eshleman*, 169 Cal. 200, 146 Pac. 656, P. U. R. 1915B, 842.

[c] Where any corporation is authorized to file a complaint, it is immaterial that the complainant is not a corporation engaged in public service over which the commission would have jurisdiction. *Grand Rapids & I. R. Co. v. Michigan R. R. Com.*, 188 Mich. 108, 154 N. W. 15, P. U. R. 1915F, 805.

83. *Grand Rapids & I. R. Co. v. Michigan R. R. Com.*, 188 Mich. 108, 154 N. W. 15, P. U. R. 1915F, 805.

[a] **A telephone company affected**

by a city ordinance requiring the physical connection of two systems, may apply to the commission for its enforcement. *Milbank v. Dakota Central Tel. Co.* (S. D. Bd. R. C. R.), P. U. R. 1917C, 808.

[b] **A civic, commercial, or other quasi public body** is under many statutes, authorized to seek relief from a public service commission. *Colorado State Board of Stock Inspection v. Atchison, T. & S. F. Ry. Co.* (Colo. P. U. C.), P. U. R. 1916D, 751.

[c] **A stockholder** cannot file a petition for increased rates to be charged by a corporation. *Kohner v. Mt. Vernon Farmers Tel. Co.* (Minn. R. & W. C.), P. U. R. 1917E, 882.

[d] **A married woman** should make complaint in her own name, where she seeks personal relief, and not through her husband. *Plummer v. United Tel. Co.* (Ohio P. U. C.), P. U. R. 1915C, 416.

[e] **No direct damage** need be suffered by a party to entitle him to seek relief from a commission, under some statutes. *Interstate Commerce Com. v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. ed. 860.

Number of signers to petition, see *infra*, X, I, 3.

84. See *infra*, X, J, 2, a.

85. See *infra*, this note.

[a] **A statute denying the right to the public utility** to apply for modification of the order, is unconstitutional. *Village of Saratoga Springs v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713.

86. *First Nat. Bank v. Pacific Tel. & Tel. Co.*, 81 Ore. 307, 159 Pac. 561, P. U. R. 1917A, 90.

holders of the utility affected are not ordinarily necessary parties to the proceedings.⁸⁷ Leave will be given complainant to bring additional and necessary parties into the proceeding.⁸⁸

3. Pleadings.—A formal application, petition or complaint setting forth the grievance of which complaint is made, should be filed,⁸⁹ though compliance with the technical rules of pleading is not necessary,⁹⁰ and, under some statutes, no petition is required to be filed in order to confer jurisdiction upon the commission,⁹¹ the giving of

87. See *infra*, this note.

[a] **In a proceeding to fix the value** of the property of a public utility sought to be purchased or condemned, bondholders whose bonds may be called in at any time are not necessary parties to the proceeding. *Oshkosh Waterworks Co. v. Railroad Com.*, 161 Wis. 122, 152 N. W. 859, P. U. R. 1915D, 336.

88. *West v. Missouri & K. Tel. Co.* (Kan. P. U. C.), P. U. R. 1915A, 208.

89. See notes following.

[a] **Verification.**—A complaint which is not verified in accordance with the rules of the commission will be dismissed. *Wiseman v. Rupert Elec. Co.* (Idaho P. U. C.), P. U. R. 1915E, 901.

[b] **Signature by a specified number of consumers** (1) is sometimes required on a petition seeking to effect a change in rates or service. **Ark.**—*St. Louis, I. M. & S. R. Co. v. Bellamy*, 113 Ark. 384, 169 S. W. 322, L. R. A. 1915D, 91. **Cal.**—*Home Tel. & Tel. Co. v. Pacific Tel. & Tel. Co.* (Cal. R. C. R.), P. U. R. 1915A, 687, a competing utility company cannot file a complaint. **Wash.**—See *State ex rel. Goss v. Metaline Falls L. & W. Co.*, 80 Wash. 652, 141 Pac. 1142, such a statute does not apply to a petition complaining of discrimination in rates. (2) Corporations are not "bona fide citizens residing within the territory sought to be affected" within the meaning of such language used in the statute. *St. Louis & S. F. R. Co. v. State*, 120 Ark. 182, 179 S. W. 342, Ann. Cas. 1917C, 873, P. U. R. 1916A, 868. (3) Additional required signatures may be supplied by amendment. *Commercial Club v. Missouri Pub. Util. Co.* (Mo. P. S. C.), P. U. R. 1915C, 1017. (4) Where the requisite number of petitioners have not signed the application, the commission may, where justice requires it, proceed with the investigation upon its own initiative. *Public Utilities Comm. v. St. Croix*

Gaslight Co. (Me. P. U. C.), P. U. R. 1916A, 404.

[c] **Signature to a petition in behalf of a partnership** should be by the members of the partnership. *In re Tidewater & W. R. Co.* (Va. S. C. C. R.), P. U. R. 1917E, 798.

90. **Ariz.**—*Southern Pac. Co. v. State*, 165 Pac. 303, P. U. R. 1917F, 938. **Conn.**—*Root v. New Britain Gas Light Co.*, 91 Conn. 134, 99 Atl. 559, P. U. R. 1917C, 102. **Ind.**—*Southern R. Co. v. Railroad Com.*, 42 Ind. App. 90, 83 N. E. 721; *Chicago, I. & L. R. Co. v. Railroad Com.*, 39 Ind. App. 358, 79 N. E. 927. **Okla.**—*Hine v. Wadlington*, 27 Okla. 285, 111 Pac. 543.

[a] **If the grievance complained of and the remedy sought appears clearly**, the complaint will be held sufficient. *Winchester & S. R. Co. v. Com.*, 106 Va. 264, 55 S. E. 692. And see *Grand Rapids & I. R. Co. v. Michigan R. Co.*, 183 Mich. 383, 150 N. W. 154.

[b] **A complaint to require an extension of gas service** need not allege that the gas company had unreasonably failed or refused to provide the desired service. *Root v. New Britain Gas Light Co.*, 91 Conn. 134, 99 Atl. 559, P. U. R. 1917C, 102.

[c] **A complaint based upon the requirements of a city ordinance** which has been superseded by a later ordinance, need not be amended and refiled where no material changes were made in the ordinance in so far as the matter involved in the application is concerned. *Re Troy Auto Car Co.*, (N. Y., P. S. C., 2nd Dist.), P. U. R. 1917A, 700.

[d] **A letter setting forth the grounds of complaint** has been held sufficient. *Elmira Heights v. Erie R. Co.* (N. Y. P. S. C., 2nd Dist.), P. U. R. 1915D, 308.

91. *People ex rel. New York Tel. Co. v. Public Service Com.*, 157 App. Div. 156, 141 N. Y. Supp. 1018.

notice of the hearing being sufficient for that purpose.⁹² A complaint or petition must be based upon specific matters and must seek the remedying of specific wrongs,⁹³ though it need not show special or direct damage to the person complaining.⁹⁴ Where permission to issue stock or bonds is sought, the complaint should ask the commission to determine the amount necessary for the purposes for which the issue is to be made.⁹⁵ A demurrer to a complaint is not a proper pleading.⁹⁶ But an answer may properly be filed,⁹⁷ though it is not always necessary.⁹⁸ Technical objections to the complaint will not be considered after an answer upon the merits has been made.⁹⁹

4. Evidence.—A public service commission, being an administrative rather than a strictly judicial body, is not strictly limited by the general rules of evidence applied by courts,¹ though such rules

92. *St. Louis & S. F. Co. v. Williams*, 25 Okla. 662, 107 Pac. 428.

[a] **The insufficiency of the complaint to state a cause of action** cannot be urged as an objection to the jurisdiction of the commission under such a statute. *St. Louis & S. F. R. Co. v. Miller*, 31 Okla. 801, 123 Pac. 1047.

93. *Valley v. Atlantic Shore Line Ry.* (Me. P. U. C.), P. U. R. 1915B, 569; *In re Kalbach* (N. Y. P. S. C. 1st Dist.), P. U. R. 1917E, 523.

[a] **Complaint To Lower Rates.** "A complaint, or a proceeding on information by the commission itself, in regard to any road, may include more than the rate on one commodity, or more than one rate, but there must be some specific complaint or information in regard to each rate to be investigated, and there can be, under this statute, no such wholesale complaint, which by its looseness and generalities can be made applicable to every rate in operation on a railroad or upon several or all of the railroads of the state." *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 197, 29 Sup. Ct. 451, 53 L. ed. 753.

[b] **Disagreement of Parties.** Where the commission is given authority to act in the event the persons interested fail to agree upon the matters involved, a petition seeking relief evidences a person's election not to agree and no specific allegation of the failure of negotiations is required. *In re Nashua & L. R. Corp.* (Mass. P. S. C.), P. U. R. 1916E, 1029.

[c] **Prayer for relief**, see *Valley v. Atlantic Shore Line Ry. Co.* (Me. P. U. C.), P. U. R. 1915B, 569.

94. *East Denver Business & P.*

Assn. v. Denver Tramway Co. (Colo. P. U. C.), P. U. R. 1917C, 206.

95. See *infra* this note.

[a] **A request for permission to issue a specific amount** is not approved but the defect will be cured by a proper request in an application for a rehearing. *Grafton County Elec., L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028.

96. *West v. Missouri & K. Tel. Co.* (Kan. P. U. C.), P. U. R. 1915A, 208.

97. See the statutes.

[a] **Service by mail** in accordance with general statutory provisions is good. *Milbank v. Dakota Central Tel. Co.* (S. D. Bd. of R. C. R.), P. U. R. 1917C, 808.

98. See *infra*, this note.

[a] **Upon an application of a public utility to increase its rates**, a pleading in the nature of an objection or answer on the part of persons interested is unnecessary. *Re Richmond Light, H. & P. Co.* (Ind. P. S. C.), P. U. R. 1917B, 300; *Landon v. Lawrence* (Kan. P. U. C.), P. U. R. 1915E, 763.

99. *Union Switch & Signal Co. v. Pennsylvania Water Co.* (Pa. P. S. C.), P. U. R. 1916E, 1053.

1. *Interstate Commerce Comm. v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. ed. 860; *Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.*, 266 Ill. 567, 107 N. E. 841, P. U. R. 1915B, 872.

[a] **View by Commission.**—"The commission if it sees proper to do so may ascertain some of the facts necessary to be taken into consideration in the making of such order by a personal inspection on the ground." *Railroad Com. v. Louisville & N. R. Co.*,

will ordinarily be followed.² The findings and orders of the commission must, however, be based solely upon such evidence as is produced before it and considered at the hearing,³ though there are seeming departures from this rule among the authorities.⁴ The gen-

197 Ala. 161, 72 So. 397, P. U. R. 1916F, 356.

[b] An appraisal of the value of its property found among the records of a public utility may be considered. *Duluth St. R. Co. v. Railroad Com.*, 161 Wis. 245, 152 N. W. 887, P. U. R. 1915D, 192.

Evidence to be considered on application for a discontinuance of a proceeding, see, *infra*, X, I, 5, b.

2. See *infra*, this note.

[a] The testimony of expert witnesses (1) is not conclusive upon a commission. *McGregor-Noe v. Springfield Gas & Elec. Co.*, 1 Mo. P. S. C. R. 528. (2) Testimony of the engineering or other experts of the commission will be scrutinized with the same care as the testimony of other experts. *Palo Alto v. Palo Alto Gas Co.*, 2 Cal. R. C. R. 300, P. U. R. 1916E, 1073; *West End Business Men's Assn. v. United R. Co.* (Mo. P. S. C.), P. U. R. 1915D), 482; *Commercial Club v. Missouri Pub. Util. Co.* (Mo. P. S. C.), P. U. R. 1915C, 1017.

3. U. S.—*Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431. Ala.—*Railroad Com. v. Louisville & N. R. Co.*, 197 Ala. 161, 72 So. 396, P. U. R. 1916F, 356. Ill.—*Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.*, 266 Ill. 567, 107 N. E. 841, P. U. R. 1915B, 872. N. Y.—*Saratoga Springs v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 613, reversing 122 App. Div. 203, 107 N. Y. Supp. 341. Vt.—*Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915C, 1269. Wash.—*State ex rel. Gt. North. R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

[a] Basis of the Rule.—To allow a commission to consider information it has acquired in regard to the subject matter other than through evidence produced at the hearing "would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain,

or refute. The information gathered under the provisions of §12 may be used as a basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available as such in cases where the party is entitled to a hearing. The Commission is an administrative body, and, even where it acts in a quasi-judicial capacity is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. . . . But the more liberal the practice in admitting testimony the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding." *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431.

[b] Reports and returns made by a utility or results of investigations made by agents of a commission, are not considered unless they are made matters of record on the hearing. *Campbell v. Hood River Gas & Elec. Co.* (Ore. P. S. C.), P. U. R. 1915D, 855.

4. *State ex rel. Northern P. R. Co. v. Public Service Com.*, 95 Wash. 376, 163 Pac. 1143, 166 Pac. 793.

[a] A commission is not bound "as is a court, to acquire its information concerning all matters involved in the proceedings before it wholly and en-

eral rules as to presumptions⁵ and burden of proof⁶ are followed in this class of proceedings. Existing rates, attacked by consumers as unreasonable are presumed to be fair and reasonable,⁷ unless a contrary rule is expressly created by statute,⁸ and where rates charged by a public utility are below the maximum fixed by a public service commission they are to be considered as *prima facie* fair and reasonable to the public, and the burden of proof is upon the person attacking them.⁹ The burden of establishing the reasonableness of a discrimination,¹⁰ or of a proposed increase¹¹ in rates, is upon the public

tirely from the evidence of witnesses or other evidence produced before it, but may take into consideration the results of its general investigations, general information upon a given subject within its powers, and all matters which affect the matter and concerning which it must determine the facts." *State ex rel. Northern P. R. Co. v. Public Service Com.*, 95 Wash. 376, 163 Pac. 1143.

5. As to presumptions generally see *ENCY. OF EV.*, title "Presumptions."

[a] Rules Adopted by a Public Utility Presumed To Be Reasonable. *Western R. S. Assn. v. Chicago, M. & St. P. R. Co.* (Wash. P. S. C.), P. U. R. 1917C, 915.

6. As to burden of proof generally, see *ENCY. OF EV.*, title, "Burden of Proof."

[a] The burden of proving a violation of the law is ordinarily upon the complainant. *Follansbee v. Manufacturers L. & H. Co.* (W. Va. P. S. C.), P. U. R. 1915D, 825.

[b] If special rights under its charter are claimed by a public utility, based upon the intention of the legislature to deprive individuals or other utilities of the same rights the burden of proof of the existence of such rights is upon the utility claiming them. *Western Union Tel. Co. v. Burlington Traction Co.*, 90 Vt. 506, 99 Atl. 4, Ann. Cas. 1918B, 841, P. U. R. 1917C, 320.

7. *Colo.*—*Colburn v. Florence & C. C. R. Co.* (Colo. P. U. C.), P. U. R. 1915E, 551. *Fla.*—*State ex rel. R. R. Com. v. Florida East Coast R. Co.*, 64 Fla. 112, 59 So. 385. *N. Y.*—*People ex rel. New York Tel. Co. v. Public Service Com.*, 169 App. Div. 448, 154 N. Y. Supp. 1093, P. U. R. 1915F, 725 (the rule is applicable to common carriers); *People ex rel. New York, etc., Co. v. Public Service Com.*, 159 App. Div. 546, 145 N. Y. Supp.

513 (*affirmed*, 215 N. Y. 241, 109 N. E. 252, P. U. R. 1915D, 423); *Board of Trade v. Mountain Home Tel. Co.* (N. Y. P. S. C., 2nd Dist.), P. U. R. 1916C, 688. *Okla.*—*New Castle Box Co. v. New Castle Water Co.* (Pa. P. S. C.), P. U. R. 1916C, 106.

[a] Conduct of a business with economy and efficiency will be presumed. *Public Service Comm. v. Tonopah Sewer & D. Co.* (Nev. P. S. C.), P. U. R. 1915F, 95.

8. *Turner Creamery Co. v. Chicago, M. & St. P. R. Co.*, 36 S. D. 310, 154 N. W. 819, P. U. R. 1916A, 1083.

[a] Rates due to competitive conditions are not within the terms of a statute providing that "the lowest rate published or charged by any railway company for substantially the same kind of service, whether in this or another state, shall when introduced in evidence, be accepted as *prima facie* evidence of a reasonable rate for the service under investigation." *Nebraska Portland Cement Co. v. Chicago, B. & Q. R. Co.* (Neb. S. R. C.), P. U. R. 1915E, 64.

9. *State Public Utilities Com. v. Atchison, T. & S. F. R. Co.*, 278 Ill. 58, 115 N. E. 904.

10. *Peterson v. Oregon S. L. R. Co.* (Idaho P. U. C.), P. U. R. 1915D, 749.

11. *Colo.*—*In re Denver & S. L. R. Co.* (Colo. P. U. C.), P. U. R. 1917C, 206, and not upon persons protesting against the increase. *Ga.*—*In re Macon Ry. & L. Co.* (R. C.), P. U. R. 1915E, 648. *Mass.*—*Bay State Rate Case* (P. S. C.), P. U. R. 1916F, 221; *Natick Petitions* (Bd. G. & E. L. C.), P. U. R. 1915D, 655. *Mo.*—*Anderson v. Clinton County Tel. Co.* (P. S. C.), P. U. R. 1917A, 31. *N. J.*—*In re Public Service Ry. Co.* (Bd. P. U. C.), P. U. R. 1916A, 437; *In re Increased Pass. Rates, etc.* (Bd. P. U. C.), P.

utility. Statements in an exhibit filed by the utility, as to cost of service, will not be taken as true because not assailed.¹² Judicial notice of the existence of facts material to the issues may be taken by a commission.¹³

5. Hearing or Trial.—a. *In General.*—Legal questions may be considered;¹⁴ and those involving the jurisdiction of the commission should ordinarily be determined before other matters are investigated,¹⁵ though this rule may be disregarded when circumstances of convenience require it.¹⁶ Hearings should be given as promptly as is reasonably possible.¹⁷

Process may issue to require the attendance of witnesses.¹⁸ Testimony should only be received from witnesses who have been sworn.¹⁹ The number of witnesses to be heard may be limited.²⁰ Questions as to matters not specifically set forth in the petition or complaint,²¹ will not be investigated or passed upon.²² The practice and principles

U. R. 1915B, 161. **N. Y.**—*In re United Traction Co.* (P. S. C., 2nd Dist.), P. U. R. 1916E, 249. **Ohio.**—*In re Rates on Wall Board, Carloads* (P. U. C.), P. U. R. 1916E, 109.

Contra, *State ex rel. Seattle v. Public Service Com.*, 76 Wash. 492, 136 Pac. 850.

[a] **If the public utility fails to appear at the hearing** the commission is required to cancel the proposed rates. *In re Rates on Wall Board, Carloads* (Ohio P. U. C.), P. U. R. 1916E, 109.

[b] "It is sufficient if the evidence produced satisfies the minds of the Commission, acting fairly and endeavoring to reach a correct conclusion, that the rates as they are increased are reasonable and just." *West Virginia Pulp & P. Co. v. Pennsylvania R. Co.* (Pa. P. S. C.), P. U. R. 1915D, 11.

12. *In re Denver & S. L. R. Co.* (Colo. P. U. C.), P. U. R. 1917C, 195.

13. See *St. Louis & S. F. R. Co. v. Williams*, 25 Okla. 662, 107 Pac. 428.

Judicial notice, generally, see, 7 ENCY. OF EV. 869; 16 STANDARD PROC. 598.

14. See *infra*, this note.

[a] **In passing upon applications (1) for a certificate of public convenience and necessity**, legal questions involving the right and status of the applicant and its compliance with requirements of the law which are conditions precedent to its operation as a public utility, will be determined (*People ex rel. N. Y. C. & H. R. R. Co. v. Public Service Com.*, 195 N. Y.

157, 88 N. E. 261), though (2) the commission will go no further in this connection than it can avoid. *Petition of Gray* (N. Y. P. S. C., 2nd Dist.), P. U. R. 1916A, 33.

15. *Ratner v. Denver Gas & E. L. Co.* (Colo. P. U. C.), P. U. R. 1917E, 988.

16. *Public Utilities Com. v. Maine Cent. R. Co.* (Me. P. U. C.), P. U. R. 1917D, 88.

17. *In re Long Island R. Co.* (N. Y. P. S. C., 2nd Dist.), P. U. R. 1916C, 81, application for leave to issue securities.

18. *Hine v. Wadlington*, 27 Okla. 285, 111 Pac. 543.

19. *Southern Pac. Co. v. State* (Ariz), 165 Pac. 303, P. U. R. 1917F, 938.

[a] **The commission may itself call witnesses** who may be members of its engineering department who have made an expert examination of the subject matter of the controversy. *In re Marion Municipal Water Dist* (Cal. R. C.), P. U. R. 1915C, 433.

20. *State ex rel. Ore. R. & Nav. Co. v. Railroad Com.*, 52 Wash. 17, 100 Pac. 179, a statute providing for a limitation on the number of witnesses is constitutional.

21. See *supra*, X, I, 3.

22. *Mich.*—*Baldwin & Co. v. Pere Marquette R. Co.* (R. C. R.), P. U. R. 1917A, 15. **S. D.**—*Cilley v. Kennebec Tel. Co.* (Bd. R. Comrs.), P. U. R. 1915F, 839, desirability of physical connection of telephone systems. **Wis.** *Vogt v. Linden Tel. Co.* (R. C. R.), P. U. R. 1917A, 614.

adopted by other commissions, though not binding, will be given due consideration;²³ and the commission is, of course, bound to follow and adopt rulings of the courts made upon a review of their earlier orders in the same case.²⁴

b. *Continuances and Discontinuances.*—Adjournments of hearings may be made as occasion requires.²⁵ And proceedings before the commission may under proper circumstances be dismissed or discontinued, in its discretion.²⁶ Whether a complaint filed by persons invoking the action of the commission will be dismissed upon request is a matter within the discretion of the commission.²⁷

[a] *Rates on classes of service not in issue* will not be fixed. *In re Fort Scott & N. Light H. W. & P. Co.*, 2 Mo. P. S. C. R. 581, P. U. R. 1915F, 512.

[b] *Where not only the reasonableness of rates is charged, but discrimination is alleged* the commission may investigate the reasonableness of other rates charged by the utility. *Moritz v. Edison Elec. Illum. Co.* (N. Y. P. S. C., 1st Dist.), P. U. R. 1917A, 364.

Orders upon matters not in issue, see *infra*, X, J, 2, a.

[c] *Effect of Prayer for Relief.* "Where the complaint is in general terms and the relief prayed for is set out specifically, the latter must be construed to govern and limit the former for the purposes of formal hearing and investigation,—especially where there is no apt language to indicate that the prayer is not intended to include everything sought and no general request for relief is sought. Otherwise neither the Commission has any information on which it could determine whether the error complained of had been corrected, nor the respondent on which to prepare its defense." *Valley v. Atlantic Shore Line Ry* (Me. P. U. C. R. 1915B, 569).

23. *District No. 6 v. Akron C. & Y. R. Co.* (Ohio P. U. C.), P. U. R. 1916E, 627, approving the practice of group making in fixing rates.

24. See *infra*, this note.

[a] *Opinions expressed after a full consideration of the point* should be followed although the decision of the court was placed upon other grounds. *In re Dry Dock E. B. & B. R. Co.* (N. Y. P. S. C., 1st Dist.), P. U. R. 1916D, 551.

25. See *infra*, this section.

[a] *Where an adjournment would be equivalent in its effect to an injunction* it should not be granted un-

less the party seeking it shows himself to be *prima facie* entitled to relief. *In re Long Island R. Co.* (N. Y. P. S. C., 2nd Dist.), P. U. R. 1916C, 81.

26. See *infra*, this note.

[a] *A proceeding instituted by a commission* may, in its discretion, be discontinued upon its own initiative, or on the request of an interested party. *In re Bronx Gas & E. Co.* (N. Y. P. S. C., 1st Dist.), P. U. R. 1917D, 777.

[b] *The exercise of its discretion may be based* "upon either the evidence formally produced at the hearing or the knowledge acquired by it from records in its files or investigation made by it." *In re Bronx Gas & E. Co.* (N. Y. P. S. C., 1st Dist.), P. U. R. 1917D, 777.

[c] *Effect.*—The effect of discontinuing a proceeding involving a rate reduction, is not to determine whether or not the rate in question is unreasonable but simply whether the commission should continue with the proceeding upon its own motion. *In re Bronx Gas & E. Co.* (N. Y. P. S. C., 1st Dist.), P. U. R. 1917D, 777.

[d] *Under exceptional circumstances*, and in order to enable the parties interested to immediately resort to the courts, a commission will sometimes dismiss a proceeding over which it considers that it has jurisdiction. *Municipal League v. Southern P. Co.* (Cal. R. C. R.), P. U. R. 1917A, 486, where no appeal would lie from a preliminary decision of the court that it had jurisdiction of the subject matter and the parties would be placed at great expense if the hearing was continued.

27. *Monitor Warehouse Co. v. Southern Pac. Co.* (Ore. P. S. C.), P. U. R. 1917A, 721.

6. Rehearings.²⁸ — A rehearing by the commission upon application made in due season is provided for by most of the statutes.²⁹ The granting of a rehearing lies largely within the discretion of the commission.³⁰ The procedure upon the rehearing must substantially conform to that laid down by the statute.³¹ A provision requiring a decision within a specified time after submission on rehearing, is merely directory.³²

J. FINDINGS AND ORDERS. — 1. Findings. — Findings should be made by the commission upon all matters which, under the statute, must necessarily exist in order to support the order of the commission,³³ and if necessary findings are not made, a case will be re-

28. Application for rehearing as prerequisite to review by court, see *infra*, X, K, 4.

29. See the statutes and *Buffalo v. Buffalo Gas Co.*, 82 Misc. 304, 143 N. Y. Supp. 716, *affirmed*, 160 App. Div. 914, 145 N. Y. Supp. 1117, application must be made within a reasonable time.

[a] If a person is by the statute given a right to apply for a rehearing before the commission, this is sufficient to render an order affecting them valid over the objection that his property is being taken without due process of law. *City of Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210.

[b] The petition should be specific in its reference to the points upon which a rehearing is desired, to the evidence and the place where it can be found in the transcript, and to the authorities which it is desired to call to the attention of the commission. *In re City of Los Angeles* (Ann. Rep. Cal. R. C. R.), P. U. R. 1917A, 454.

30. *Buffalo v. Buffalo Gas Co.*, 82 Misc. 304, 143 N. Y. Supp. 716, *affirmed*, 160 App. Div. 914, 145 N. Y. Supp. 1117.

[a] **Different Result Probable.** A rehearing will not be ordered unless there is good reason to believe that a different order would be made upon a further consideration of the matters involved. *In re Kent Water & L. Co.* (Ohio P. U. C.), P. U. R. 1917D, 394.

31. See *infra*, this note.

[a] If a hearing on the application for a rehearing is given there need be no further hearing accorded to the parties. *Mt. Konocti Light & P. Co. v. Thelen*, 170 Cal. 468, 150 Pac. 359, P. U. R. 1915E, 291.

32. *Mt. Konocti Light & P. Co. v.*

Thelen, 170 Cal. 468, 150 Pac. 359, P. U. R. 1915E, 291; it "is simply directory so far as the commission is concerned in no way going to its jurisdiction, and, in so far as the parties are concerned, simply authorizes them, pending final decision to act without fear of penalty upon the assumption that the order is affirmed."

33. *Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028.

[a] **Rule Stated.**—"It is conceded that questions of law involved in the action of the Commission are revisable by this court. It is therefore the duty of the Commission to find all facts which either party may request, essential to the presentation of all questions of law raised by any decision or order made by them." *Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028.

[b] **An adjudication that a rate is not so low as to be confiscatory** is insufficient where the utility claims that the rate fixed is so low as to be unreasonable. *Collingswood Sewerage Co. v. Borough of Collingswood* (N. J. L.), 102 Atl. 901.

[c] **On an application for authority to issue stock or bonds** and to effect a consolidation, there must be a finding as to (a) whether the proposed consolidation, at a proper capitalization, will be for the public good and (b) if it is, what amount of stock or bonds is reasonably required for the proposed purpose. *Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028.

[d] **Where the order requires the continued maintenance of existing rates** there need not be such findings as would be required to support an order establishing such rates in the first instance. *Chicago, M. & St. P. R. Co.*

manded in order that the defect may be corrected.³⁴ In some states, however, no findings are required to be made.³⁵

2. Orders.—a. *Form and Sufficiency.*—The order of the commission should, in form, comply with the requirements of the statute,³⁶ and must fully protect the rights of all parties interested.³⁷ A written order is usually required.³⁸ It must be sufficiently definite and certain as to be capable of enforcement according to its terms.³⁹

v. State Public Utilities Com., 267 Ill. 544, 108 N. E. 737, P. U. R. 1915D, 141.

[e] **An order requiring a utility to cease discrimination** against a customer in regard to rates charged him need not be accompanied with a finding as to reasonableness of the rates. *Vandalia R. Co. v. Public Service Com. (Ind.)*, 114 N. E. 412, P. U. R. 1917B, 579.

34. *Atchison, T. & S. F. R. Co. v. State*, 47 Okla. 645, 150 Pac. 108, P. U. R. 1915E, 265, additional evidence may be taken by the commission.

35. *Root v. New Britain Gaslight Co.*, 91 Conn. 134, 99 Atl. 559, P. U. R. 1917C, 102.

[a] **Under the presumption that the orders of a commission were properly formulated after due consideration**, the making of an order will be treated as a finding that the facts necessary to support the order existed. *Railroad Com. v. Alabama G. S. R. Co.*, 185 Ala. 354, 64 So. 13, L. R. A. 1915D, 98.

36. See the statutes.

37. See *infra*, this note.

[a] **The general interests of the public** should be considered and protected by each order. "Unlike the decision of a court, which ordinarily is conclusive only on the rights of the interested parties, a report and order of the commission prescribing rates regulations, or practices for the future must affect many who are not directly represented before it." *Deane v. Atchison, T. & S. F. R. Co.*, 3 Mo. P. S. C. 466, P. U. R. 1916E, 182. See also *Deane v. Atchison, T. & S. F. Ry. Co.*, 3 Mo. P. S. C. 466, P. U. R. 1916E, 182, holding that a rule regulating storage charges should apply to general baggage as well as to sample baggage.

[b] **Form of order requiring physical connection of telephone systems**, see, *State ex rel. Public Serv. Com. v. Skagit River Tel. & Tel. Co.*, 85

Wash. 29, 147 Pac. 885, P. U. R. 1915C, 902.

38. See the statutes and *Root v. New Britain Gas Light Co.*, 91 Conn. 134, 99 Atl. 559, P. U. R. 1917C, 102.

[a] **An oral announcement at the conclusion of a hearing as to what the order would be**, is not to be considered as the order itself and does not exhaust the power of the commission to make a proper written order. *State ex rel. Railroad Com. v. Oregon R. & N. Co.*, 68 Wash. 160, 123 Pac. 3.

39. *Baltimore & O. R. Co. v. Railroad Com.*, 196 Fed. 690, order requiring equipment of locomotives with headlights held too indefinite. See *State ex rel. Railroad Com. v. Oregon R. & N. Co.*, 68 Wash. 160, 123 Pac. 3, order requiring change in depot facilities.

[a] **An order requiring the establishment of joint through rates** need not specify what the rates are to be or whether they are to apply to car load lots or less or both. *State ex rel. Northern P. R. Co. v. Public Service Comm.*, 95 Wash. 376, 163 Pac. 1143, 166 Pac. 793.

[b] **An order requiring the construction and maintenance of a union railroad station** need not specify the exact location nor contain plans and specifications for the building. *Railroad Com. v. Alabama G. S. R. Co.*, 185 Ala. 354, 64 So. 13, L. R. A. 1915D, 98; *Gulf, C. & S. F. Ry. Co. v. State (Tex. Civ. App.)*, 167 S. W. 192.

[c] **Order Requiring the Installation of Tracks for Transfer Connections.**—"The necessity of making the order specific as to the aggregate cost, character of material, and particular location of the track to be constructed including its length, angles, curves, and the amount of money to be expended by each company in its construction, is very apparent from the far-reaching effect of the requirement and the evident fact that the several companies could not readily agree up-

and greater certainty is required in the order when mandamus proceedings are to be employed in its enforcement, than under other conditions.⁴⁰ The order may properly be made conditional and tentative, and the application dismissed in part and retained in part to await the determination of tests instituted by the commission.⁴¹ A requirement that a utility shall comply with any existing law in performance of the order, is proper.⁴²

Slight defects in the order or in mode in which it is promulgated, will not affect its validity.⁴³ The order should not be broader than or involve matters not specified in the complaint,⁴⁴ or in the notice of hearing served upon the defendant.⁴⁵ No order can be made against a person who is not a party to the proceeding or given an opportunity to be heard.⁴⁶ A commission may, unless this matter is regulated by statute,⁴⁷ specify the time at which its order shall become effective,⁴⁸ or the date or time within which the defendant must comply with the order.⁴⁹ An order need not specify the time during which it is to remain in force,⁵⁰ particularly where this matter is regulated by statute.⁵¹ Service of the order upon every person

on so many details immediately affecting their material interests." State *v. Chicago*, M. & St. P. Ry. Co., 16 S. D. 517, 94 N. W. 406.

[d] Where there is a presumption that an order has been complied with, because of the lapse of time within which it would become effective, this amounts to a showing that it was not too vague and indefinite to be enforced. State *ex rel. Northern P. R. Co. v. Public Service Com.*, 95 Wash. 376, 163 Pac. 1143, 166 Pac. 793.

40. Seward *v. Denver & R. G. R. Co.*, 17 N. M. 557, 131 Pac. 980, 46 L. R. A. (N. S.) 242.

[a] Absolute certainty "would seem essential to an order enforceable by a proceeding in the nature of mandamus, and especially so when for each day's failure to comply therewith a fine" may be imposed. State *v. Chicago*, M. & St. P. Ry. Co., 16 S. D. 517, 94 N. W. 406.

41. State *ex rel. Watts Eng. Co. v. Public Service Com.*, 269 Mo. 525, 191 S. W. 412, Ann. Cas. 1917E, 786, P. U. R. 1917C, 581 (temporary gas rates fixed to ascertain their effect); *Borough of Mt. Union v. Mt. Union Water Co.*, 256 Pa. 516, 100 Atl. 968, *affirming* 63 Pa. Super. 337.

42. State *v. Great Northern Ry. Co.*, 135 Minn. 19, 159 N. W. 1089, P. U. R. 1917B, 413.

43. Woodburn *v. Public Service Com.*, 82 Ore. 114, 161 Pac. 391, Ann. Cas. 1917E, 996, L. R. A. 1917C, 98, P. U. R. 1917B, 967,

44. Valley *v. Atlantic Shore Line Ry.* (Me. P. U. C.), P. U. R. 1915B, 569; State *ex rel. Northern P. R. Co. v. Railroad Com.*, 52 Wash. 440, 100 Pac. 987.

[a] Where discrimination in rates is charged, the order may require a utility to cease furnishing service under a particular private contract. Raymond Lbr. Co. *v. Raymond L. & P. Co.*, 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574, P. U. R. 1916F, 437.

45. Pioneer Tel. & Tel. Co. *v. State*, 38 Okla. 412, 133 Pac. 476; *In re Rutland R. Co.*, 79 Vt. 53, 64 Atl. 233.

46. *In re Connecticut Co. (Conn. P. U. C.)*, P. U. R. 1916A, 1; Winchester & S. R. Co. *v. Com.*, 106 Va. 264, 55 S. E. 692; Vogt *v. Linden Tel. Co.* (Wis. R. C. R.), P. U. R. 1917A, 614.

Orders indirectly affecting persons not parties to the proceeding, see *supra*, X, D.

47. See the statutes.

48. Clemmons *v. Railroad Com.*, 173 Cal. 254, 159 Pac. 713, P. U. R. 1916F, 469.

49. State *ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8.

50. New York Cent. & H. R. R. Co. *v. Interstate Commerce Com.*, 168 Fed. 131, 135; McIlfresh *v. Hocking Valley R. Co.* (Ohio P. U. C.), P. U. R. 1916D, 140.

51. New York Cent. & H. R. R. Co. *v. Interstate Commerce Com.*, 168 Fed. 131, 135; Village of Saratoga Springs

affected by it is sometimes required by statute.⁵²

b. *Conclusiveness*.⁵³ — Orders of a commission, which have become final are conclusive upon the parties and their privies in future litigation.⁵⁴ But an order may be modified by a subsequently enacted statute,⁵⁵ and under most of the statutes, a commission is given authority to change or modify its orders from time to time as the changes in circumstances may require.⁵⁶

v. Saratoga Gas, E. L. & P. Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713.

52. *State ex rel. Railroad Com. v. Oregon R. & N. Co.*, 68 Wash. 160, 123 Pac. 3.

[a] **An order requiring a railroad to obtain real property in order to relocate a portion of its road need not be served upon persons whose land will be taken under eminent domain proceedings.** *Chicago, B. & Q. R. Co. v. Cavanagh*, 278 Ill. 609, 116 N. E. 128.

[b] **Where proceedings have been instituted by a public utility, the order of the commission need not be served upon each of its patrons.** *Clemmons v. Railroad Com.*, 173 Cal. 254, 159 Pac. 713, P. U. R. 1916F, 469.

53. **Conclusiveness on review by the courts**, see *infra*, X, K, 9, c, (III).

54. *Pioneer Tel. & Tel. Co. v. State*, 40 Okla. 417, 138 Pac. 1033; *State ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8. But see, *Park Abbott Realty Co. v. Iroquois Nat. Gas Co.*, 102 Misc. 266, 168 N. Y. Supp. 673.

Conclusiveness of judgments generally, see 15 STANDARD PROC. 377, *et seq.*, and the title "Res Judicata."

[a] **Collateral Attack**.—A proceeding before a commission to recover excess charges by a utility is collateral to the proceeding in which the rates were fixed, and their reasonableness cannot be attacked. *Pioneer Tel. & Tel. Co. v. State*, 40 Okla. 417, 138 Pac. 1033.

[b] **Matters not passed upon at former proceedings** may be investigated subsequently. *Union Switch & S. Co. v. Pennsylvania Water Co.* (Pa. P. S. C.), P. U. R. 1916E, 1053.

55. *State v. New Haven & N. Co.*, 43 Conn. 351, the commission is not a judicial body and its orders are not judgments which are beyond the power of the legislature to modify.

56. *State Public Utilities Com. v. Illinois Cent. R. Co.*, 274 Ill. 36, 113 N. E. 162.

[a] **An order for the construction of an interlocking system, at an intersecting railroad crossing and apportioning the expense, does not have the force and effect of a contract, requiring the cost of a new plant to be borne by the railroads in the same proportions.** *State Public Utilities Com. v. Illinois Cent. R. Co.*, 274 Ill. 36, 113 N. E. 162.

[b] **Order requiring the physical connection of telephone systems may be rescinded if it is found to operate unduly to the injury of one of the companies.** *Michigan State Tel. Co. v. Michigan R. Co.*, 193 Mich. 515, 161 N. W. 240, P. U. R. 1917C, 355.

[c] **Formal action is required in order to modify a prior order.** *People v. Dempsey* (App. Div.), 167 N. Y. Supp. 810.

[d] **A change in membership of a commission is of itself no reason for reopening a case.** *Lodge v. United Traction Co.* (N. Y. P. S. C. 2nd Dist.), P. U. R. 1916A, 187.

[e] **An order made by a former commission whose jurisdiction differed from that of the existing commission, is not res judicata.** *Cabrillo Club v. Atchison, T. & S. F. Co.* (Cal. R. C.), P. U. R. 1916A, 702.

[f] **"In matters purely administrative res judicata cannot be invoked."** *In re Swan Creek Elec. Co.* (Idaho P. U. C.), P. U. R. 1915F, 323.

[g] **An order affirmed upon appeal to the courts remains the order of the commission and may be modified by it in its discretion.** *Hill v. Union Pac. R. Co.*, 96 Neb. 205, 147 N. W. 681.

[h] **Second Application**. — Under such statutes, a refusal of an application for relief is no bar to another application, made at a subsequent date. *State ex rel. R. R. Comrs. v. Florida East Coast R. Co.*, 72 Fla. 379, 73 So. 171, P. U. R. 1917B, 1023; *Brogger v. Chicago, St. P., M. & O. R. Co.*, 137 Minn. 338, 163 N. W. 662, 164 N. W. 368.

c. *Enforcement of Orders.*—(I.) *In General.*⁵⁷—Under many statutes a commission is given no authority to directly enforce its own orders;⁵⁸ but under others the commission has power to punish by imposing a penalty or fine for contempt.⁵⁹ And after review and affirmance by the courts the order may be enforced by ordinary judicial process.⁶⁰

(II.) *By Action.*—(A.) *IN GENERAL.*—A common method of enforcing the orders of a public service commission is by an action of an equitable nature in the court upon which jurisdiction of such matters is conferred by statute.⁶¹ The action may be maintained by the commission,⁶² and should be instituted in the name of the state.⁶³ The complaint should recite the proceedings had before the commission,⁶⁴ the order entered by the commission,⁶⁵ and the failure of the corporation defendant to comply with the order.⁶⁶ It need not recite the facts upon which the order was based.⁶⁷ In some states, the complaint or petition is allowed to be of an informal character.⁶⁸ The general rules governing demurrers and answers⁶⁹ apply to such ac-

57. Enjoining enforcement of an order, see *infra*, X, L.

58. *Detroit & M. R. Co. v. Michigan R. Co.*, 178 Mich. 250, 144 N. W. 689; *State ex rel. North Carolina Corp. Com. v. Southern R. Co.*, 147 N. C. 483, 61 S. E. 271.

[a] "Any order made by such board in compliance with statutory notice and procedure constitutes an exercise of administrative authority only, and not of judicial power. Nor can such order be enforced except through the order or judgment of a duly constituted judicial tribunal having jurisdiction to hear and determine the matters involved and in which the corporation is given the right to be heard." *Chicago & N. W. Ry. Co. v. Dougherty*, 39 S. D. 147, 163 N. W. 715.

59. See *infra*, X, J, 2, c (V).

60. *Detroit & M. R. Co. v. Michigan R. Co.*, 178 Mich. 250, 144 N. W. 689.

61. See the statutes and *Wabash R. Co. v. Railroad Com.*, 176 Ind. 428, 95 N. E. 673; *State v. Chicago, M. & St. P. R. Co.*, 37 N. D. 98, 163 N. W. 730.

62. *Wabash R. Co. v. Railroad Com.*, 176 Ind. 428, 95 N. E. 673; *State ex rel. Board of R. Comrs. v. Duluth, W. & P. R. Co.*, 25 S. D. 106, 125 N. W. 565.

63. *State v. Chicago, B. & Q. R. Co.*, 90 Iowa 594, 58 N. W. 1060; *State v. Mason City & Ft. D. Ry. Co.*, 85 Iowa 516, 52 N. W. 490.

[a] An amendment may be allowed changing the form of action from one instituted in the name of the commissioners to one instituted in the name of the state. *Smith v. Chicago, M. & St. P. R. Co.*, 86 Iowa 202, 53 N. W. 128.

64. *State v. Chicago, M. & St. P. R. Co.*, 37 N. D. 98, 163 N. W. 730.

[a] Where the proceeding is purely statutory, the complaint must allege the performance of every act or condition necessary to the validity of the order. *State ex rel. La Follette v. Chicago, M. & St. P. R. Co.*, 16 S. D. 517, 94 N. W. 406. And see, *State v. Chicago, M. & St. P. R. Co.*, 86 Iowa 641, 53 N. W. 323.

65. *State v. Chicago, M. & St. P. R. Co.*, 37 N. D. 98, 163 N. W. 730, a statement of the substance of the order is sufficient.

[a] An allegation that the order made was within the jurisdiction of the commission is commonly inserted and is proper but unnecessary. *State v. Chicago, M. & St. P. R. Co.*, 37 N. D. 98, 163 N. W. 730.

66. *State v. Chicago, M. & St. P. R. Co.*, 37 N. D. 98, 163 N. W. 730.

67. *Board of Railroad Comrs. v. Delaware, L. & W. R. Co.*, 79 N. J. L. 219, 76 Atl. 236.

68. *State ex rel. Board of R. Comrs. v. Duluth, W. & P. R. Co.*, 25 S. D. 106, 125 N. W. 565, unnecessary formality will not however affect the pleading.

69. See generally the titles "An-

tions. Under some statutes, a right to a jury trial exists when the order of the commission requires the payment of money.⁷⁰ The judgment may be moulded to afford any relief appropriate under the pleadings.⁷¹

(B.) MATTERS REVIEWABLE. — The scope of the review of the action of the commission in such actions is determined by the provisions of the particular statute which is involved.⁷² The objection that an order is void, for want of jurisdiction may always be taken.⁷³

(III.) By Mandamus. — (A.) IN GENERAL. — In some states mandamus is the proper remedy to employ for the purpose of enforcing an order of a public service commission,⁷⁴ even though a suit in equity be pend-

swers;" "Bills and Answers;" "Demurrers;" "Denials."

[a] The nonexistence of facts, which if they did not exist would render the order of the commission untimely and inappropriate will not be presumed on demurrer. *State v. Chicago, M. & St. P. R. Co.*, 37 N. D. 98, 163 N. W. 730.

70. *Turner Creamery Co. v. Chicago, M. & St. P. R. Co.*, 36 S. D. 310, 154 N. W. 819, P. U. R. 1916A, 1083.

71. *State v. Chicago, M. & St. P. R. Co.*, 37 N. D. 98, 163 N. W. 730, the rule is based upon the equitable nature of the action.

[a] A conditional decree requiring compliance with the order whenever same act, which is a necessary condition precedent to performance, is performed by other persons, may be given. *State v. Chicago, M. & St. P. R. Co.*, 37 N. D. 98, 163 N. W. 730.

72. See the statutes.

73. *Southern Indiana R. Co. v. Railroad Com.*, 172 Ind. 113, 87 N. E. 966, a suit in equity.

74. *Ala.*—*Railroad Com. v. Alabama G. S. R. Co.*, 185 Ala. 354, 64 So. 13, L. R. A. 1915D, 98. *Fla.*—*State ex rel. R. R. Comrs. v. Florida East Coast R. Co.*, 64 Fla. 112, 59 So. 385; *State ex rel. R. R. Comrs. v. Atlantic Coast Line R. Co.*, 60 Fla. 465, 54 So. 394. *Kan.* *State v. Parsons St. R. & Elect. Co.*, 81 Kan. 430, 105 Pac. 704, 28 L. R. A. (N. S.) 1082; *State ex rel. Taylor v. Missouri Pac. R. Co.*, 76 Kan. 467, 92 Pac. 606. *Mich.*—*Michigan R. R. Com. v. Detroit & M. R. Co.*, 182 Mich. 234, 148 N. W. 385; *Detroit & M. R. Co. v. Michigan R. Co.*, 178 Mich. 250, 144 N. W. 689, *affirmed*, 240 U. S. 561, 36 Sup. Ct. 424, 60 L. ed. 802. *Neb.* *State ex rel. Nebraska S. R. Com. v. Missouri Pac. Ry. Co.*, 100 Neb. 700, 161 N. W. 270, P. U. R. 1917C, 597.

N. J.—*Board of Railroad Comrs. v. Delaware, L. & W. R. Co.*, 79 N. J. L. 219, 76 Atl. 236, although the remedy by specific performance also exists. *N. C.*—*State ex rel. North Carolina Corp. Com. v. Southern R. Co.*, 147 N. C. 483, 61 S. E. 271. *S. D.*—*State v. Chicago, M. & St. P. R. Co.*, 16 S. D. 517, 94 N. W. 406. *Utah.*—*State v. Ogden Rapid Transit Co.*, 38 Utah 242, 112 Pac. 120.

Unless the Order Has Been Suspend-
ed.—See *infra*, X, K, 5.

[a] Until an order of the commission is fully, finally and completely made the writ will not issue. *State ex rel. Caster v. Flannelly*, 96 Kan. 372, 152 Pac. 22, P. U. R. 1916C, 810.

[b] In New York, either a writ of mandate or an injunction may issue as the court may determine is best suited to afford relief. *Public Service Com. v. Interborough R. T. Co.*, 219 N. Y. 355, 114 N. E. 387, P. U. R. 1917B, 323.

[c] An order conflicting with a municipal ordinance, which was not brought to the attention of the commission, will not be enforced by mandamus. *State ex rel. Burr v. Atlantic Coast Line R. Co.*, 71 Fla. 102, 70 So. 941, P. U. R. 1916C, 519.

[d] Leave to sue the federal receiver of a public utility need not be obtained from the court. *Railroad Com. v. Alabama G. S. R. Co.*, 185 Ala. 354, 64 So. 13, L. R. A. 1915D, 98.

[e] In the event of an expressed predetermination not to obey the order, the proceeding may be instituted prior to the expiration of the period given the utility to comply with it. *State v. Chicago, B. & Q. R. Co.*, 85 Kan. 649, 118 Pac. 872.

[f] Only when a clear right to the writ is shown. *State ex rel. R. R. Comrs. v. Florida East Coast R. Co.*,

ing to review the order.⁷⁵ The proceedings are governed by the general rules applicable to other mandamus proceedings.⁷⁶ They may be instituted by the attorney of the commission.⁷⁷ The alternative writ should be specific and certain in its allegations.⁷⁸

(B.) MATTERS REVIEWABLE. — The jurisdiction of the commission to make the order in question,⁷⁹ and its reasonableness and regularity⁸⁰ may be reviewed.

(IV.) Other Remedies. — In a few states the remedy provided is purely statutory,⁸¹ or the proceedings are criminal in character and

69 Fla. 165, 67 So. 906, P. U. R. 1915C, 207.

75. Michigan R. R. Com. v. Detroit & M. R. Co., 182 Mich. 234, 148 N. W. 385; Michigan R. Com. v. Detroit & M. R. Co., 178 Mich. 230, 144 N. W. 696; Michigan R. Com. v. Michigan Cent. R. Co., 159 Mich. 580, 124 N. W. 564.

76. See the title "Mandamus."

And see, Michigan R. Com. v. Detroit & M. R. Co., 178 Mich. 230, 144 N. W. 696.

77. State v. Chicago, B. & Q. R. Co., 85 Kan. 649, 118 Pac. 872.

78. State ex rel. R. R. Comrs. v. Atlantic Coast Line R. Co., 67 Fla. 441, 63 So. 729; State ex rel. R. R. Comrs. v. Atlantic Coast Line R. Co., 60 Fla. 465, 54 So. 394, a specific duty should be averred.

79. State ex rel. Public Serv. Com. v. Skagit River Tel. & Tel. Co., 85 Wash. 29, 147 Pac. 885, P. U. R. 1915C, 902.

[a] Failure of the utility to seek a review of the order by the method provided by statute does not prevent it from attacking the order on this ground. State ex rel. Public Serv. Com. v. Skagit River Tel. & Tel. Co., 85 Wash. 29, 147 Pac. 885, P. U. R. 1915C, 902.

80. Fla.—State ex rel. R. R. Comrs. v. Florida East Coast R. Co., 72 Fla. 379, 73 So. 171, P. U. R. 1917B, 1023; State ex rel. R. R. Comrs. v. Florida East Coast Ry. Co., 64 Fla. 112, 59 So. 385, 392. Kan.—State ex rel. Taylor v. Missouri P. R. Co., 76 Kan. 467, 92 Pac. 606. Minn.—State v. Minneapolis, etc., R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514. Okla.—Atchison, T. & S. F. R. Co. v. State, 26 Okla. 166, 109 Pac. 218.

[a] Failure to institute a direct proceeding to vacate an order does not prevent a public utility from contest-

ing its reasonableness. State ex rel. Taylor v. Missouri P. R. Co., 76 Kan. 467, 92 Pac. 606.

[b] The burden (1) of proving unreasonableness of the order is upon the utility (State ex rel. Taylor v. Missouri P. R. Co., 76 Kan. 467, 92 Pac. 606). See also State ex rel. R. R. Comrs. v. Atlantic Coast Line R. Co., 67 Fla. 441, 63 So. 729), and (2) clear and satisfactory evidence is required. State ex rel. R. R. Comrs. v. Florida East Coast R. Co., 67 Fla. 83, 64 So. 443; Michigan R. Com. v. Detroit & M. R. Co., 178 Mich. 230, 144 N. W. 696.

[c] It is presumed that the findings of the commission were supported by the evidence, where an appeal to the courts from its order was authorized but was not taken. State ex rel. Nebraska S. R. Com. v. Missouri Pac. R. Co., 100 Neb. 700, 161 N. W. 270, P. U. R. 1917C, 597.

[d] Admissions in the pleadings may overcome the prima facie effect of the order as a reasonable regulation. State ex rel. R. R. Comrs. v. Florida East Coast R. Co., 64 Fla. 112, 59 So. 385.

[e] The main question to be determined "is not whether the relators erred in their findings on the facts upon which they acted in making the order involved here, but whether the relators as Railroad Commissioners in making the order exceeded their authority or abused their official discretion to the substantial injury of respondent's constitutional rights." State ex rel. R. R. Comrs. v. Florida East Coast R. Co., 67 Fla. 83, 64 So. 443.

[f] A referee's findings of fact or conclusions of law are not binding upon the court in such a proceeding. State ex rel. Taylor v. Missouri P. R. Co., 76 Kan. 467, 92 Pac. 606.

81. Louisville & N. R. Co. v. Green-

are prosecuted by indictment.⁸² An action for damages may be maintained by any person injured by reason of the failure of a public utility to obey an order of the commission.⁸³

(V.) **Actions To Recover Fines or Penalties.**—(A.) **IN GENERAL.**—Under some statutes, the commission is authorized to assess a fine against a corporation which is in contempt by reason of failure to obey its orders, rules or regulations,⁸⁴ or the statute itself prescribes the penalty,⁸⁵ and an action in the courts may be maintained to recover the amount of the fine.⁸⁶ An action to recover a fine or penalty though

brier Dist. Co., 170 Ky. 775, 187 S. W. 296, P. U. R. 1916F, 508.

[a] **In Kentucky** (1) a summons issues upon the award of the commission, filed in the circuit court, and no petition is necessary. *Louisville & N. R. Co. v. Greenbrier Dist. Co.*, 170 Ky. 775, 187 S. W. 296, P. U. R. 1916F, 508. (2) An answer based on information and belief as to a fact presumptively within the knowledge of the defendant is insufficient. *Louisville & N. R. Co. v. Greenbrier Dist. Co.*, 170 Ky. 775, 187 N. W. 296, P. U. R. 1916F, 508. (3) The record is composed of a copy of the award and of the evidence; if the utility desires other papers to be filed, it may cause them to be filed. *Louisville & N. R. Co. v. Greenbrier Dist. Co.*, 170 Ky. 775, 187 S. W. 296, P. U. R. 1916F, 508.

[b] **In New Mexico** the cause is removed to the Supreme Court when the utility fails to comply with the order of the commission. *Seward v. Denver & R. G. R. Co.*, 17 N. M. 557, 131 Pac. 980, 46 L. R. A. (N. S.) 242.

[c] **The validity of the order** cannot be questioned. *Louisville & N. R. Co. v. Greenbrier Dist. Co.*, 170 Ky. 775, 187 S. W. 296, P. U. R. 1916F, 508.

82. *St. Louis, I. M. & S. R. Co. v. State*, 99 Ark. 1, 136 S. W. 938; *People v. Dempsey* (App. Div.), 167 N. Y. Supp. 810.

[a] **No right to a Jury Trial Exists.**—*St. Louis, I. M. & S. R. Co. v. State*, 99 Ark. 1, 136 S. W. 938.

[b] **The Order of the Commission Is Presumed To Be Reasonable and Legal.**—*St. Louis, I. M. & S. R. Co. v. State*, 99 Ark. 1, 136 S. W. 938.

83. See *infra*, this note.

[a] **Venue.**—An action for damages suffered by reason of the failure of a railroad to construct a spur track be brought in the county where the

principal place of business of the railroad is located. *English v. Central of Georgia R. Co.*, 7 Ga. App. 263, 66 S. E. 969.

84. **Fla.**—*Atlantic Coast Line R. Co. v. State*, 74 So. 595. **La.**—*Railroad Com. v. Kansas City Southern R. Co.*, 111 La. 133, 35 So. 487. **Okla.** *Atchison, T. & S. F. R. Co. v. State*, 165 Pac. 125.

[a] **Where a statute authorizes a penalty for violation of a "rate, schedule, rule, or regulation"** no penalty can be imposed for violation of an "order" of the commission, the words not being synonymous. *Atlantic Coast Line R. Co. v. State* (Fla.), 74 So. 595.

[b] **A complaint before a commission** for violation of an order should contain a specific allegation with reference to the act constituting a violation of the order. *Ft. Supply Tel. & Tel. Co. v. Pioneer Tel. & Tel. Co.* (Okla. C. C. R.), P. U. R. 1917A, 188.

85. *Missouri Pac. R. Co. v. Board of R. R. Comrs.*, 85 Kan. 229, 116 Pac. 896.

86. **Ariz.**—*Southern Pac. Co. v. State*, 165 Pac. 303, P. U. R. 1917F, 938. **Fla.**—*State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639. **Tex.**—*State v. Gulf, C. & S. F. R. Co.*, 55 Tex. Civ. App. 108, 118 S. W. 736, for failure to furnish information. **Vt.**—*Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915C, 1269.

Wash. *State ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8.

[a] **An action at common law** may be maintained to recover any fine, penalty or compensation for violation of a public utility of a valid rule or order of a commission. *State ex rel. Chicago, etc., R. Co. v. Public Service Com.*, 94 Wash. 274, 162 Pac. 523,

civil in form is criminal in its nature;⁸⁷ it cannot be removed from a state to a federal court.⁸⁸ In such an action a party is entitled to a jury trial.⁸⁹

(B.) PLEADINGS. — The complaint should clearly show that the order of the commission was one which it was within the jurisdiction of the commission to make.⁹⁰ Except where the common law rule is still followed, the statute need not be pleaded or counted upon.⁹¹ The order violated must be pleaded,⁹² but the facts showing its reasonableness need not be set out.⁹³

(C.) SCOPE OF REVIEW. — The order violated cannot be attacked for mere errors or irregularities,⁹⁴ and under some statutes the reasonableness of the order cannot be inquired into,⁹⁵ though under others a contrary rule prevails.⁹⁶

P. U. R. 1917C, 631, amount specified in a general rule to be fortified for failure of carrier to supply cars on demand.

[b] The commission may maintain the action under some statutes. *Railroad Com. v. Kansas City Southern R. Co.*, 111 La. 133, 35 So. 487.

87. *State v. St. Louis & S. F. R. Co.*, 173 Fed. 572. But compare the title "Penalties, Forfeitures and Fines."

[a] Such proceedings are quasi-criminal and the procedure prescribed by the statute must be closely followed. *St. Louis & S. F. R. Co. v. State*, 26 Okla. 62, 107 Pac. 929, 30 L. R. A. (N. S.) 137.

88. *State v. St. Louis & S. F. R. Co.*, 173 Fed. 572.

89. See *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639.

90. *Littlefield v. Fitchburg R. Co.*, 158 Mass. 1, 32 N. E. 859.

[a] An affidavit (1) is the basis of proceedings, under some statutes. The affidavit must set forth the facts alleged to constitute the offense. *St. Louis & S. F. R. Co. v. State*, 26 Okla. 62, 107 Pac. 929, 30 L. R. A. (N. S.) 137. (2) An amendment to the affidavit must be verified. *St. Louis & S. F. R. Co. v. State*, 26 Okla. 62, 107 Pac. 929, 30 L. R. A. (N. S.) 137.

91. *Atlantic Coast Line R. Co. v. State* (Fla.), 74 So. 595. See the title "Penalties, Forfeitures and Fines."

92. See *infra*, this note.

[a] Defects appearing on the face of the order may be cured by allegations of the complaint. *State v. Seaboard Air Line Ry.*, 56 Fla. 670, 47 So. 986; *Littlefield v. Fitchburg R. Co.*,

158 Mass. 1, 32 N. E. 859, omission of showing that notice of the hearing was given.

[b] A copy of the order for the violation of which the penalty was incurred, must be set out in or attached to the complaint, under some statutes. *State v. Seaboard Air Line Ry.*, 56 Fla. 670, 47 So. 986.

93. *State v. Corvallis & E. R. Co.*, 59 Ore. 450, 117 Pac. 980.

94. See *infra*, this note.

[a] The objection that the complaint before the commission failed to state a cause of action cannot be urged. *State ex rel. Railroad Com. v. Oregon R. & N. Co.*, 68 Wash. 160, 123 Pac. 3.

[b] The amount of the fine assessed will not be reviewed, where it is within the limit fixed by statute and the proceedings have not been irregular. *Achison, T. & S. F. Ry. Co. v. State* (Okla.), 165 Pac. 125.

95. *State v. Corvallis & E. R. Co.*, 59 Ore. 450, 117 Pac. 980; *State ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8.

[a] The right to review the order by a direct appeal furnishes an exclusive remedy under some statutes. *State ex rel. Railroad Com. v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8.

96. *State v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.), 165 S. W. 491, where defendant's answer amounts to a plea in reconviction or a cross-bill.

[a] Reasonableness a question of law for the court. *Southern R. Co. v. Atlanta Sand & Supply Co.*, 135 Ga. 35, 68 S. E. 807.

[b] In Oklahoma when an order belongs to a class from which no appeal could be taken, its reasonableness may

K. REVIEW AND APPEAL. — 1. In General. — Many of the statutes provide a method for reviewing final⁹⁷ orders of a public service commission by an appeal or by proceedings in the nature of an appeal, in courts which are expressly given jurisdiction of the subject matter,⁹⁸ and even in the absence of such a provision, the courts are open to any interested party for the purpose of determining any matter which is the appropriate subject of judicial inquiry,⁹⁹ though, in the

be determined on an appeal from the imposition of a fine. *Gulf, C. & S. F. R. Co. v. State*, 33 Okla. 378, 125 Pac. 1103.

[c] Only the objections to the order presented to the commission as a ground for rehearing, may be urged. *Southern Pac. Co. v. State* (Ariz.), 165 Pac. 303, P. U. R. 1917F, 938.

97. See *infra*, this note.

[a] A provisional order fixing rates subject to modification upon ascertainment of the actual results after a fair test has been made, is not such a final order as may be appealed. *Bluefield v. Bluefield Waterworks & Imp. Co.* (W. Va.), 94 S. E. 121.

[b] An order directing the installation of an intersecting railroad crossing is a final order from which an appeal lies, although the commission retains jurisdiction to supervise the execution of the order. *Pittsburg, C. C. & St. L. Ry. Co. v. Hunt*, 171 Ind. 189, 86 N. E. 328.

98. See the statutes and *Ala.*—*Railroad Commission v. Alabama Northern R. Co.*, 182 Ala. 357, 62 So. 749. *Cal.* *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652. *Ind.*—*Grand Rapids & Ind. R. Co. v. Railroad Com.*, 38 Ind. App. 657, 78 N. E. 358. *Miss.*—*Illinois Central R. Co. v. Dodd*, 105 Miss. 23, 61 So. 743, 49 L. R. A. (N. S.) 565. *Neb.*—*Hooper Tel. Co. v. Nebraska Tel. Co.*, 96 Neb. 245, 147 N. W. 674. *N. H.*—*Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028. *N. M.*—*Seward v. Denver & R. G. R. Co.*, 17 N. M. 557, 131 Pac. 980, 46 L. R. A. (N. S.) 242. *N. C.*—*State ex rel. Board of Railroad Comrs. v. Wilmington & W. R. Co.*, 122 N. C. 877, 29 S. E. 334. *N. D.*—*In re Minneapolis*, St. P. & S. S. M. R. Co., 30 N. D. 221, 152 N. W. 513, P. U. R. 1915D, 434. *Ohio.*—*Hocking Valley R. Co. v. Public Utilities Com.*, 92 Ohio St. 362, 110 N. E. 521, P. U. R. 1916A, 1062. *Va.*—See *Winchester & S. R. Co. v. Com.*, 106 Va.

264, 55 S. E. 692. *W. Va.*—*Bluefields v. Bluefields Waterworks & Imp. Co.*, 94 S. E. 121.

[a] Whether an order is framed in negative or affirmative language, is immaterial. *In re Minneapolis*, St. P. & S. S. M. R. Co., 30 N. D. 221, 152 N. W. 513, P. U. R. 1915D, 434.

[b] The amount involved is not made a test of appellate jurisdiction in this class of appeals. *Winchester & S. R. Co. v. Com.*, 106 Va. 264, 55 S. E. 692.

[c] In California, under the terms of the state constitution, the courts, other than the supreme court in a limited class of cases, have no control over the action of the state railroad commission. *Sexton v. Atchison, T. & S. F. R. Co.*, 173 Cal. 760, 161 Pac. 748, P. U. R. 1917B, 786; *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652.

[d] In Kansas if proceedings are instituted in the supreme court, other proceedings pending in a district court may be stayed. See *Union Pac. R. Co. v. Public Utilities Com.*, 95 Kan. 604, 148 Pac. 667, P. U. R. 1915D, 377.

[e] A review of the legislative or administrative action of a commission by the courts, is not prohibited by a constitutional segregation of powers into legislative, executive and judicial. *In re Minneapolis*, St. P. & S. S. M. R. Co., 30 N. D. 221, 152 N. W. 513, P. U. R. 1915D, 434.

Review in actions brought to enforce orders, see *supra*, X, J, 2, c, (II), (B); X, J, 2, c, (III), (B).

Review in action for fine or penalty, see *supra*, X, J, 2, c, (V), (C).

99. *U. S.*—*Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 311, 34 Sup. Ct. 48, 58 L. ed. 229; *Delaware, L. & W. R. Co. v. Stevens*, 172 Fed. 595. *Ark.*—*St. Louis, I. M. & S. R. Co. v. State*, 99 Ark. 1, 136 S. W. 938. *Vt.* *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915C, 1269.

[a] **Rule Stated.** — "Undoubtedly

absence of a right of review conferred by statute, the order of a commission in its administrative aspect is final and conclusive.¹ The statutory method of review is exclusive,² and the failure to resort to it renders the order conclusive,³ except that it may always be attacked for want of jurisdiction,⁴ or, in equity, because of the alleged invasion of constitutional rights.⁵ Exceptions to the rulings of the commission raising questions of law may, under some statutes, be taken to the courts,⁶ and in other states a review of the order may be made in an action to vacate or set it aside,⁷ or the same relief may be sought by an order to show cause,⁸ or a suit in equity to enjoin its enforcement may be maintained.⁹ An appeal may ordinarily be taken from a final judgment in a lower court to the proper appellate tribunal.¹⁰

the courts have power to prevent an abuse of discretion by the commission and to require that their powers be exercised according to law and in a manner not to injure property rights unjustly. Whether their orders deprive a party of a constitutional or statutory right, whether he has been accorded a fair and adequate hearing, or whether for any reason their orders are contrary to law, are justifiable questions; and if they arise in circumstances calling for equitable relief, the court of chancery will afford a remedy." *Sayers v. Montpelier & W. R. R.*, 90 Vt. 201, 97 Atl. 660, Ann. Cas. 1918B, 1050, P. U. R. 1916E, 508.

Suits in equity to determine the reasonableness of orders, see *infra*, X, L.

1. *Clemmons v. Railroad Com.*, 173 Cal. 254, 159 Pac. 713, P. U. R. 1916F, 469; *Grand Rapids & I. R. Co. v. Railroad Com.*, 167 Ind. 214, 78 N. E. 981.

[a] **Failure of a statute to provide for a judicial review** of orders of a commission, does not render the statute unconstitutional as failing to provide for due process of law. *Louisville & N. R. Co. v. Siler*, 186 Fed. 176, 191, *affirmed*, *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. ed. 229.

2. *Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210.

[a] **A suit to enjoin the enforcement of an order**, as unreasonable, (1) cannot be maintained where the statute provides for an appeal from the order (*Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210. See also *Denver & S. P. R. Co. v. Englewood*, 62 Colo. 229, 161 Pac. 151, P. U. R. 1916E, 134),

(2) even though the appeal is to be taken to the court of equity. *Sayers v. Montpelier & W. R. R.*, 90 Vt. 201, 97 Atl. 660, Ann. Cas. 1918B, 1050, P. U. R. 1917E, 1022.

3. *State ex rel. Railroad Com. v. Oregon R. & N. Co.*, 68 Wash. 160, 123 Pac. 3.

4. *State ex rel. Public Serv. Com. v. Skagit River Tel. & Tel. Co.*, 85 Wash. 29, 147 Pac. 885, P. U. R. 1915C, 902.

5. See *infra*, X, L.

6. *Augusta v. Lewiston, A. & W. St. Ry.*, 114 Me. 24, 95 Atl. 267, P. U. R. 1915F, 260.

7. See the statutes.

8. *In re Rochester, C. E. Traction Co.*, 118 App. Div. 521, 102 N. Y. Supp. 1112, attacking an order refusing to issue a certificate of public necessity.

9. *In re Luttgerding*, 83 Kan. 205, 110 Pac. 95.

10. **Conn.**—*Appeal of Norwalk*, 89 Conn. 537, 94 Atl. 988, P. U. R. 1915E, 294. **Ind.**—*Northern Indiana & Southern Mich. Tel. & C. Co. v. People's Mut. Tel. Co.*, 184 Ind. 267, 111 N. E. 4, P. U. R. 1916C, 534. **La.**—*Vicksburg, S. & P. R. Co. v. Railroad Com.*, 132 La. 193, 61 So. 199, Ann. Cas. 1914C, 1168. **Mo.**—*Macon v. Atkinson*, 266 Mo. 484, 181 S. W. 396, discussing the position of the supreme court on such an appeal. **N. D.**—*In re Minneapolis, St. P. & S. S. M. R. Co.*, 30 N. D. 221, 152 N. W. 513, P. U. R. 1915D, 434.

[a] **A judgment which does not dispose of a case** as to all of the parties to it is not a final judgment and not appealable. *Northern Indiana & Southern Mich. Tel. & C. Co. v. People's*

Certiorari, or as it is sometimes called, a writ of review, may be employed in some states to review the orders of a public service commission,¹¹ which are final in character;¹² in other states this remedy is not available.¹³

2. Orders Reviewable.—Only such of the orders of a commission are subject to review by the courts in their supervisory or appellate capacity, as are specially mentioned by the statute.¹⁴

Mut. Tel. Co., 184 Ind. 267, 111 N. E. 4, P. U. R. 1916C, 534.

[b] **A commission may appeal from a judgment reversing its order** although the statute does not expressly give it such right. It is a party "aggrieved" by the judgment, under the general law. *State v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

11. **Ala.**—*Ex parte* Birmingham, 74 So. 51, P. U. R. 1917C, 667. **Cal.** *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652. **N. J.**—*Collingswood Sewerage Co. v. Borough of Collingswood* (N. J. L.), 102 Atl. 901; *Public Service Gas Co. v. Board of Public Utility Comrs.*, 87 N. J. L. 581, 92 Atl. 606, 94 Atl. 634, 95 Atl. 1079, P. U. R. 1915E, 251, L. R. A. 1917B, 930. **N. Y.**—*People ex rel. Coney Island, etc. Co. v. Public Service Com.*, 157 App. Div. 698, 142 N. Y. Supp. 942; *People ex rel. Sawyer v. Board of R. R. Comrs.*, 128 App. Div. 814, 114 N. Y. Supp. 122; *People ex rel. Brooklyn H. R. Co. v. Public Service Com.*, 101 Misc. 10, 166 N. Y. Supp. 825, discussing the necessary allegations in the writ.

Certiorari proceedings, generally, see 4 STANDARD PROC. 881.

As to the scope of review on certiorari proceedings, see *infra*, X, K, 9, b, (III).

[a] **An order granting or refusing a certificate of public necessity may be reviewed.** *People ex rel. N. Y. C. & H. R. R. Co. v. Public Service Com.*, 195 N. Y. 157, 88 N. E. 261.

[b] **The reasonableness of an order fixing rates may be reviewed by certiorari in some states.** *Public Service Gas Co. v. Board of Public Utility Comrs.*, 87 N. J. L. 581, 92 Atl. 606, 94 Atl. 634, 95 Atl. 1079, P. U. R. 1915E, 251; *Passaic v. Board of Public Utility Comrs.*, 87 N. J. L. 705, 95 Atl. 127, P. U. R. 1915E, 625.

12. *Holabird v. Railroad Com.*, 171 Cal. 691, 154 Pac. 831, P. U. R. 1916C, 458.

[a] **A decision upholding the jurisdiction of the commission over the defendant and the subject matter of the complaint, but reserving final determination of the proceedings, is not reviewable.** *Holabird v. Railroad Com.*, 171 Cal. 691, 154 Pac. 831, P. U. R. 1916C, 458.

13. See *infra*, this note.

[a] **Basis of this rule is that certiorari does not lie to review the action of a board or commission of a legislative character in the absence of a special statutory provision.** *Dela-ware, L. & W. R. Co. v. Stevens*, 172 Fed. 595.

14. See the statutes and **Ind.**—*Public Service Com. v. State*, 184 Ind. 273, 111 N. E. 10, P. U. R. 1916C, 42. **Minn.** *Minneapolis & St. L. Ry. Co. v. Railroad & Warehouse Com.*, 44 Minn. 336, 46 N. W. 559. **Okla.**—*Atchison, T. & S. F. R. Co. v. State*, 28 Okla. 12, 115 Pac. 1101 (order repealing penalty imposed on passengers paying cash fares not appealable); *Atchison, T. & S. F. Ry. Co. v. State*, 28 Okla. 797, 115 Pac. 872; *Atchison, T. & S. F. Ry. Co. v. State*, 28 Okla. 465, 114 Pac. 722; *St. Louis & S. F. Ry. Co. v. State*, 24 Okla. 805, 105 Pac. 351, order requiring report of all accidents is not reviewable. **W. Va.**—*Howell v. Public Service Com.*, 78 W. Va. 664, 90 S. E. 105, P. U. R. 1917A, 268, order granting the right to erect a dam.

[a] **Orders granting or refusing authority to issue securities are not appealable in Indiana.** *Public Service Com. v. State*, 184 Ind. 273, 111 N. E. 10, P. U. R. 1916C, 42.

[b] **Orders calling upon a public utility for information are frequently not reviewable.** *Atchison, T. & S. F. Ry. Co. v. State*, 27 Okla. 329, 117 Pac. 328.

[c] **In Oklahoma** (1) an appeal lies only from orders affecting the management and operation of transportation companies in the interest of persons who use such companies for the transportation of themselves or their

3. Jurisdiction of the Courts.—Under the proceedings for review provided by statute, the jurisdiction of the court is entirely statutory,¹⁵ and its nature and extent varies in different states. In some the court acts merely as a superior administrative body,¹⁶ and the judgments which can be rendered are limited to those which the commission could have entered in the first instance;¹⁷ in others it acts in the exercise of its purely judicial functions.¹⁸ In some states the reviewing court can affirm or reverse the commissioner's order as a whole but cannot direct a dismissal of the proceedings,¹⁹ or revise or modify the order made by the commission.²⁰ A federal court has no appellate or supervisory jurisdiction over the administrative orders of a state commission,²¹ and a proceeding to review the action of a commission pending in a state court, cannot be removed to a federal court.²²

4. Conditions Precedent.—The conditions precedent to review depend upon statute,²³ which sometimes requires a previous application to the commission for a rehearing;²⁴ under other statutes, how-

property. *Atchison, T. & S. F. R. Co. v. State*, 40 Okla. 411, 138 Pac. 1026; *St. Louis & S. F. R. Co. v. Miller*, 31 Okla. 801, 123 Pac. 1047; *Cooper v. Chicago, R. I. & P. R. Co.*, 31 Okla. 282, 121 Pac. 654. (2) In contempt cases an order adjudging the defendant guilty are reviewable, but an order adjudging him not guilty is not reviewable. *St. Louis & S. F. Ry. Co. v. Coyle*, 29 Okla. 201, 115 Pac. 769.

15. *Briggs v. Cass* Circ. Judge, 178 Mich. 28, 144 N. W. 501, no intendments are made in favor of the action of the court.

16. **U. S.**—*Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150, applying the law of Virginia. **Conn.**—*Root v. New Britain Gas Light Co.*, 91 Conn. 134, 99 Atl. 559, P. U. R. 1917C, 102. **N. H.**—*Boston & M. R. R. v. State*, 77 N. H. 437, 93 Atl. 306, P. U. R. 1915C, 25. **Okla.**—*In re Intrastate Express Rates*, 40 Okla. 237, 138 Pac. 382; *Pioneer Tel. & Tel. Co. v. State*, 40 Okla. 417, 138 Pac. 1033; *Atchison, T. & S. F. R. Co. v. State*, 23 Okla. 510, 101 Pac. 262.

17. *Boston & M. R. R. v. State*, 77 N. H. 437, 93 Atl. 306, P. U. R. 1915C, 25.

18. **U. S.**—*Detroit & Mackinac R. Co. v. Michigan R. Com.*, 235 U. S. 402, 35 Sup. Ct. 126, 59 L. ed. 288 (applying the law of Michigan); *Bacon v. Rutland R. Co.*, 232 U. S. 134, 34 Sup. Ct. 283, 58 L. ed. 538, applying the law of Vermont. **La.**—*Morgan's*

L. & T. R. & S. S. Co. v. Railroad Com., 109 La. 247, 33 So. 214. **Mich.**—*Michigan R. R. Com. v. Detroit & M. R. Co.*, 182 Mich. 234, 148 N. W. 385; *Detroit & M. R. Co. v. Michigan R. Com.*, 178 Mich. 250, 144 N. W. 689. **Neb.**—*Hooper Tel. Co. v. Nebraska Tel. Co.*, 96 Neb. 245, 147 N. W. 674.

19. *Chicago, B. & Q. R. Co. v. Public Service Com.*, 266 Mo. 333, 181 S. W. 61.

20. **N. J.**—*Public Service Gas Co. v. Board of Public Utility Comrs.*, 84 N. J. L. 463, 87 Atl. 651. **Okla.**—*Gulf, C. & S. F. Ry. Co. v. State*, 23 Okla. 524, 101 Pac. 258, order cannot be affirmed in part and reversed in part. **Wis.**—*Chicago, B. & Q. R. Co. v. Railroad Com.*, 152 Wis. 654, 140 N. W. 296.

[a] "What order should be made in lieu of the one set aside rests exclusively within the jurisdiction of the board of public utilities commissioners." *Erie R. Co. v. Board of Public Utility Comrs.* (N. J. L.), 100 Atl. 346.

21. *North Carolina Corp. Com. v. Southern R. Co.*, 151 N. C. 447, 66 S. E. 427, order affecting maintenance of a station.

22. *North Carolina Corp. Com. v. Southern R. Co.*, 151 N. C. 447, 66 S. E. 427.

23. *Clemmons v. Railroad Com.*, 173 Cal. 254, 159 Pac. 713, P. U. R. 1916F, 469.

24. **Ariz.**—*Southern Pac. Co. v. State*, 165 Pac. 303, P. U. R. 1917F,

ever, no previous motion for a new trial or rehearing is required.²⁵

5. Supersedeas or Stay of Proceedings.—The court's right to suspend the operation of the commission's orders pending review is sometimes provided for²⁶ or restricted,²⁷ and are valid,²⁸ by statute, a common provision being that all orders of the commission shall be in force until finally held otherwise by the courts or until altered by the commission.²⁹

6. Taking and Perfecting the Appeal.—The procedure for taking an appeal is regulated by the various statutes.³⁰ The application for review must, of course, be made within the prescribed period of time.³¹

7. Parties.—The statute usually determines who may appeal from the commission's orders.³² Ordinarily, only persons directly interested in an order may take an appeal therefrom.³³ Under some stat-

938. Cal.—*Clemmons v. Railroad Com.*, 173 Cal. 254, 159 Pac. 713, P. U. R. 1916F, 469. Ind.—*Chicago, I. & L. R. Co. v. Railroad Com.*, 175 Ind. 630, 95 N. E. 364. N. H.—*Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028.

Rehearings before the commission, see *supra*, X, I, 6.

[a] One purpose of requiring a motion for a rehearing, specifying every ground of complaint, must have been to enable the commission to correct any error into which they may have fallen and thereby render an appeal unnecessary. *Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028.

25. *Baltimore & O. R. Co. v. Railroad Com.*, 196 Fed. 690 (applying law of Indiana); *St. Louis & S. F. R. Co. v. Williams*, 25 Okla. 662, 107 Pac. 423.

26. See the statutes and *State ex rel. Board, etc. v. District Court*, 53 Mont. 229, 163 Pac. 115, P. U. R. 1917C, 884 (certain classes of orders only fall within the rule); *Great Northern R. Co. v. Public Service Com.*, 69 Wash. 579, 125 Pac. 948.

Right to a temporary injunction in a suit in equity, attaching an order, see *infra*, X, L, 6.

27. *Briggs v. Cass Circ. Judge*, 178 Mich. 28, 144 N. W. 501; *State ex rel. Board, etc. v. District Court*, 53 Mont. 229, 163 Pac. 115, P. U. R. 1917C, 881, the rule is limited to orders affecting rates and charges.

[a] In Louisiana, (1) an order could not formerly be suspended by an injunction (*Kansas City Ry. Co. v. Railroad Com.*, 106 La. 582, 20 So. 131) but (2) under a subsequent amend-

ment to the statute an injunction may issue. *McAdams v. Wells, Fargo & Co. Express*, 139 La. 681, 71 So. 945, P. U. R. 1916E, 464.

28. No constitutional right to a supersedeas pending review. *State Public Utilities Com. v. Chicago & W. T. R. Co.*, 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50, P. U. R. 1917B, 1040.

[a] Enforcement of an order by mandamus pending its review by the courts, does not deprive a person of due process of law. *Detroit & M. Ry. Co. v. Michigan R. R. Co.*, 240 U. S. 564, 36 Sup. Ct. 424, 60 L. ed. 802.

29. *Detroit & M. R. Co. v. Michigan R. Co.*, 178 Mich. 250, 144 N. W. 689, *affirmed*, 240 U. S. 564, 36 Sup. Ct. 424, 60 L. ed. 802.

30. See the statutes.

[a] Notice of appeal need be served only upon the commission, under some statutes. *North Carolina Corp. Com. v. Southern R. Co.*, 151 N. C. 447, 66 S. E. 427.

31. *New Orleans G. N. R. Co. v. Railroad Com.*, 126 La. 1067, 53 So. 322.

[a] An appeal to a higher court from the judgment of a lower court must be perfected within the time expressly limited by statute. *Brugier v. Railroad Com.*, 132 La. 401, 61 So. 415; *Atchison, T. & S. F. Ry. Co. v. State*, 23 Okla. 192, 99 Pac. 1081.

32. See the statutes and *Gulf, C. & S. F. Ry. Co. v. State*, 26 Okla. 761, 110 Pac. 651.

33. *Wharton v. Miller*, 33 Okla. 771, 127 Pac. 1063.

[a] An appeal from a general order not applicable to any particular utility, can be taken only by a utility whose

utes, the state may appeal.³⁴

Only such persons as are mentioned in the statute should be made parties defendant.³⁵ Ordinarily, the commission is a proper, or necessary, party defendant to proceedings for review,³⁶ though under some statutes it is not.³⁷

8. Record or Pleadings.—The record upon which the appeal is heard is to be made up, or the pleadings upon which a trial de novo is had are to be prepared, in accordance with the provisions of the particular statute.³⁸

9. Hearing and Determination.—a. *Generally.*—The character of the hearing is determined largely by statute.³⁹

b. *Nature and Scope of Review.*—(I.) *In General.*—Generally a statute cannot constitutionally make the commission's determination of the facts conclusive on the courts,⁴⁰ though the state constitution and

interests are directly affected by the order. *Gulf, C. & S. F. Ry. Co. v. State*, 26 Okla. 761, 110 Pac. 651.

[b] Where an order determines the location of a station property owners at other but adjacent places are not entitled to appeal from the order. *Wharton v. Miller*, 33 Okla. 771, 127 Pac. 1063.

[c] A competing utility is a party aggrieved by an order granting a certificate of public convenience. *People ex rel. N. Y. C. & H. R. R. Co. v. Public Service Com.*, 195 N. Y. 157, 88 N. E. 261, it may be the relator in certiorari proceedings.

34. *North Carolina Corp. Com. v. Winston-Salem S. R. Co.*, 170 N. C. 560, 87 S. E. 785; *North Carolina Corp. Com. v. Southern R. Co.*, 151 N. C. 447, 66 S. E. 427.

35. *Gates v. Public Service Com.*, 86 Ore. 442, 167 Pac. 791, 168 Pac. 939.

[a] The lessor of the party operating a public utility is not a proper defendant. *Gates v. Public Service Com.*, 86 Ore. 442, 167 Pac. 791, 168 Pac. 939.

[b] Upon an appeal from an order adjudging a utility guilty of contempt for the violation of an order of the commission, a co-defendant who was acquitted of the charge is not a proper party respondent. *St. Louis & S. F. R. Co. v. Coyle*, 29 Okla. 201, 115 Pac. 769.

[c] Where an order requiring repayment of excessive charges to particular individuals is made, such persons are necessary parties to an action to have the order set aside. *Louisville & N. R. Co. v. Siler*, 186 Fed. 175,

affirmed, *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 319, 34 Sup. Ct. 48, 58 L. ed. 229.

36. *In re Luttgerding*, 83 Kan. 205, 110 Pac. 95.

37. *Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028; *Boston & M. R. R. v. State*, 77 N. H. 437, 93 Atl. 306, P. U. R. 1915C, 25; the state is the adverse party in a proceeding involving rendition of service by a railroad.

38. See the statutes and *St. Louis & S. F. R. Co. v. Williams*, 25 Okla. 662, 107 Pac. 428.

[a] Where an order remanding the case for taking further evidence and reporting the same to the court has been made, evidence taken upon a collateral proceeding pending the appeal may be incorporated in the return. *Hine v. Wadlington*, 27 Okla. 285, 111 Pac. 543.

Right of appellate court to consider new evidence, see *infra*, X, K, 9, c.

39. See the statutes and *infra*, this section.

[a] The fact that a trial by jury is not provided for in the courts does not render a statute unconstitutional. *Seward v. Denver & R. G. R. Co.*, 17 N. M. 557, 131 Pac. 980, 46 L. R. A. (N. S.) 242; *Turner Creamery Co. v. Chicago, M. & St. P. R. Co.*, 36 S. D. 310, 154 N. W. 819, P. U. R. 1916A, 1083, at least where a jury trial may be had in an action to enforce the order of the commission.

40. U. S.—*Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970. Fla.—*State ex rel. R. R. Comrs. v. Florida East Coast R. Co.*, 72 Fla. 379, 73 So. 171,

statutes may be such as to make the commission a judicial body and give conclusive effect to its findings of fact, so far as the courts of the state are concerned.⁴¹ In some states the order of the commission is regarded as *prima facie* correct and reasonable, and the sole question for the court to determine is whether on the record before it the order made is in fact reasonable.⁴² In other states, while the order

P. U. R. 1917B, 1023. **Mo.**—*State ex rel. Columbia Tel. Co. v. Atkinson*, 271 Mo. 28, 195 S. W. 741.

[a] A statute declaring that a fixing of the valuation of the property of a public service corporation should be conclusive of the fact would be unconstitutional. *State ex rel. Columbia Tel. Co. v. Atkinson*, 271 Mo. 28, 195 S. W. 741.

[b] Orders of a commission regulating rates are not *res judicata* upon the matter, and binding upon the courts. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150; *Delaware, L. & W. R. Co. v. Stevens*, 172 Fed. 595.

[c] "On a writ of error to the United States Supreme Court, from a state court, the supreme court will review the findings of fact either where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it or where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary in order to pass upon the Federal question to analyze the facts." *Northern Pac. R. Co. v. North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. ed. 735, P. U. R. 1915C, 277.

41. *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652. See also *Mt. Konocti Light & P. Co. v. Thelen*, 170 Cal. 468, 150 Pac. 359, P. U. R. 1915E, 291; *Oro Elec. Corp. v. Railroad Com.*, 169 Cal. 466, 117 Pac. 118, P. U. R. 1915C, 191.

[a] A finding of the value of the property in eminent domain proceedings before the railroad commission is conclusive on the courts. *Marin Municipal Water Dist. v. Marin Water & Power Co.*, 55 Cal. Dec. 793.

[b] In Vermont the findings of the commission have the effect of reports of special matters in courts of equity and are conclusive on appeal. *Western Union Tel. Co. v. Burlington Traction Co.*, 90 Vt. 506, 99 Atl. 4, Ann. Cas. 1918B, 841, P. U. R. 1917C, 320.

42. **U. S.**—*Goldfield Con. W. Co. v. Public Service Com. (Fed.)*, P. U. R. 1917A, 685. **Ala.**—*Railroad Com. v. Louisville & N. R. Co.*, 197 Ala. 161, 72 So. 397, P. U. R. 1916F, 356. **Ark.**—*St. Louis, I. M. & S. R. Co. v. Bellamy*, 113 Ark. 384, 169 S. W. 322, L. R. A. 1915D, 91. **Fla.**—*State ex rel. R. R. Comrs. v. Florida East Coast R. Co.*, 69 Fla. 165, 67 So. 906; *State ex rel. R. R. Comrs. v. Florida East Coast R. Co.*, 64 Fla. 112, 59 So. 385. **Idaho.**—*Coeur d'Alene v. Public Utilities Com.*, 29 Idaho 508, 160 Pac. 751, P. U. R. 1917B, 348. **Ill.**—*State Public Utilities Com. v. Atchison, T. & S. F. R. Co.*, 278 Ill. 58, 115 N. E. 904, holding the provision of the statute constitutional. **Md.**—*Pennsylvania R. Co. v. Towers*, 126 Md. 59, 94 Atl. 330, Ann. Cas. 1917B, 1144, P. U. R. 1915D, 398; *Public Service Com. v. Northern C. R. Co.*, 122 Md. 355, 388, 90 Atl. 105, 118. **Mass.**—*City of Fall River v. Public Service Com.*, 117 N. E. 915. **Mich.**—*Grand Rapids & I. R. Co. v. Michigan R. R. Co.*, 188 Mich. 108, 154 N. W. 15, P. U. R. 1915F, 805. **Minn.**—*Brogger v. Chicago, St. P., M. & O. R. Co.*, 137 Minn. 338, 163 N. W. 662, 164 N. W. 368; *Schain v. Great Northern R. Co.*, 137 Minn. 157, 162 N. W. 1079; *State v. Great Northern R. Co.*, 135 Minn. 19, 159 N. W. 1089, P. U. R. 1917B, 413; *State v. Great Northern R. Co.*, 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1917B, 1201, P. U. R. 1915D, 467; *In re Citizens of Brook Park*, 124 Minn. 533, 144 N. W. 771. **Miss.**—*Mississippi Railroad Com. v. Mobile & O. R. Co.*, 115 Miss. 101, 75 So. 778, Ann. Cas. 1918B, 828. **Neb.**—*Hill v. Union Pac. R. Co.*, 96 Neb. 205, 147 N. W. 681; *Byington v. Chicago, R. I. & P. R. Co.*, 96 Neb. 584, 148 N. W. 520; *Chicago, R. I. & P. R. Co. v. Nebraska State Ry. Com.*, 85 Neb. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444. See *State v. Fremont, E. & M. V. R. Co.*, 23 Neb. 117, 36 N. W. 305. **N. J.**—*Public Service R. Co. v. Board of Public Utility Comrs.*, 87 N. J. L. 250, 93 Atl. 585, P. U. R.

of the commission is treated as *prima facie* correct, the court will re-

1915C, 224; *Easterr Tel. & Tel. Co. v. Board of Public Utility Comrs.*, 85 N. J. L. 511, 89 Atl. 924. 17. Y.—*People ex rel. N. Y. & Q. Gas Co. v. McCall*, 219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042, P. U. R. 1917A, 553; *In re Public Service Com.*, 177 App. Div. 444, 164 N. Y. Supp. 310. But see *In re Rochester, C. E. Traction Co.*, 118 App. Div. 521, 102 N. Y. Supp. 1112, treating an order to show cause why an order refusing a certificate of public necessity should not be vacated as an original proceeding. Ohio. *Pollitz v. Public Utilities Com.*, 118 N. E. 107; *Settle v. Public Utilities Com.*, 94 Ohio St. 417, 114 N. E. 1036, P. U. R. 1917C, 366; *Hocking Valley R. Co. v. Public Utilities Com.*, 110 N. E. 952, P. U. R. 1916B, 406. Pa. *Borough of Mt. Union v. Mt. Union Water Co.*, 256 Pa. 516, 100 Atl. 968, *affirming* 63 Pa. Super. 337. S. D. *Cahill v. Great Northern Ry. Co.*, 166 N. W. 306. Tex.—*International & G. W. R. Co. v. Railroad Com.*, 99 Tex. 332, 89 S. W. 961 (*affirming* 86 S. W. 16); *State v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.), 165 S. W. 491. Va. *Standard Oil Co. v. Com.*, 104 Va. 683, 52 S. E. 390; *Newport News & O. P. Ry. & E. Co. v. Hampton Roads Ry. & E. Co.*, 102 Va. 847, 47 S. E. 858. Wis.—*Menasha Woodenware Co. v. Railroad Com.*, 166 N. W. 435; *Duluth St. R. Co. v. Railroad Com.*, 161 Wis. 245, 152 N. W. 887, P. U. R. 1915D, 192; *State ex rel. Northern Pac. R. Co. v. Railroad Com.*, 140 Wis. 145, 121 N. W. 919; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Com.*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821.

[a] **Rule Stated.**—"The legislature never intended that the court should put itself in the place of the commission, try the matter anew as an administrative body, substituting its findings for those of the commission. A statute which so provided would be unconstitutional as a delegation to the judiciary of nonjudicial powers. . . . The court on appeal from the order of the commission must distinguish them, between the legislative power to establish regulations and the judicial power to determine upon the reasonableness of regulations already established. *State v.*

Great Northern R. Co., 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1917B, 1201.

[b] "The court is not to enquire (1) whether the order is the best solution of the problem presented, but whether it is unreasonable or in violation of some constitutional or legal right of the railroad." *Schain v. Great Northern R. Co.*, 137 Minn. 157, 162 N. W. 1079. (2) A court does not "have the power to determine that the extension of the relator's gas mains and pipes ordered by the Public Service Commission was unreasonable in the sense that it was an unwise or inexpedient order, but only that it was unreasonable if it was an unlawful, arbitrary, or capricious exercise of power." *People ex rel. N. Y., etc. Co. v. McCall*, 219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042, P. U. R. 1917A, 553.

[c] The function of the court "is not to determine whether the rate or service fixed by it [the commission] is just and reasonable, but to determine whether the order is unreasonable or unlawful. If the order is found by the court to be such that reasonable men might well differ as to its correctness it cannot be said to be unreasonable." *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Com.*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821.

[d] The determination of the reasonableness of the order as against constitutional objections "necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony, or of deciding upon pure questions of fact but . . . from an inspection of the entire records including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter." *Washington ex rel. Ore. R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. ed. 863. And see, *Hocking Valley R. Co. v. Public Utilities Com.*, 92 Ohio St. 362, 110 N. E. 521, P. U. R. 1916A, 1032.

[e] **Tests of Reasonableness.**—"No court or commentator has yet undertaken to lay down a rule which shall

examine the facts, weigh the evidence in order to determine whether it supports the findings, and then in the light of its own deductions from the facts, determine whether the order made was clearly unjust or unreasonable.⁴³ In still other states where the order of the

furnish a test of what is reasonable that will fit every case. . . . Some things, however, are definitely settled. The order may be vacated as unreasonable if it is contrary to some provision of the Federal or state constitution or laws, or if it is beyond the power granted to the commission or if it is based on some mistake of law, or if there is no evidence to support it, or if, having regard to the interest of both the public and the carrier, it is so arbitrary as to be beyond the exercise of a reasonable discretion and judgment. . . . The pecuniary loss or profit to the carrier in executing the particular order is an important criterion in determining the reasonableness of the order, but it is not the only one." *State v. Great Northern Ry. Co.*, 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1917B, 1201.

[f] The phrase "prima facie just reasonable and correct," as used in a statute, "simply means that, in considering the testimony and the record upon which the order was based, the presumption arises in the Supreme court that the order thereon made is to be regarded as prima facie just, reasonable and correct, such presumption subject to be overcome by evidence that may be in the record that clearly rebuts same." *Atchison, T. & S. F. R. Co. v. State*, 23 Okla. 210, 100 Pac. 11, 21 L. R. A. (N. S.) 908.

[g] General statutory provisions concerning the scope of review on certiorari do not have the effect of modifying the rule stated in the text. *People ex rel. N. Y. & Q. Gas. Co. v. McCall*, 219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042, P. U. R. 1917A, 553.

[h] Where the unreasonableness of concurrent orders is complained of, the court should consider and determine the validity or invalidity of each order separately; if both, when so considered, are valid, then their concurrent effect should be considered and determined. *Railroad Com. v. St. Louis & S. F. R. Co.*, 195 Ala. 527, 70 So. 645, P. U. R. 1916C, 451.

43. **Kan.**—*Emporia Tel. Co. v. Public Utilities Com.*, 97 Kan. 136, 154 Pac. 262, P. U. R. 1916B, 987; *Union Pac. R. Co. v. Public Utilities Com.*, 95 Kan. 604, 148 Pac. 667, P. U. R. 1915D, 377. **La.**—*Vicksburg, S. & P. R. Co. v. Railroad Com.*, 132 La. 193, 61 So. 199, Ann. Cas. 1914C, 1168. See *Texas & Pac. R. Co. v. Railroad Com.*, 137 La. 1059, 69 So. 837, P. U. R. 1916A, 334. **Mo.**—*State ex rel. St. Joseph, etc., Co. v. Public Service Com.*, 272 Mo. 645, 199 S. W. 999; *State ex rel. Wabash R. Co. v. Public Service Com.*, 271 Mo. 155, 196 S. W. 369; *Chicago, B. & Q. R. Co. v. Public Service Com.*, 266 Mo. 333, 181 S. W. 61. **N. H.**—*Grafton County Elec. L. & P. Co. v. State*, 100 Atl. 668; *Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028. **N. M.** *Seward v. Denver & R. G. R. Co.*, 17 N. M. 557, 131 Pac. 980, 46 L. R. A. (N. S.) 242. **N. D.**—*In re Minneapolis, St. P. & S. S. M. R. Co.*, 30 N. D. 221, 152 N. W. 513, P. U. R. 1915D, 434. **Okla.**—*Pawhuska v. Pawhuska Oil & Gas Co.*, 28 Okla. 563, 115 Pac. 353, P. U. R. 1917F, 226; *Missouri, K. & T. Ry. Co. v. State*, 28 Okla. 610, 115 Pac. 770; *Atchison, T. & S. F. R. Co. v. State*, 28 Okla. 476, 114 Pac. 721; *Atchison, T. & S. F. R. Co. v. State*, 23 Okla. 510, 101 Pac. 262; *Atchison, T. & S. F. R. Co. v. State*, 23 Okla. 210, 100 Pac. 11, 21 L. R. A. (N. S.) 908.

[a] There is a clear distinction "between the weight to be given to the evidentiary findings upon which the final judgment of the Commission is based and the final judgment itself. The latter is not to be set aside or vacated unless clearly unjust or unreasonable, while the former are merely to be deemed prima facie lawful and reasonable." *Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028.

[b] The basis of the rule in Missouri, is that the proceeding is made subject to the rules affecting suits in equity in which the courts on appeal make their own findings. *State ex rel. Wabash R. Co. v. Public Serv-*

commission is not required to embody or be accompanied with findings,⁴⁴ or where additional evidence may be received on the hearing,⁴⁵ the appeal is treated as an original proceeding and the trial is *de novo*.⁴⁶

Generally an appellate court will not grant relief first asked for before it,⁴⁷ nor consider objections not previously made,⁴⁸ except that the jurisdiction of the commission to make the order from which an appeal is taken, is always open.⁴⁹ Under some statutes, only such questions as were presented to the commission by motion for a rehearing,⁵⁰ may be passed upon by the court,⁵¹ unless upon a showing

ice Com., 271 Mo. 155, 196 S. W. 369.

[c] **The presumption that an order of the commission is reasonable** applies only to the facts found by the commission or that are established by evidence upon which the commission failed to find a material fact and where a fact material to the reasonableness of the order is lacking in the findings of fact and is not supplied by the evidence, the presumption does not arise. *Pioneer Tel. & Tel. Co. v. Westernhaver*, 29 Okla. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 1209; *St. Louis & S. F. R. Co. v. Newell*, 25 Okla. 502, 106 Pac. 818; *Missouri, K. & T. Ry. Co. v. State*, 24 Okla. 331, 103 Pac. 613; *Chicago, R. I. & P. Ry. Co. v. State*, 24 Okla. 370, 103 Pac. 617, 24 L. R. A. (N. S.) 393.

[d] **The public service commission "is not a legislature" or a court** but "simply a committee created by the legislature to make findings of fact and orders based on such findings which, if reasonable and within the power of the Commission, may be enforced by the action of the courts." *Atchison, T. & S. F. Ry. Co. v. Public Service Com. (Mo.)*, 192 S. W. 460, P. U. R. 1917C, 1005.

44. See *supra*, X, J, 1.

45. See *infra*, X, K, 9, e, (I).

46. Conn.—*Turner v. Connecticut Co.*, 91 Conn. 692, 101 Atl. 88; *Root v. New Britain Gas Light Co.*, 91 Conn. 134, 99 Atl. 559, P. U. R. 1917C, 102. But see, *Appeal of Norwalk*, 89 Conn. 537, 94 Atl. 988, P. U. R. 1915E, 294. N. C.—*Corporation Com. v. Seaboard Air Line R. Co.*, 161 N. C. 270, 76 S. E. 554. S. D.—*State ex rel. Rice v. Chicago, M. & P. S. R. Co.*, 31 S. D. 547, 141 N. W. 473.

47. *Milbank v. Dakota Central Tel. Co.*, 37 S. D. 504, 159 N. W. 99, P. U.

R. 1916F, 562, even though the findings of fact are sufficient to justify it.

48. See *infra*, this note.

[a] **Objections to the evidence** must have been made at the hearing or they will be disregarded. *Rowland v. Boyle*, 244 U. S. 106, 37 Sup. Ct. 577, 61 L. ed. 1022, that it was hearsay.

[b] **Objections urged for the first term on a motion for a rehearing** before the court, will not be considered. *State ex rel. Mo. P. R. Co. v. Atkinson*, 269 Mo. 634, 192 S. W. 86, Ann. Cas. 1917E, 987, L. R. A. 1918A, 46, P. U. R. 1917C, 971.

49. Cal.—*Clemmons v. Railroad Com.*, 173 Cal. 254, 159 Pac. 713, P. U. R. 1916F, 469. N. H.—*Boston & M. R. R. v. State*, 77 N. H. 437, 93 Atl. 306, P. U. R. 1915C, 25. Wash.—*State ex rel. Chicago, etc., Co. v. Public Service Com.*, 94 Wash. 274, 162 Pac. 523, P. U. R. 1917C, 631.

[a] **But technical objections** as to the jurisdiction of the commission made for the first time on reporting to the courts will not be entertained. *In re Public Service Com.*, 177 App. Div. 444, 164 N. Y. Supp. 310.

50. **Motion for a rehearing as a condition precedent** to a resort to the courts, see *supra*, X, K, 4.

51. *State ex rel. Buffum Tel. Co. v. Public Service Com.*, 272 Mo. 627, 199 S. W. 962 (even the rule applies to constitutional questions); *State ex rel. Mo. P. R. Co. v. Atkinson*, 269 Mo. 634, 192 S. W. 86, Ann. Cas. 1917E, 987, L. R. A. 1918A, 46, P. U. R. 1917C, 971.

[a] **The objection that an order is so vague and indefinite** as not to furnish a basis for intelligent action and is therefore a denial of due process of law cannot be urged where no rehearing was prosecuted. *Vandalia R. Co. v. Public Service Com.*, 242 U. S.

of good cause, it allows other matters to be presented.⁵² Upon a review by the courts of an order of a commission fixing rates, the reasonableness of prior existing rates is not to be determined,⁵³ unless the power to determine this question is expressly conferred upon the court, by statute.⁵⁴ Questions involving the constitutionality of statutes not directly involved by the appeal will not be determined.⁵⁵ A portion of an order favorable to a party who does not appeal from the order will not be reviewed.⁵⁶

(II.) **Sufficiency of Pleadings.**—Great liberality is allowed as to the form and sufficiency of the pleadings before the commission,⁵⁷ and unless it appears that the appellant was surprised or misled because of their insufficiency, any defect in them will be treated as non-prejudicial.⁵⁸

(III.) **On Certiorari.**—Upon certiorari proceedings the court is limited to a determination of the question of the jurisdiction of the commission over the matter and the regularity⁵⁹ of the proceedings before

255, 37 Sup. Ct. 93, 61 L. ed. 276, P. U. R. 1917B, 1004.

52. *Boston & M. R. R. v. State*, 77 N. H. 437, 93 Atl. 306, P. U. R. 1915C, 23.

53. *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 313, 34 Sup. Ct. 48, 53 L. ed. 229.

54. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.

55. *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915C, 1269.

[a] **The validity of limitations on the right to produce only such evidence in court in actions to enforce orders of the commission, as was produced before the commission, will not be passed upon prior to the right being denied in the action.** *Louisville & N. R. Co. v. Finn*, 235 U. S. 601, 604, 607, 35 Sup. Ct. 146, 59 L. ed. 379, P. U. R. 1915A, 121.

56. *Mississippi Railroad Com. v. Mobile & O. R. Co.*, 115 Miss. 101, 75 So. 778, Ann. Cas. 1918B, 828.

57. See *supra*, X, I, 3.

58. *St. Louis & S. F. R. Co. v. Miller*, 31 Okla. 801, 123 Pac. 1047.

[a] **Objections to the form of the pleadings, not made before the commission, will be deemed to have been waived.** *Root v. New Britain Gas Light Co.*, 91 Conn. 134, 99 Atl. 559, P. U. R. 1917C, 102.

[b] **Failure to ask for a continuance of the hearing is a waiver of any defect of this character.** *St. Louis*

& S. F. R. Co. v. Miller, 31 Okla. 801, 123 Pac. 1047.

59. *Ex parte Birmingham* (Ala.), 74 So. 51, P. U. R. 1917C, 667; *Mt. Konocti L. & P. Co. v. Thelen*, 170 Cal. 468, 150 Pac. 359, P. U. R. 1915E, 291; *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652. See the title "**Certiorari**."

[a] **A determination of matters not essential to an adjudication on the issue before the commission will not be compelled by a writ of review.** *C. A. Hooper & Co. v. Railroad Com.*, 175 Cal. 811, 165 Pac. 689.

[b] **An order directing a carrier to enforce against shippers certain tariff charges, cannot be reviewed by the shippers on certiorari, since the order can be enforced by the carrier only by resort to the courts and by actions in which the legality of the order can be tested.** *E. Clemens Horst Co. v. Railroad Com.*, 175 Cal. 660, 166 Pac. 804, P. U. R. 1917F, 893.

[c] **The interests and rights of a city involved in a proposed consolidation of public utilities cannot be determined.** *Ex parte Birmingham* (Ala.), 74 So. 51, P. U. R. 1917C, 667.

[d] **The question whether a certificate of convenience and necessity must be obtained before a public utility can operate in a municipality cannot be determined upon certiorari to review the action of the commission in denying a certificate.** *Valley Tel. Co. v. Railroad Com.*, 171 Cal. 55, 151 Pac. 740, P. U. R. 1915F, 872.

the commission, though in some jurisdictions a much broader review may be exercised.⁶⁰

c. *Evidence*. — (I.) *In General*. — Though there must be some evidence in support of the commission's findings or order,⁶¹ the statute may constitutionally restrict the evidence to be considered upon a judicial review of a commission's order, to such evidence as was introduced on the hearing before the commission.⁶² Under many statutes it is not contemplated that additional evidence shall be received;⁶³ under others additional evidence is proper,⁶⁴ as where the proceedings in court are *de novo*, and a hearing is to be had and judgment rendered upon the evidence there produced.⁶⁵

A member of the commission may be required to testify as to what, if any, evidence its action was based on.⁶⁶

Judicial notice will be taken of subsequent orders of the commission in the same case,⁶⁷ and of such matters of common and public interest as are judicially known by courts generally,⁶⁸ and are material to the issues of the case under review.⁶⁹

(II.) *Burden of Proof*. — An order of a public service commission which it is sought to have set aside by the courts is *prima facie* reason-

[e] Unless the proceeding is "by certiorari with a bill of exceptions," questions of fact cannot be reviewed. *Ex parte Birmingham* (Ala.), 74 So. 51, P. U. R. 1917C, 667.

[f] A preliminary objection made on the return of an order to show cause why a writ of certiorari should not issue, but not passed on at that time may be renewed on the main hearing. *Clemmons v. Railroad Com.*, 173 Cal. 254, 159 Pac. 713, P. U. R. 1916F, 469.

60. *Erie R. Co. v. Board of Public Utility Comrs.*, 85 N. J. L. 420, 89 Atl. 1001; *People ex rel. Brooklyn H. R. Co. v. Public Service Com.*, 101 Misc. 10, 166 N. Y. Supp. 825.

61. See *infra*, X, K, 9, c, (III).

62. *U. S.*—*State ex rel. Ore. R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. ed. 863, such a statute affords due process of law. *Ky.*—*Louisville & N. R. Co. v. Greenbrier Dist. Co.*, 170 Ky. 775, 187 S. W. 296, P. U. R. 1916F, 508; *Illinois Central R. Co. v. Paducah Brewery Co.*, 157 Ky. 357, 163 S. W. 239. *N. M.*—*Woody v. Denver & R. G. R. Co.*, 17 N. M. 686, 132 Pac. 250, 47 L. R. A. (N. S.) 974; *Seward v. Denver & R. G. R. Co.*, 17 N. M. 557, 131 Pac. 980, 46 L. R. A. (N. S.) 242, the court may remand the case for the taking of further evidence. *Okla.*—*Atchison, T. & S. F. R. Co. v. Levick*, 38 Okla. 746, 134 Pac. 874. *S. D.*—*Turner*

Creamery Co. v. Chicago, M. & St. P. R. Co., 36 S. D. 310, 154 N. W. 819, P. U. R. 1916A, 1083. But see *State ex rel. Rice v. Chicago, M. & P. S. R. Co.*, 31 S. D. 547, 141 N. W. 473. *Wash.*—*State ex rel. Ore. R. & Nav. Co. v. Railroad Com.*, 52 Wash. 17, 100 Pac. 179.

63. *Hooper Tel. Co. v. Nebraska Tel. Co.*, 96 Neb. 245, 147 N. W. 674; *Atchison, T. & S. F. R. Co. v. State*, 23 Okla. 210, 100 Pac. 11, 21 L. R. A. (N. S.) 908. See *supra*, X, K, 9, b, (I); *infra*, X, K, 9, c, (III).

64. See the statutes.

Transmitting new evidence to commission for its action, see *infra*, X, K, 10.

65. *Root v. New Britain Gas Light Co.*, 91 Conn. 134, 99 Atl. 559, P. U. R. 1917C, 102; *Corporation Com. v. Seaboard Air Line R. Co.*, 161 N. C. 270, 76 S. E. 554. See *supra*, X, K, 9, b, (I).

66. *State ex rel. R. R. Comrs. v. Florida East Coast R. Co.*, 72 Fla. 379, 73 So. 171, P. U. R. 1917B, 1023.

67. *Morgan's Louisiana & T. R. & S. S. Co. v. Isaac Joseph Iron Co.*, 243 Fed. 149, 156 C. C. A. 15.

68. See ENCY. OF EV., title "Judicial Notice."

69. *Delaware, L. & W. R. Co. v. Board of Public Utility Comrs.*, 83 N. J. L. 212, 84 Atl. 702 (progress of sanitary science); *St. Louis & S. F. R. Co. v. Reynolds*, 26 Okla. 804, 110

able and valid and the burden of proof is upon the party attacking it.⁷⁰

(III.) **Sufficiency of Evidence.**—An administrative order indisputably contrary to the evidence or made without any evidence is an arbitrary and illegal order and will be set aside by the courts,⁷¹ the

Pac. 668, 138 Am. St. Rep. 1003 (distance between towns at which stations are located where a new station has been ordered; *St. Louis & S. F. R. Co. v. Williams*, 25 Okla. 662, 107 Pac. 428.

70. **Ala.**—*Railroad Com. v. Alabama N. R. Co.*, 182 Ala. 357, 62 So. 749. **Fla.**—*State ex rel. R. R. Comrs. v. Florida East Coast R. Co.*, 72 Fla. 379, 73 So. 171, P. U. R. 1917B, 1023.

Ill.—*State Public Utilities Com. v. Toledo, St. L. & W. R. Co.*, 267 Ill. 93, 107 N. E. 774, P. U. R. 1915B, 879. **Kan.**—*Union Pac. R. Co. v. Public Utilities Com.*, 95 Kan. 604, 148 Pac. 667, P. U. R. 1915D, 377. **La.**

Texas & P. R. Co. v. Railroad Com., 127 La. 387, 53 So. 660. **Mass.**—*Fall River v. Public Service Com.*, 117 N. E. 915. **Mich.**—*Michigan State Tel. Co. v. Michigan Railroad Com.*, 193 Mich. 515, 161 N. W. 240, P. U. R. 1917C, 355, order directing the physical connection of telephone systems.

Minn.—*Schain v. Great Northern R. Co.*, 137 Minn. 157, 162 N. W. 1079; *Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 519, 74 N. W. 893, 70 Am. St. Rep. 358, 40 L. R. A. 389, *affirmed*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. ed. 194. **Miss.**—*Mississippi Railroad Com. v. Mobile & O. R. Co.*, 115 Miss. 101, 75 So. 778, Ann. Cas. 1918B, 828.

Mont.—*State ex rel. Board, etc. v. District Court*, 53 Mont. 229, 163 Pac. 115, P. U. R. 1917C, 884. **Ohio.**—*Hocking Valley R. Co. v. Public Utilities Com.*, 110 N. E. 952, P. U. R. 1916B, 406; *Cincinnati v. Public Utilities Com.*, 91 Ohio St. 331, 110 N. E. 461, Ann. Cas. 1916E, 1081, P. U. R. 1916A, 1057.

Okla.—*Oklahoma Gin Co. v. State*, F. U. R. 1916C, 22; *Atchison, T. & S. F. R. Co. v. State*, 23 Okla. 210, 100 Pac. 11, 21 L. R. A. (N. S.) 908. **Pa.** *In re Relief Elec. Light, H. & P. Co. (Pa. Super.)*, P. U. R. 1916D, 592.

Va.—*Louisville & N. R. Co. v. Interstate R. Co.*, 107 Va. 225, 57 S. E. 654. **Wis.**—*Wisconsin Tel. Co. v. Railroad Com.*, 162 Wis. 383, 156 N. W. 614, P. U. R. 1916D, 212 (order directing physical connection of telephone systems); *Duluth St. R. Co. v.*

Railroad Com., 161 Wis. 245, 152 N. W. 887, P. U. R. 1915D, 192.

[a] A general rule promulgated by the commission is presumptively reasonable. *State ex rel. R. R. Comrs. v. Florida E. C. R. Co.*, 69 Fla. 480, 68 So. 729, P. U. R. 1915D, 105; *State ex rel. R. R. Comrs. v. Florida E. C. R. Co.*, 69 Fla. 491, 68 So. 761, L. R. A. 1918A, 158, P. U. R. 1915D, 355.

[b] But on appeal by the commission from the judgment of a lower court declaring an order of a commission to be unreasonable, the burden of proof is upon the commission to show error in the judgment. *State ex rel. Gt. North. R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

71. **U. S.**—*Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431. **Ala.**—*Railroad Com. v. Louisville & N. R. Co.*, 197 Ala. 161, 72 So. 397, P. U. R. 1916F, 356. **Fla.**—*State ex rel. R. R. Comrs. v. Florida East Coast R. Co.*, 69 Fla. 165, 67 So. 906, P. U. R. 1915C, 207. **Ill.**—*State Public Utilities Com. v. Atchison, T. & S. F. R. Co.*, 279 Ill. 194, 116 N. E. 696.

Ky.—*Louisville & N. R. Co. v. Greenbrier Dist. Co.*, 170 Ky. 775, 187 S. W. 296, P. U. R. 1916F, 508. **N. J.** *West Jersey & S. R. Co. v. Board of Public Utility Comrs.*, 87 N. J. L. 170, 94 Atl. 57, P. U. R. 1915D, 847.

Wash.—*State ex rel. Gt. Northern R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075.

[a] As to the nature and extent of the investigation required to be made, see, *Louisiana R. Comm. v. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577, *reversing* 156 Fed. 823.

[b] The interstate commerce commission is subject to this rule. *Interstate Commerce Com. v. Union Pac. R. Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308.

[c] The "due process" provision of the 14th amendment may be sufficient to impose the operation of this principle upon state commissions. See *Louisville & N. R. Co. v. Finn*, 235

question being⁷² in each case whether the order is reasonable and just

U. S. 601, 604, 607, 35 Sup. Ct. 146, 59 L. ed. 379, P. U. R. 1915A, 121.

[d] A recital in an order that "no testimony was taken" renders the order void upon its face and unenforceable as the recital destroys the presumption that the orders of a commission are made upon proper evidence. *Railroad Com. v. Louisville & N. R. Co.*, 197 Ala. 161, 72 So. 397, P. U. R. 1916F, 356.

72. As to scope of review, see *supra*, X, K, 9, b, (I).

[a] Reasonableness a Judicial Question.—*Fla.*—State *ex rel.* R. R. Comrs. *v.* Florida East Coast R. Co., 69 Fla. 165, 67 So. 906, P. U. R. 1915C, 207. *Kan.*—State *ex rel.* Taylor *v.* Missouri P. R. Co., 76 Kan. 467, 92 Pac. 606. *Minn.*—State *v.* Great Northern R. Co., 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1917B, 1201, P. U. R. 1915D, 467.

[b] An order (1) requiring the construction of a new station is unreasonable where there is nothing to show that repairs and alterations would not remedy the defects of which complaint is made. State *ex rel.* Wabash R. Co. *v.* Public Service Com., 271 Mo. 155, 196 S. W. 369; *St. Louis, I. M. & So. R. Co. v. State*, 28 Okla. 372, 111 Pac. 396, 114 Pac. 1096. (2) As to reasonableness of such orders, generally, see: *Fla.*—State *ex rel.* R. R. Comrs. *v.* Florida East Coast R. Co., 69 Fla. 165, 67 So. 906, P. U. R. 1915C, 207; *Louisville & N. R. Co. v. Railroad Comrs.*, 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189. *Minn.* State *v.* Great Northern R. Co., 135 Minn. 19, 159 N. W. 1089, P. U. R. 1917B, 413. *N. Y.*—People *ex rel.* Long Island R. Co. *v.* Public Service Com., 173 App. Div. 780, 160 N. Y. Supp. 63, P. U. R. 1916E, 475. *Okla.*—Kansas City Southern Ry. Co. *v.* Redwine, 43 Okla. 610, 143 Pac. 847. *Tex.*—Railroad Com. *v.* Chicago, R. I. & G. R. Co., 102 Tex. 393, 117 S. W. 794.

[c] Evidence to support order for construction of a union station, see the following cases: *Ala.*—Railroad Com. *v.* Alabama Great Southern R. Co., 185 Ala. 354, 64 So. 13, L. R. A. 1915D, 98; *Railroad Com. v. Alabama Northern R. Co.*, 182 Ala. 357, 62 So. 749. *Fla.*—State *ex rel.* R. R. Comrs. *v.* Atlantic Coast Line R. Co., 67 Fla.

441, 63 So. 729. *N. C.*—Corporation Com. *v.* Seaboard Air Line R. Co., 161 N. C. 270, 76 S. E. 554. *Tex.*—State *v.* St. Louis S. W. Ry. Co. (Tex. Civ. App.), 199 S. W. 829.

[d] Reasonableness of an order requiring the establishment or reestablishment of a station, or the stopping of trains at a station is to be determined in view of a consideration of the interests of both the railroad and the public. *Ark.*—*St. Louis, I. M. & S. R. Co. v. Bellamy*, 113 Ark. 384, 169 S. W. 322, L. R. A. 1915D, 91. *La.*—*Vicksburg, S. & P. R. Co. v. Railroad Com.*, 132 La. 193, 61 So. 199, Ann. Cas. 1914C, 1168. *Minn.* *Brogger v. Chicago, St. P., M. & O. R. Co.*, 137 Minn. 338, 163 N. W. 662, 164 N. W. 368 (where the existing station was beyond the territorial limits of a village); *State ex rel. R. & W. Com. v. Great Northern R. Co.*, 123 Minn. 463, 144 N. W. 155. *Neb.* *Hill v. Union Pac. R. Co.*, 96 Neb. 205, 147 N. W. 681; *Chicago, R. I. & P. R. Co. v. Nebraska State Ry. Com.*, 85 Neb. 818, 124 N. W. 477, 26 L. R. (N. S.) 444. *N. J.*—*Delaware, L. & W. R. Co. v. Board of Railroad Comrs.*, 79 N. J. L. 154, 74 Atl. 269. *Okla.*—*Atchison, T. & S. F. R. Co. v. State*, 28 Okla. 465, 114 Pac. 722; *Missouri, K. & T. R. Co. v. State*, 24 Okla. 331, 103 Pac. 613. *Va.*—*Clayville Mfg. Co. v. Southern R. Co.*, 113 Va. 356, 76 S. E. 942.

[e] Order making changes in train service, see the following cases: *U. S.*—*Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. ed. 933, 11 Ann. Cas. 398; *Delaware, L. & W. R. Co. v. Van Santwood*, 216 Fed. 252. *Ala.* *Railroad Com. v. St. Louis & S. F. R. Co.*, 195 Ala. 527, 70 So. 645, P. U. R. 1916C, 451. *Colo.*—*Colorado & S. R. Co. v. State Railroad Com.*, 54 Colo. 64, 129 Pac. 506. *Fla.*—State *ex rel.* R. R. Comrs. *v.* Louisville & N. R. Co., 62 Fla. 315, 57 So. 175. *Kan.*—State *ex rel.* Taylor *v.* Missouri P. R. Co., 76 Kan. 467, 92 Pac. 606. *La.*—*Texas & P. R. Co. v. Railroad Com.*, 127 La. 387, 53 So. 660. *Minn.*—*Schain v. Great Northern R. Co.*, 137 Minn. 157, 162 N. W. 1079; *State v. Great Northern R. Co.*, 130 Minn. 57, 153 N. W. 247, Ann. Cas. 1917B, 1201, P. U. R.

in view of all the circumstances of the case, and not whether the order

1915D, 467, order compelling operation of a Sunday train, reversed. **Mo.** State *ex rel.* Mo. P. R. Co. *v.* Atkinson, 269 Mo. 634, 192 S. W. 86, Ann. Cas. 1017E, 987, L. R. A. 1918A, 46, P. U. R. 1917C, 971, sleeping car service. **N. D.**—*In re* Minneapolis, St. P. & S. S. M. R. Co., 30 N. D. 221, 152 N. W. 513, P. U. R. 1915D, 434. **Ohio**.—Hocking Valley R. Co. *v.* Public Utilities Com., 92 Ohio St. 362, 110 N. E. 521, P. U. R. 1916A, 1062. **Okla.**—Missouri, K. & T. Ry. Co. *v.* State, 28 Okla. 610, 115 Pac. 770; Gulf, C. & S. F. Ry. Co. *v.* State, 23 Okla. 524, 101 Pac. 258. **Wash.** Puget Sound Tr. L. & P. Co. *v.* Public Service Com., 170 Pac. 1014 (of street car company); State *ex rel.* Gt. Northern R. Co. *v.* Railroad Comm., 60 Wash. 218, 110 Pac. 1075.

[f] **Order relating to intersecting railroad crossings**, see the following cases: **Ind.**—Pittsburgh, C., C. & St. L. Ry. Co. *v.* Hunt, 171 Ind. 189, 86 N. E. 328. **Kan.**—State *v.* Chicago, B. & Q. R. Co., 85 Kan. 649, 118 Pac. 872. **Va.**—Louisville & N. R. Co. *v.* Interstate R. Co., 107 Va. 225, 57 S. E. 654. **Wash.**—State *ex rel.* Gt. Northern R. Co. *v.* Public Service Com., 81 Wash. 275, 142 Pac. 684.

[g] **Order requiring construction of side track or private switch**, see the following cases: **Ark.**—St. Louis, I. M. & S. R. Co. *v.* State, 99 Ark. 1, 136 S. W. 938. **Minn.**—State *v.* Chicago, M. & St. P. R. Co., 115 Minn. 51, 131 N. W. 859. **Ore.**—Southern Pac. Co. *v.* Railroad Com., 60 Ore. 400, 119 Pac. 727. **Tex.**—Crosbyton-South-plains R. Co. *v.* Railroad Com. (Tex. Civ. App.), 169 S. W. 1038. **Wis.** Menasha Woodenware Co. *v.* Railroad Com., 166 N. W. 435.

[h] **Orders Relating to Public Health and Sanitation**.—Erie R. Co. *v.* Board of Public Utility Comrs., 85 N. J. L. 420, 89 Atl. 1001; Delaware, L. & W. R. Co. *v.* Board of Public Utility Comrs., 83 N. J. L. 212, 84 Atl. 702, order requiring sanitary drinking cups.

[i] **Orders Extending Street Railway Service**.—Cincinnati *v.* Public Utilities Com., 91 Ohio St. 331, 110 N. E. 461, Ann. Cas. 1916E, 1081, P. U. R. 1916A, 1057.

[j] **Evidence in Proceedings to**

Compel Extension of Gas Service. People *ex rel.* N. Y. & Q. Gas. Co. *v.* McCall, 219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042, P. U. R. 1917A, 553.

[k] **Order requiring physical connection of utilities**, see: Seaboard Air Line Ry. *v.* Railroad Com., 206 Fed. 181; Wisconsin Tel. Co. *v.* Railroad Com., 162 Wis. 383, 156 N. W. 614, P. U. R. 1916D, 212, telephone systems.

[l] **Order Requiring Railroad to Install Telegraph Service**.—St. Louis & S. F. Ry. Co. *v.* Newell, 25 Okla. 502, 106 Pac. 818; Chicago, R. I. & Pac. R. Co. *v.* State, 24 Okla. 370, 103 Pac. 617, 24 L. R. A. (N. S.) 393.

[m] **Orders as to issue of capital stock or bonds**, see: **Kan.**—Kansas City, K. V. & W. R. Co. *v.* Bristow, 101 Kan. 557, 167 Pac. 1138. **N. H.** Grafton County Elec. L. & P. Co. *v.* State, 100 Atl. 668. **N. Y.**—Matter of Watertown Gas Light Co., 127 App. Div. 462, 111 N. Y. Supp. 486. **Ohio.** Pollitz *v.* Public Utilities Com., 118 N. E. 107. **Wis.**—Citizens' Tel. Co. *v.* Railroad Com., 157 Wis. 498, 146 N. W. 798.

[n] **Sufficiency of Evidence On Application For Certificate of Public Convenience and Necessity**.—*In re* Buffalo Frontier Ter. R. Co., 131 App. Div. 503, 115 N. Y. Supp. 483; *In re* Rochester, C. E. Traction Co., 118 App. Div. 521, 102 N. Y. Supp. 1112.

[o] **Existence of a public necessity** (1) is not to be determined by the number of people asking for relief. State *ex rel.* Northern Pac. R. Co. *v.* Public Serv. Com., 95 Wash. 376, 163 Pac. 1143, 166 Pac. 793. (2) The words "convenience" and "necessity" are not synonymous. "The word 'convenience' is much broader and more inclusive than the word 'necessity.'" Most things that are necessities are also conveniences, but not all conveniences are necessities. Wisconsin Tel. Co. *v.* Railroad Com., 162 Wis. 383, 156 N. W. 614, P. U. R. 1916D, 212.

[p] **Order Requiring Sunday Service**.—Twin Valley Telephone Co. *v.* Mitchell, 27 Okla. 388, 113 Pac. 914, Ann. Cas. 1912C, 582, 38 L. R. A. (N. S.) 235.

[q] **The cost of an improvement**

is so unreasonable as to amount to a taking of property.⁷³ Orders fixing and regulating rates fall within this rule in most jurisdictions;⁷⁴ except where they are attacked in equity.⁷⁵

Clear and satisfactory evidence is required to justify the setting aside of a commission's order.⁷⁶

ordered to be made is to be considered but is not the sole test of the reasonableness of an order. *Chicago, R. I. & P. R. Co. v. Nebraska State Ry. Com.*, 85 Neb. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444; *Puget Sound Tr. L. & P. Co. v. Public Service Com.* (Wash.), 170 Pac. 1014.

73. *La.*—*Texas & P. R. Co. v. Railroad Com.*, 127 La. 387, 53 So. 660. *Okla.*—*Atchison, T. & S. F. R. Co. v. State*, 23 Okla. 510, 101 Pac. 262, 21 L. R. A. (N. S.) 908. *Tex.*—*Railroad Com. v. Houston & T. C. R. Co.*, 90 Tex. 340, 38 S. W. 750.

74. *Kan.*—*Union Pac. R. Co. v. Public Utilities Com.*, 95 Kan. 604, 148 Pac. 667, P. U. R. 1915D, 377. *Md.*—*Pennsylvania R. Co. v. Towers*, 126 Md. 59, 94 Atl. 330, Ann. Cas. 1917B, 1144, P. U. R. 1915D, 398. *Mich.*—*Detroit & M. R. Co. v. Michigan R. Com.*, 171 Mich. 335, 137 N. W. 329. *N. J.*—*Collingswood Sewerage Co. v. Borough of Collingswood* (N. J. L.), 102 Atl. 901.

[a] Reasonableness under the evidence of orders fixing rates; see: *Ill.*—*State Public Utilities Com. v. Chicago, & N. W. R. Co.*, 279 Ill. 110, 116 N. E. 620. *Ohio.*—*Hocking Valley R. Co. v. Public Utilities Com.*, 110 N. E. 952, P. U. R. 1916B, 406. *Okla.*—*Pawhuska v. Pawhuska Oil & Gas Co.*, 28 Okla. 526, 115 Pac. 353, P. U. R. 1917F, 263; *Oklahoma Gin Co. v. State*, P. U. R. 1916C, 22. *S. D.*—*Turner Creamery Co. v. Chicago, M. & St. P. R. Co.*, 36 S. D. 310, 154 N. W. 819, P. U. R. 1916A, 1083. *Tex.*—*Railroad Com. v. Weld*, 96 Tex. 394, 73 S. W. 529. *Wis.*—*Duluth St. R. Co. v. Railroad Com.*, 161 Wis. 245, 152 N. W. 887, P. U. R. 1915D, 192, street railway fares.

75. See *infra*, X, L.

76. *Ala.*—*Railroad Com. v. St. Louis & S. F. R. Co.*, 195 Ala. 527, 70 So. 645, P. U. R. 1916C, 451; *Railroad Com. v. Alabama G. S. R. Co.*, 185 Ala. 354, 64 So. 13, L. R. A. 1915D, 98. *Colo.*—*Garwood v. Colorado & S. Ry. Co.* (Dist. Ct. Div. 2), P. U. R. 1916A, 911. *Fla.*—*State ex rel. R. R.*

Comrs. v. Florida East Coast R. Co., 72 Fla. 379, 73 So. 171, P. U. R. 1917B, 1023; *State ex rel. R. R. Comrs. v. Florida East Coast R. Co.*, 69 Fla. 473, 68 So. 727; *State ex rel. R. R. Comrs. v. Atlantic Coast Line R. Co.*, 64 Fla. 469, 60 So. 186. *Ind.*—*Pittsburgh, C. & St. L. Ry. Co. v. Hunt*, 171 Ind. 189, 86 N. E. 328. *Mich.*—*Briggs v. Cass Circuit Judge*, 178 Mich. 28, 144 N. W. 501. *Miss.*—*Mississippi Railroad Com. v. Mobile & O. R. Co.*, 115 Miss. 101, 75 So. 778, Ann. Cas. 1918B, 828. *Neb.*—*Chicago, R. I. & P. R. Co. v. Nebraska State Ry. Com.*, 85 Neb. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444. *Tex.*—*Pecos & N. T. Ry. Co. v. Railroad Com.* (Tex. Civ. App.), 193 S. W. 770; *State v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.), 165 S. W. 491. *Wash.*—*State ex rel. Great Northern R. Co. v. Public Service Com.*, 81 Wash. 275, 142 Pac. 684; *State ex rel. Gt. North. R. Co. v. Railroad Com.*, 60 Wash. 218, 110 Pac. 1075. *Wis.*—*Menasha Woodenware Co. v. Railroad Com.*, 166 N. W. 435; *Oshkosh Waterworks Co. v. Railroad Com.*, 161 Wis. 122, 152 N. W. 859, P. U. R. 1915D, 336; *Citizens' Tel. Co. v. Railroad Com.*, 157 Wis. 498, 146 N. W. 798.

[a] "The quantum of proof required to establish that the order of the commission is unreasonable is more than a mere preponderance as in an ordinary case. The evidence must outweigh that offered by the defendant, and it must be of the same clear and satisfactory nature as that required in other cases where presumptions of validity attach to the instrument sought to be set aside or to the transaction sought to be declared void." *Chicago, R. I. & P. R. Co. v. Nebraska State Ry. Com.*, 85 Neb. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444.

[b] Two different rules of evidence which amount to a taking of property without due process of law are not created by a statute which provides that the findings of a commission are prima facie correct and shall not be

On an appeal to a higher court from a judgment of a lower court holding an order of a commission to be unreasonable, the general rule applicable to appeals prevails and the judgment appealed from will be upheld if the evidence tends reasonably to support it,⁷⁷ though there are authorities which refuse to follow this rule.⁷⁸

10. Judgment or Determination.—Where the court finds error in the action of the commission it may remand the case for such further proceedings as may be proper.⁷⁹ An order which is separable in its nature may be affirmed in part and reversed in part.⁸⁰ Where new evidence has been introduced, some statutes provide for its transmission to the commission and a limited opportunity for reconsideration by that body before the court renders its judgment.⁸¹ The general rules as to the conclusiveness and effect of judgments,⁸² are

set aside except upon clear evidence. *State Public Utilities Com. v. Chicago & W. T. R. Co.*, 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917C, 50, P. U. R. 1917B, 1046.

77. *Mississippi Railroad Com. v. Mobile & O. R. Co.*, 115 Miss. 101, 75 So. 778, Ann. Cas. 1918B, 828.

[a] "Weight naturally attaches to the opinion of the judge who heard the case." *Rowland v. Boyle*, 244 U. S. 106, 37 Sup. Ct. 577, 61 L. ed. 1022.

[b] In New York a judgment of the appellate division, setting aside an order of the public service commission, is not reviewable by the court of appeals. *People ex rel. N. Y. & Q. Gas Co. v. McCall*, 219 N. Y. 84, 113 N. E. 795, Ann. Cas. 1916E, 1042.

78. *Union Pac. R. Co. v. Public Utilities Com.*, 95 Kan. 604, 148 Pac. 667, P. U. R. 1915D, 377; *State v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.), 165 S. W. 491. But see *Board of Railroad Comrs. v. Missouri Pac. Ry. Co.*, 71 Kan. 192, 80 Pac. 53.

[a] **Reasons for Not Following General Rule.**—"Ordinarily the facts are established in the district court for the first time. In freight rate cases the facts are first developed, and established before the Public Utilities Commission. That body is equipped with statisticians, accountants, engineers and other assistants. The commissioners live in an atmosphere where freight rates are studied, debated and discussed the whole year round. When its orders come up for review in the courts, the time for presentation and consideration is limited by the myriad of other cases involving every other branch of the law; and the substitution of the court's judgment for the judgment of the

Commissioners ought not to be lightly undertaken." *Union Pac. R. Co. v. Public Utilities Com.*, 95 Kan. 604, 148 Pac. 667, P. U. R. 1915D, 377.

79. *Baltimore & O. R. Co. v. Com.*, 110 Va. 215, 65 S. E. 528, where necessary party was not made a party.

[a] Where the commission fails to find on material issues and dismisses the petition the court may remand the case for further findings. *Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028.

[b] **Harmless Error.**—If error in the proceedings before the commission can be reasonably said to have inflicted no injury upon the party, the order of the commission will not be reversed. *Missouri, K. & T. R. Co. v. State*, 24 Okla. 331, 103 Pac. 613, erroneous admission of incompetent evidence where there is other competent evidence.

80. *St. Louis & S. F. R. Co. v. Williams*, 25 Okla. 662, 107 Pac. 428.

Limitations on the character of judgment the court may render, see *supra*, X, K, 3.

81. La.—*Morgan's L. & T. R. & S. Co. v. Railroad Com.*, 138 La. 377, 70 So. 332, P. U. R. 1916B, 356. *Mich.* *Briggs v. Cass Circ. Judge*, 178 Mich. 28, 144 N. W. 501, failure to do so renders the judgment invalid. *N. H.* *Grafton County Elec. L. & P. Co. v. State*, 77 N. H. 490, 93 Atl. 1028. *Wis.*—*Duluth St. R. Co. v. Railroad Com.*, 161 Wis. 245, 152 N. W. 887, P. U. R. 1915D 192.

[a] **Such a Statute Applies to Existing Suits.**—*Morgan's L. & T. R. & S. Co. v. Railroad Com.*, 138 La. 377, 70 So. 332, P. U. R. 1916B, 356.

82. See the titles "Judgments;" "Res Judicata."

equally applicable to judgments of this class.⁸³

L. SUITS IN EQUITY.—1. In General.—A suit in equity may be maintained to determine the reasonableness, under the limitations of the constitution, of an order of a public service commission,⁸⁴ or of a statute or ordinance fixing a rate or otherwise regulating the affairs of a public utility,⁸⁵ or the legality of the proceedings by which a rate, order, or regulation was established,⁸⁶ and it is the remedy best adapted to that end.⁸⁷ The jurisdiction of the court rests upon its

83. See *infra*, this note.

[a] **Judgment ordering a refund** by one telegraph company to another on intrastate messages is not conclusive as to the rights to a refund on interstate messages, that matter not having been litigated. *In re Postal Tel.-Cable Co.*, 169 App. Div. 382, 154 N. Y. Supp. 997, P. U. R. 1915F, 643.

[b] **A judgment of a state court** determining the confiscatory character of rates is res judicata of that question in the federal courts. *Detroit & M. R. Co. v. Michigan R. R. Co.*, 235 U. S. 402, 35 Sup. Ct. 126, 59 L. ed. 288.

Conclusiveness of orders of the commission, see *supra*, X, J, 2, b.

84. **U. S.**—*Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 311, 34 Sup. Ct. 48, 58 L. ed. 229; *Love v. Atchison, T. & S. F. R. Co.*, 185 Fed. 321, 107 C. C. A. 403. **Ark.**—*Rowland v. Saline River Ry. Co.*, 177 S. W. 896. **Colo.**—*Montezuma County v. Montezuma W. & L. Co.*, 39 Colo. 166, 89 Pac. 794. **Ky.**—*Louisville & N. R. Co. v. Greenbrier Dist. Co.*, 170 Ky. 775, 187 S. W. 296, P. U. R. 1916F, 508. **Minn.**—*State v. Chicago, M. & St. P. R. Co.*, 130 Minn. 144, 153 N. W. 320, L. R. A. 1916B, 764, P. U. R. 1915D, 797; *St. Paul Book & S. Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N. W. 262, Ann. Cas. 1916B, 286, L. R. A. 1918A, 384, P. U. R. 1915D, 474. **Miss.**—*Mississippi Railroad Com. v. Mobile & O. R. Co.*, 115 Miss. 101, 75 So. 778, Ann. Cas. 1918B, 828.

[a] "The rule is that, where a tribunal such as a Board of Railway Commissioners exceeds its powers and issues an arbitrary and unreasonable order, an injunction is a proper remedy to curb the abuse of power." *Rowland v. Saline River Ry. Co.* (Ark.), 177 S. W. 896.

[b] **A suit to enjoin the enforcement of a rate** fixed by a commission is not bad "as an attempt to enjoin

legislation or as a suit against a state." *Prentiss v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 230, 29 Sup. Ct. 67, 53 L. ed. 150.

[c] **The Suit Is Not To Be Treated as One Against a State.**—*Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584; *Reagin v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Louisville & N. R. Co. v. Railroad Com.*, 157 Fed. 944; *Louisville & N. R. Co. v. Railroad Comrs.*, 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189.

[d] **Whether the suit in equity (1) is regarded as a direct attack** upon the order (*Pioneer Tel. & Tel. Co. v. State*, 40 Okla. 417, 138 Pac. 1033), or (2) as a collateral attack (*Sayers v. Montpelier & W. R. R. R.*, 90 Vt. 201, 97 Atl. 660, Ann. Cas. 1918B, 1050, P. U. R. 1916E, 508; *Bessette v. Goddard*, 87 Vt. 77, 88 Atl. 1), is immaterial as far as the jurisdiction of the court is concerned.

85. *Consolidated Gas Co. v. New York*, 157 Fed. 849; *St. Paul Book & S. Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N. W. 262, Ann. Cas. 1916B, 286, L. R. A. 1918A, 384, P. U. R. 1915D, 474.

86. *Dallas v. Dallas Consol. Elec. St. Ry. Co.* (Tex. Civ. App.), 159 S. W. 76, rate fixed by an initiative ordinance.

87. *Ex parte Young*, 209 U. S. 123, 163, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932.

[a] "Such remedy is undoubtedly the most convenient, the most comprehensive and the most orderly in which the rights of all parties can be properly, fairly and adequately passed upon." *Ex parte Young*, 209 U. S. 123, 166, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932.

[b] **The rule that equity will not enjoin prosecutions** for violation of a criminal statute, does not apply to this class of actions. *Southern Pac. Co. v.*

power to prevent a multiplicity of actions or irreparable injury,⁸⁸ and the inadequacy of the remedy at law.⁸⁹ In the absence of these elements a court of equity will not act.⁹⁰

2. Conditions Precedent. — Unless the commission is dealing with a subject matter beyond its power and as to which no regulation would be valid,⁹¹ its order cannot be reviewed in equity until passed upon by the legislative body which has the final determination of the matter,⁹² or until the right to ask for a rehearing has been exercised.⁹³ But it is not necessary to wait until the commission takes steps to enforce the order.⁹⁴

3. In State or Federal Court. — In accordance with the general rules governing the jurisdiction of United States courts,⁹⁵ federal equity courts have authority to enjoin the enforcement of orders or regulations of a state public service commission,⁹⁶ on constitutional

California R. Comrs., 78 Fed. 236. See *supra*, VIII.

[c] **That the rate fixed has been put into operation** by the utility does not prevent its maintaining the suit. *Allen v. St. Louis, I. M. & S. R. Co.*, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. ed. 1625.

88. *Consolidated Gas Co. v. New York*, 157 Fed. 849; *Chicago & N. W. Ry. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744; *Gainesville Gas & Elec. P. Co. v. Gainesville*, 63 Fla. 425, 58 So. 785.

[a] **Where assurance is given that a single test or joint action is to be maintained by numerous parties affected by a reparation order, an injunction will be refused.** *Louisville & N. R. Co. v. Kentucky R. R. Com.*, 214 Fed. 465.

89. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932.

[a] **A suit in equity is the only adequate remedy in some states since "certiorari could not stay the execution of the order."** *Bessette v. Goddard*, 87 Vt. 77, 88 Atl. 1.

90. *Louisville & N. R. Co. v. Railroad Comrs.*, 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189.

91. See *Prentiss v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 231, 29 Sup. Ct. 67, 53 L. ed. 150.

92. *Pioneer Tel. & Tel. Co. v. State*, 40 Okla. 417, 138 Pac. 1033.

[a] **This is a rule based upon "the most proper and orderly course" of procedure and not upon any want of jurisdiction in the courts.** *Prentiss v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 230, 29 Sup. Ct. 67, 53 L. ed. 150.

[b] **A bill filed prematurely** will be retained to await the result of proceedings before the legislative body and will not be dismissed where there is a possibility that a hearing on the merits cannot be had. *Prentiss v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 232, 29 Sup. Ct. 67, 53 L. ed. 150.

93. *Palermo L. & W. Co. v. Railroad Comm.*, 227 Fed. 708, P. U. R. 1916B, 437 (even though such application does not arrest the order, or though the commission may order a rehearing of its own motion); *Louisville & N. R. Co. v. Railroad Comrs.*, 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189.

[a] **An informal, written request for a modification of the order will be treated as an application for a rehearing.** *Delaware, L. & W. R. Co. v. Stevens*, 172 Fed. 595.

[b] **If a commission refuses to suspend operation of an order pending a rehearing and irreparable loss would follow the courts will be open to the party injured.** *Palermo L. & W. Co. v. Railroad Comm.*, 227 Fed. 708, P. U. R. 1916B, 437.

94. *Prentiss v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 228, 29 Sup. Ct. 67, 53 L. ed. 150.

[a] **Suit may be instituted prior to the operative date of the order.** *Chicago & N. W. Ry. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744.

95. See 17 STANDARD PROC. 812 *et seq.*, and the title "United States Courts."

96. See *infra*, this note.

[a] **Federal statute prohibiting federal courts from enjoining state courts**

or other proper grounds,⁹⁷ concurrently with state courts.⁹⁸ The injured person may at his option resort to either court;⁹⁹ it is unnecessary to first seek a review of a commission's order in a state court,¹ even though the latter is given power to review the commission's action, unless such state court acts in an administrative capacity.² But where the state court has assumed jurisdiction a federal court will not interfere until the judgment of the state court becomes *res judicata* of the matters in controversy.³ Jurisdiction once having been obtained by a federal court, will be retained to determine all questions in the case.⁴

is inapplicable, since the commission is not a court. *Mississippi R. Com. v. Illinois Central R. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. ed. 209. And see *Prentiss v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.

[b] Not regarded as an action against the state itself. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932; *Mississippi R. Com. v. Illinois Central R. Co.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. ed. 209; *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. ed. 1142; *Consolidated Gas Co. v. New York*, 157 Fed. 849, where the action was maintained against the state attorney general.

97. *Phoenix R. Co. v. Geary*, 239 U. S. 277, 36 Sup. Ct. 45, 60 L. ed. 287; *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, such enormous penalties as would prevent a resort to the courts.

[a] It is the duty of a federal court to exercise its jurisdiction,—no question of discretion or comity is involved. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134.

[b] Diversity of Citizenship.—*Louisiana R. Comm. v. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Railroad Com. v. J. Rosenbaum Grain Co.*, 130 Fed. 110, 64 C. C. A. 444; *Chicago, B. & Q. R. Co. v. Oglesby*, 198 Fed. 153; *Delaware, L. & W. R. Co. v. Stevens*, 172 Fed. 595.

[c] The sufficiency of rates, with reference to the federal constitution, is a judicial question. *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. ed. 753; *Ex parte Young*,

209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819.

98. U. S.—*Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. Minn.—*State v. Chicago, M. & St. P. R. Co.*, 130 Minn. 320, 153 N. W. 320, P. U. R. 1915D, 797. Tex.—*Gulf, C. & S. F. R. Co. v. Railroad Com.*, 102 Tex. 338, 113 S. W. 741, 116 S. W. 795.

For rules governing exercise of concurrent jurisdiction, see 17 STANDARD PROC. 797, 812.

[a] The court which first acquires jurisdiction retains it until the case is finally determined and proceedings in another court will be stayed meanwhile. *Boston & M. R. R. v. Niles*, 218 Fed. 944; *State v. Chicago, M. & St. P. R. Co.*, 130 Minn. 144, 153 N. W. 320, L. R. A. 1916B, 764, P. U. R. 1915D, 797.

99. *Delaware, L. & W. R. Co. v. Stevens*, 172 Fed. 595.

1. *Prentiss v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 228, 29 Sup. Ct. 67, 53 L. ed. 150; *Delaware, L. & W. R. Co. v. Stevens*, 172 Fed. 595.

2. *Bacon v. Rutland R. Co.*, 232 U. S. 134, 34 Sup. Ct. 283, 58 L. ed. 538; *Manufacturers' L. & H. Co. v. Ott*, 215 Fed. 940.

3. *Detroit & M. R. Co. v. Michigan R. Com.*, 235 U. S. 402, 35 Sup. Ct. 126, 59 L. ed. 288; *Michigan R. R. Com. v. Detroit & M. R. Co.*, 182 Mich. 234, 148 N. W. 385.

[a] Even where a state court has affirmed an order and remanded the case to the commission for enforcement of the order, a federal court will not act. *Central Vermont Ry. Co. v. Redmond*, 189 Fed. 683.

4. *Van Dyke v. Geary*, 244 U. S. 39, 37 Sup. Ct. 483, 61 L. ed. 973;

4. Parties.⁵ — Any person directly affected by an order of a public service commission may maintain a suit in equity attacking its reasonableness,⁶ but persons who will be only indirectly affected by the order have no standing to enjoin its enforcement.⁷ Confiscatory rates may be enjoined at the suit of the utility affected, or under special circumstances, by its stockholders,⁸ or the trustee of mortgage bondholders.⁹ All persons adversely interested to the petitioner should be made parties defendant.¹⁰

5. Pleadings.¹¹ — The facts showing in what manner the order will operate unreasonably or unjustly must be clearly alleged.¹² Thus the facts showing the alleged confiscatory character of rates must be set forth.¹³

Siler v. Louisville & N. R. Co., 212 U. S. 175, 29 Sup. Ct. 451, 53 L. ed. 753; *Louisville & N. R. Co. v. Siler*, 186 Fed. 176, *affirmed* in *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. ed. 229.

5. See generally the title "**Parties.**" Parties in proceedings for review and appeal, *see supra*, X, K, 7.

6. *Railroad Com. v. Galveston Chamber of Commerce*, 51 Tex. Civ. App. 476, 115 S. W. 94.

7. *College Arms Hotel Co. v. Atlantic Coast Line R. Co.*, 61 Fla. 550, 54 So. 459 (adjacent property owners cannot enjoin change of location of a depot); *Michigan Independent Tel. & T. Assn. v. Michigan R. Com.*, 190 Mich. 337, 157 N. W. 52, P. U. R. 1916E, 1033.

8. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932. See *State v. Chicago, M. & St. P. R. Co.*, 130 Minn. 144, 153 N. W. 320, L. R. A. 1916B, 764, P. U. R. 1915D, 797.

9. See *infra*, this note.

[a] Where the mortgage is in process of foreclosure and the utility is in the hands of a receiver, the trustee cannot maintain the suit unless the insufficiency of the mortgaged property to satisfy the mortgage is clearly shown. *Winthrop v. Fellows*, 230 Fed. 702.

[b] Bondholders cannot maintain the suit unless the trustee refuses to act. *Winthrop v. Fellows*, 230 Fed. 702. And see *Old Colony Trust Co. v. City of Atlanta*, 83 Fed. 39 (*affirmed*, 88 Fed. 859, 32 C. C. A. 125); *Mercantile Trust Co. v. Texas & P. R. Co.*, 51 Fed. 529.

10. See *infra*, this note, and the title "**Parties.**"

[a] Persons holding contracts with a public utility are not necessary parties to proceedings involving service by the utility which may result in orders affecting their contracts. *Western Union Tel. Co. v. Foster*, 224 Mass. 365, 113 N. E. 192, P. U. R. 1916F, 176.

[b] The body or persons (1) charged with the enforcement of the order of a commission are necessary defendants. *Southern Ry. Co. v. McNeill*, 155 Fed. 756. (2) The attorney general of the state is a proper party defendant (*Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. [N. S.] 932), unless (3) it is not directly within the scope of his duties to enforce the order. *Central of Georgia Ry. Co. v. McLendon*, 157 Fed. 961.

[c] Representatives of a class of consumers affected by a rate order are proper parties defendant. *Northern Pac. Ry. Co. v. Lee*, 199 Fed. 621.

11. See generally the title "**Bills and Answers.**"

12. *Chicago, B. & Q. R. Co. v. Oglesby*, 198 Fed. 153, order for additional train service.

13. *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. ed. 229 (*affirming Louisville & N. R. Co. v. Siler*, 186 Fed. 175); *Southern Pac. Co. v. Campbell*, 230 U. S. 537, 33 Sup. Ct. 1027, 57 L. ed. 1610; *Northern Pac. Ry. Co. v. Lee*, 199 Fed. 621; *Southern Pac. Co. v. California R. Com.*, 153 Fed. 699; *Burlington, C. R. & N. Ry. Co. v. Day*, 89 Iowa 13, 56 N. W. 267.

[a] An averment that an order was unreasonable and if carried out would be confiscatory has been held to be the averment of an ultimate fact. *Port-*

Demurrer. — Unless the case is entirely free from doubt, it will not be determined upon a demurrer.¹⁴

6. Interlocutory Injunctions.¹⁵ — A temporary injunction will be granted pending the hearing of an application for a permanent injunction when this is required in order to prevent irreparable loss or great injury to the parties,¹⁶ but unless such a showing is made, a temporary injunction will be refused.¹⁷ A temporary injunction will

land Ry. L. & P. Co. v. Portland, 200 Fed. 890; State *ex rel.* R. R. Comrs. v. Florida East C. R. Co., 72 Fla. 379, 73 So. 171, P. U. R. 1917B, 1023.

[b] **A general averment that revenues would be lessened** is insufficient. "The question is not simply as to the amount of reduction but whether the rates as fixed would allow a fair return. The bill does not show the value of the property employed, the expenses of operation, or the return which would be permitted under the rates prescribed." Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 315, 34 Sup. Ct. 48, 58 L. ed. 229.

[c] **For insufficient averments,** see: Portland Ry. L. & P. Co. v. Portland, 200 Fed. 890.

14. Houston & T. C. R. Co. v. Storey, 149 Fed. 499.

[a] **The court hesitates to consider the demurrer as an admission of general averments of the unreasonableness of the order.** Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014.

15. See generally the title "Injunctions."

16. Ft. Smith L. & Tr. Co. v. Ft. Smith, 202 Fed. 581; San Joaquin & Kings R. C. & Irr. Co. v. Stanislaus County, 163 Fed. 567; Louisville & N. R. Co. v. Railroad Com., 157 Fed. 944.

[a] **Enforcement of orders fixing rates** will be temporarily enjoined when the rates fixed appear upon their face to be illegal. Kansas City, C. C. & St. J. Ry. Co. v. Barker, 242 Fed. 310; Springfield Gas & Elec. Co. v. Barker, 231 Fed. 331.

[b] **Where a rate order of the interstate commerce commission conflicts with an order of a state commission and a violation of either order will subject a carrier to a multiplicity of suits and severe penalties, a temporary injunction against the enforcement of the order of the state commission will issue.** Eastern Texas R. Co. v. Rail-

road Commission, 242 Fed. 300, P. U. R. 1917F, 554.

[c] **On the hearing of an application for a temporary injunction based on the existence of conflicting rate orders, the validity of the order relied upon, whether it was properly issued, whether the court had jurisdiction of the principal case, and whether the rate established was legal, are questions which cannot be passed upon.** Eastern Texas R. Co. v. Railroad Commission, 242 Fed. 300, P. U. R. 1917F, 554.

[d] **Enforcement of order requiring a physical connection of properties of public utilities may be enjoined.** Seaboard Air Line Ry. v. Hampton, 103 S. C. 455, 88 S. E. 5, P. U. R. 1916E, 349.

[e] **An injunction issued by a federal court must be respected by state courts; the effect of the injunction is to suspend for the time being the operation of the statute.** State v. Chicago, M. & St. P. R. Co., 130 Minn. 144, 153 N. W. 320, L. R. A. 1916B, 764, P. U. R. 1915D, 797.

[f] **Where the constitutionality of a state statute (1) is attacked in the federal courts, an interlocutory injunction can now be granted only where the application has been presented to three federal judges.** Act June 18, 1910, §17, c. 309, 36 Stat. (pt. 1), p. 557; Chicago, B. & Q. R. Co. v. Oglesby, 198 Fed. 153. (2) **Where the wrongful administration of the law is the basis of complaint, the statute is inapplicable.** Chicago, B. & Q. R. Co. v. Oglesby, 198 Fed. 153. And see Seaboard Air Line Ry. v. Railroad Com., 206 Fed. 181.

17. Phoenix R. Co. v. Geary, 239 U. S. 277, 36 Sup. Ct. 45, 60 L. ed. 287; Trenton & Mercer County Tr. Corp. v. Board of Public Utilities, 229 Fed. 140, 143 C. C. A. 416, P. U. R. 1916C, 599; Brown Drug Co. v. United States, 235 Fed. 603; Winthrop v. Fellows, 230 Fed. 702; Minneapolis Gas-

be granted only upon such terms as are just and equitable.¹⁸ Pending appeal a temporary restraining order may be continued in force notwithstanding the denial of the injunction, where necessary to prevent irreparable loss;¹⁹ otherwise, however, it will be discontinued,²⁰ and the losing party may ask the appellate court for an order maintaining the status quo.²¹

7. Evidence.—The order of the commission is prima facie reasonable and just, and the burden of proof is on the party attacking it²² to show the unreasonableness by clear and satisfactory proof.²³ The duty rests upon the public utility of making a full and fair disclosure of all matters affecting the question involved in the action.²⁴

8. Hearing or Trial.—The trial or hearing follows the general course of procedure in such equitable proceedings.²⁵ A master may be appointed to ascertain and report upon the facts.²⁶ An order fixing rates will be reviewed only so far as necessary to determine

light Co. v. Minneapolis, 123 Minn. 231, 143 N. W. 728.

[a] Where a statute has been in force for a considerable time and the hearing on the merits will not be long delayed, an injunction will be refused. *Ann Arbor R. Co. v. Fellows*, 236 Fed. 387, P. U. R. 1917B, 523.

[b] *Ex parte* affidavits offered to the court will seldom prevail over the testimony taken before the commission and prima facie supporting the order made by it. *Manufacturers' L. & H. Co. v. Ott*, 215 Fed. 940.

[c] **Second Application.**—The denial of a motion for a temporary injunction is not an absolute bar to a subsequent renewal of the motion. *Louisville & N. R. Co. v. Kentucky R. R. Co.*, 214 Fed. 465, but second application only granted in clear case.

18. *In re Arkansas R. R. Rates*, 168 Fed. 720; *Spring Valley Water Co. v. San Francisco*, 165 Fed. 667.

[a] **Maximum rates** which the utility will be allowed to collect pending the final determination of the litigation may be fixed. *In re Arkansas R. R. Rates*, 168 Fed. 720.

19. *Louisville & N. R. Co. v. Siler*, 186 Fed. 176, 203.

[a] **As a condition to such relief**, excess changes may be ordered impounded pending the appeal. *Louisville & N. R. Co. v. Kentucky R. R. Co.*, 214 Fed. 465.

20. *Louisville & N. R. Co. v. Kentucky R. R. Co.*, 214 Fed. 465.

[a] **It will be continued in force for a reasonable period of time** in order to enable an application to the appellate court to be made. *Louisville*

& N. R. Co. v. United States, 227 Fed. 273.

21. See *Louisville & N. R. Co. v. Kentucky R. R. Co.*, 214 Fed. 465.

22. **U. S.**—*Louisiana R. Comm. v. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577; *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932; *Seaboard Air Line Ry. v. Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175; *Chicago, etc. R. Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; *Puget Sound Tr. L. & P. Co. v. Reynolds*, 223 Fed. 371. **Fla.**—*College Arms Hotel Co. v. Atlantic Coast Line R. Co.*, 61 Fla. 550, 54 So. 459. **Neb.**—*State v. Adams Express Co.*, 85 Neb. 25, 122 N. W. 691, 42 L. R. A. (N. S.) 396.

[a] **The burden of showing that a capital account** was not improperly increased by additions from income, is upon the utility seeking to enjoin enforcement of rates. *Louisiana R. Co. v. Cumberland Tel. & Tel. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577.

23. *Missouri Rate Cases*, 230 U. S. 474, 33 Sup. Ct. 975, 57 L. ed. 1571; *Louisville & N. R. Co. v. Alabama R. Co.*, 208 Fed. 35.

24. *State v. Adams Express Co.*, 85 Neb. 25, 122 N. W. 691, 42 L. R. A. (N. S.) 396.

25. See the titles "Hearing;" "Injunctions;" "Issues in Pleading and Practice;" "Trial."

26. See generally the title "References."

[a] Less weight is given the findings of a master where the powers of

whether it permits a fair and reasonable return on the property employed in the public use,²⁷ or whether it is confiscatory in its nature and effect.²⁸ The commission's order is presumptively fair and reasonable and will not be set aside except upon a clear showing of its confiscatory character.²⁹

9. **Decree or Judgment.**—While a judgment may declare rates to be unreasonable and confiscatory, the court has no power to establish rates itself or to restrain a commission from again establishing rates.³⁰ Where an injunction is refused because of doubt as to the effect of the rates when put into actual operation,³¹ the bill should be dismissed without prejudice to the filing of another suit if it should appear after a full and fair test that the rates were unreasonably

a legislative body are in question or constitutional questions are involved, than in the ordinary case. *Cumberland Tel. & Tel. Co. v. Louisville*, 187 Fed. 637. But see *Des Moines Gas Co. v. Des Moines*, 199 Fed. 204.

27. *Portland Ry. L. & P. Co. v. Portland*, 200 Fed. 890.

[a] The fact that an order was made in a spirit of retaliation is no ground for interfering with it if it is not confiscatory. *Puget Sound Tr. L. & P. Co. v. Reynolds*, 223 Fed. 371.

28. See the following cases: *Rowland v. Boyle*, 244 U. S. 106, 37 Sup. Ct. 577, 61 L. ed. 1022; *Des Moines Gas Co. v. City of Des Moines*, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. ed. 1244, P. U. R. 1915D, 577 (gas rates); *Goldfield Cons. W. Co. v. Public Service Comm. (Fed.)*, P. U. R. 1917A, 685; *Landon v. Public Utilities Com.*, 234 Fed. 152, P. U. R. 1917A, 120 (gas rates); *Boyle v. St. Louis & S. F. R. Co.*, 222 Fed. 539, P. U. R. 1916A, 49, railroad's rates held insufficient.

[a] The order (1) will not be reversed where the evidence is fairly conflicting (*Van Dyke v. Geary*, 244 U. S. 39, 37 Sup. Ct. 483, 61 L. ed. 973), or (2) where there is a doubt as to the effect upon the utility of the rates established. *Ann Arbor R. Co. v. Fellows*, 236 Fed. 387, P. U. R. 1917B, 523.

[b] The prior existence of a rate for a long period of time is such substantial evidence as will support an order requiring a railroad to re-establish the rate which it has attempted to increase. *Louisville & N. R. Co. v. Finn*, 235 U. S. 601, 604, 607, 35 Sup. Ct. 146, 59 L. ed. 379, P. U. R. 1915A, 121. And see *Louisville & N. R. Co.*

v. Garrett, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. ed. 229.

29. *Northern Pacific R. Co. v. North Dakota*, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. ed. 735, L. R. A. 1917F, 1148.

[a] The court will not substitute its own judgment for the judgment of the commission in determining the question of the reasonableness of the order. *Manufacturers' L. & H. Co. v. Ott*, 215 Fed. 940; *Railroad Com. v. Louisville & N. R. Co.*, 140 Ga. 817, 80 S. E. 327, Ann. Cas. 1915A, 1018, L. R. A. 1915E, 902.

[b] Unless the rate fixed is clearly confiscatory, it will not be set aside prior to a test of its actual effect in operation. U. S.—*Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371; *Cumberland Tel. & Tel. Co. v. Louisville*, 187 Fed. 637. Neb.—*State v. Adams Express Co.*, 85 Neb. 25, 122 N. W. 691, 42 L. R. A. (N. S.) 396. Ohio.—*Newark Natural Gas & F. Co. v. Newark*, 92 Ohio St. 393, 111 N. E. 150.

30. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Emporia Tel. Co. v. Public Utilities Com.*, 97 Kan. 136, 154 Pac. 262, P. U. R. 1916B, 987.

[a] **Enjoining Interference With Existing Rates.**—"The considerations that prevent a tribunal from fixing a rate to be charged in the future also forbid its accomplishing the same result by enjoining interference with a rate which it finds to have been unassailable in the past." *Emporia Tel. Co. v. Public Utilities Com.*, 97 Kan. 136, 154 Pac. 262, P. U. R. 1916B, 987.

31. *Willeox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134.

low,³² or jurisdiction of the action may be retained and permission given the complainant to renew his application for an injunction if after the lapse of a fixed or reasonable time the rates appear to be confiscatory.³³ If an injunction is granted, the rate fixing body may be authorized to apply to the court for a modification of the judgment, if in the future and under changed conditions the rates as fixed by it lose their unreasonable character.³⁴ The right of a public service commission to make such other and different orders in connection with the subject matter as may to it seem expedient in the future should not be infringed by any provision in the judgment.³⁵

32. *Darnell v. Edwards*, 244 U. S. 564, 37 Sup. Ct. 701, 61 L. ed. 1317; *Des Moines Gas Co. v. City of Des Moines*, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. ed. 1244, P. U. R. 1915D, 577; *Willeox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371.

33. *Van Dyke v. Geary*, 244 U. S. 39, 37 Sup. Ct. 483, 61 L. ed. 973;

Pennsylvania R. Co. v. Towers, 126 Md. 59, 94 Atl. 330, Ann. Cas. 1917B, 1144, P. U. R. 1915D, 398.

34. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Higginson v. Chicago, etc. R. Co.*, 100 Fed. 235, *affirmed*, 102 Fed. 197, 42 C. C. A. 254.

35. *Railroad Com. v. Texas & P. Ry. Co.* (Tex. Civ. App.), 140 S. W. 829, manner in which accounts should be kept.

PUBLIC UTILITIES. — See **Public Service Corporations.**

Vol. XXI

PUIS DARREIN CONTINUANCE, PLEAS OF

By the Editorial Staff.

I. NATURE AND PURPOSE, 960

II. APPLICATION TO PARTICULAR DEFENSES, 962

III. NUMBER OF PLEAS, 963

IV. TIME TO FILE, 963

V. LEAVE OF COURT, 963

VI. FORM AND CONTENTS, 964

VII. OBJECTIONS TO PLEA, 965

A. *Demurrer*, 965

B. *Motion*, 965

VIII. AMENDMENT, 966

IX. REPLICATION TO PLEA, 966

X. OPERATION AND EFFECT, 966

XI. DISPOSITION OF PLEA, 967

XII. COSTS, 968

CROSS-REFERENCES:

Justices of the Peace;
Pleas;

Supplemental Pleading;
Time To Plead.

For forms, see 9 STANDARD PROC. 1011.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. NATURE AND PURPOSE.—The office of the common law plea of puis darrein continuance is to set forth matters of defense arising after the commencement of the action and after issue joined.¹

1. **U. S.**—*Yeaton v. Lynn*, 5 Pet. 224, 8 L. ed. 105; *Good v. Davis*, Hempst. 16, 10 Fed. Cas. No. 55,300. | **Ala.**—*Evans v. Cincinnati, S. & M. Ry. Co.*, 78 Ala. 341; *Feagin v. Pearson*, 42 Ala. 332; *Broughton v. Bradley*, 34

Matters occurring before suit brought should not be pleaded puis darrein continuance,² nor should matters arising after suit brought but before issue joined.³ Neither can a defense which existed before but which only came to the knowledge of the party thereafter be so

- Ala. 694, 73 Am. Dec. 474; McDougald's Admr. v. Rutherford, 30 Ala. 253; Burns v. Hindman, 7 Ala. 531; Sadler v. Fisher's Admrs., 3 Ala. 200. **Ark.**—Costar v. Davies, 8 Ark. 213, 46 Am. Dec. 311. **Cal.**—Jessup v. King, 4 Cal. 331. **Conn.**—Canfield v. Eleventh School Dist., 19 Conn. 529. **Ga.**—Cook v. Georgia Land Co., 120 Ga. 1068, 48 S. E. 378. **Ill.**—Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271 (*reversing* 41 Ill. App. 238); Washington v. Louisville & N. Ry. Co., 136 Ill. 49, 26 N. E. 653; Chicago & E. I. R. Co. v. Lowry, 85 Ill. App. 533; Straight v. Hanchett, 23 Ill. App. 584. **Ind.**—Weideroder v. Mace, 184 Ind. 242, 111 N. E. 5. **Ia.**—Taylor v. Frink & Co., 2 Iowa 84. **Me.**—Rowell v. Hayden, 40 Me. 582. **Md.**—Bank of United States v. Merchants' Bank, 7 Gill 415; Semmes v. Naylor, 12 Gill & J. 358; Agnew v. Bank of Gettysburg, 2 Har. & J. 478. **Mich.**—See Johnson v. Kibbee, 36 Mich. 269. **Miss.**—Irion v. Hume, 50 Miss. 419; Lee v. Dozier, 40 Miss. 477; Heirn v. Carron, 11 Smed. & M. 361, 49 Am. Dec. 65. **N. H.**—Penigewasset Bank v. Brackett, 4 N. H. 557; Kimball v. Wilson, 3 N. H. 96, 14 Am. Dec. 342. **N. Y.**—Bendit v. Annesley, 42 Barb. 192, 27 How. Pr. 184; Hart v. Meeker, 1 Sandf. 623; Kingston Bank v. Swift, 1 How. Pr. 12; Tuffs v. Gibbons, 19 Wend. 639; Jackson *ex dem.* De Forest v. Ramsay, 3 Cow. 75, 15 Am. Dec. 242; Jackson *ex dem.* Smith v. McConnell, 11 Johns. 424. **N. C.**—Williams v. Hutton & Bourbonnais Co., 164 N. C. 216, 80 S. E. 257. **Ohio.**—Tilton v. Morgaridge, 12 Ohio St. 98; Longworth v. Flagg, 10 Ohio 300. **Ore.**—See Wagenaar v. Beeman-Woodward Co., 65 Ore. 109, 131 Pac. 1023; Noble v. Beeman-Spaulding-Woodward Co., 65 Ore. 93, 131 Pac. 1006, 16 L. R. A. (N. S.) 162. **Pa.**—Brownfield v. Braddell, 9 Watts 149. But see Johns v. Balton, 12 Pa. 339; South Easton v. Norton, 2 Pa. Co. Ct. 187, 636, that since the act of amendments of 1806, a plea in bar after issue joined of matters arising since the issuing of the writ need not be pleaded, puis darrein continuance. **S. C.**—Elms & Co. v. Beers, 3 McCord 1. **Eng.**—Prince v. Nicholson, 1 Marsh 280, 5 Taunt. 665, 15 Rev. Rep. 612, 1 E. C. L. 342, 128 Eng. Reprint 852; Vaughan v. Browne, 2 Str. 1106, 93 Eng. Reprint 1061. **Can.**—Vittum v. Stevens, 13 N. Brunsw. 217; Godard v. Fred-erickton Boom Co., 11 N. Brunsw. 448; Gordon v. Robinson, 3 Ont. Pr. 366. But see Gaines v. Conn's Heirs, 2 Dana (Ky.) 231. [a] **An exception to this rule exists** (1) in actions on the case (Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271), and (2) in the action of trespass. Kapischki v. Koch, 180 Ill. 44, 54 N. E. 179, *affirming* 79 Ill. App. 238. 2. Knapp v. Hoboken, 39 N. J. L. 394. See also Stevens v. Standard Oil Co., 156 Ala. 581, 47 So. 140. 3. **U. S.**—Yeaton v. Lynn, 5 Pet. 224, 8 L. ed. 105. **Ala.**—Lindsay v. Barnett, 130 Ala. 417, 30 So. 395; McDougald's Admr. v. Rutherford, 30 Ala. 253; Burns v. Hindman, 7 Ala. 531; Sadler v. Fisher's Admr., 3 Ala. 200. **Conn.**—Canfield v. Eleventh School Dist., 19 Conn. 529. **Ill.**—Mount v. Scholes, 120 Ill. 394, 11 N. E. 401; Kenyon v. Sutherland, 8 Ill. 99; Kapischke v. Koch, 79 Ill. App. 238; Straight v. Hanchett, 23 Ill. App. 584. **Ind.**—White v. Guest, 8 Blackf. 228. **Ia.**—See Allen v. Newberry, 8 Iowa 65. **Me.**—Rowell v. Hayden, 40 Me. 582. **Md.**—Bank of United States v. Merchants Bank, 7 Gill 415; Semmes v. Naylor, 12 Gill & J. 358. **Mass.**—Andrews v. Hooper, 13 Mass. 472. **N. H.**—Cutter v. Folsom, 17 N. H. 139. **N. J.**—Hutchinson v. Hendrickson, 29 N. J. L. 180. **N. Y.**—Covell v. Wetson, 20 Johns. 414; Cobb v. Curtiss, 8 Johns. 470; Boyd v. Weeks, 2 Denio. 321, 43 Am. Dec. 749. **Ohio.**—Longworth v. Flagg, 10 Ohio 300. **Eng.**—Le Bret v. Papillon, 4 East 502, 7 Rev. Rep. 618, 102 Eng. Reprint 923; Carlisle v. Whaley, L. R. 2 H. L. 391, 16 Wkly. Rep. 229. [a] **Payment after an imparlance**, not pleadable puis darrein continuance, but by the regular plea in bar. Tillotson v. Preston, 3 Johns. (N. Y.) 229.

pleaded.⁴

The plea is either in bar⁵ or in abatement.⁶ Matter, therefore, which is not essentially a matter of defense, should not be pleaded puis darrein continuance, though it arose after the joining of issue.⁷

Under the codes any defense which the defendant could have pleaded puis darrein continuance can be set up by supplemental answer.⁸

II. APPLICATION TO PARTICULAR DEFENSES.—The defendant may, within the limitations above stated,⁹ plead puis darrein continuance such matters as performance in full satisfaction of a breach of contract,¹⁰ accord and satisfaction,¹¹ release,¹² receipt in full,¹³ payment,¹⁴ satisfaction of the claim,¹⁵ an agreement to submit the matter in controversy to arbitration,¹⁶ a judgment recovered in another action disposing of the same issues,¹⁷ discharge in bankruptcy since the filing of the action,¹⁸ or a discontinuance of the action as to some of the

4. *Lee v. Dozier*, 40 Miss. 477.

5. *Ala.*—*Feagin v. Pearson*, 42 Ala. 332. *Ark.*—*Costar v. Davies*, 8 Ark. 213, 46 Am. Dec. 311. *Ill.*—See *Ross v. Nesbit*, 7 Ill. 252. *Mich.*—*Grosslight v. Crisup*, 58 Mich. 531, 25 N. W. 505. *Pa.*—*Woods v. White*, 97 Pa. 222.

6. *Ill.*—See *Ross v. Nesbit*, 7 Ill. 252. *Mich.*—*Grosslight v. Crisup*, 58 Mich. 531, 25 N. W. 505. *Pa.*—*Woods v. White*, 97 Pa. 222.

7. *Ala.*—*Davis v. Davis*, 93 Ala. 173, 9 So. 736; *Hall's Heirs v. Hall*, 47 Ala. 290. *Ark.*—*Costar v. Davies*, 8 Ark. 213, 46 Am. Dec. 311. *Ill.*—*Kenyon v. Sutherland*, 8 Ill. 99. *Ind.*—*Lawrence v. Sample*, 97 Ind. 53. *Mich.*—*Moon v. Harder*, 38 Mich. 566.

[a] An assignment for the benefit of creditors, made pending suit, is not proper matter for a plea puis darrein continuance. *Davis v. Davis*, 93 Ala. 173, 9 So. 736.

[b] Insolvency of defendant though arising after issue joined, not a proper subject matter for such a plea. *Tanner v. Roberts*, 1 Mo. 416.

8. *Colo.*—See *Whitsett v. Clayton*, 5 Colo. 476. *N. Y.*—*Willis v. Chipp*, 9 How. Pr. 568; *Carpenter v. Bell*, 19 Abb. Pr. 258, 263. See also *Medbury v. Swan*, 46 N. Y. 200. *N. C.*—*Williams v. Hutton & Bourbonnais Co.*, 164 N. C. 216, 80 S. E. 257.

See also the title "Supplemental Pleading."

9. Defenses arising after commencement of suit, etc., see *supra*, I.

10. *Evans v. Cincinnati, S. & M. Ry. Co.*, 78 Ala. 341.

11. *Cook v. Georgia Land Co.*, 120 Ga. 1068, 48 S. E. 378.

12. *Ga.*—*Cook v. Georgia Land Co.*, 120 Ga. 1068, 48 S. E. 378. *Ill.*—*Ryan v. Baltimore & O. R. Co.*, 60 Ill. App. 612. *N. C.*—*Smithurek v. Ward*, 52 N. C. 64, 75 Am. Dec. 453. *Can.*—*Godard v. Frederieton Boom Co.*, 11 N. Brunswick. 448.

[a] A general release given after the commencement of the action need not be pleaded puis darrein continuance, unless a plea has been before filed in the action. *Wisheart v. Legro*, 33 N. H. 177; *Kimball v. Wilson*, 3 N. H. 96, 14 Am. Dec. 342.

[b] An exception exists when the parties seek not only to adjust the amount of the claim, but further to have judgment entered for the amount agreed on. *Washington v. Louisville & N. R. Co.*, 136 Ill. 49, 26 N. E. 653.

13. *Wade v. Emerson*, 17 Mo. 267.

14. *Toppan v. Jenness*, 21 N. H. 232.

15. *Bowne v. Joy*, 9 Johns. (N. Y.) 221. But see *Kopischki v. Koch*, 180 Ill. 44, 54 N. E. 179, *affirming* 79 Ill. App. 238, holding that a former recovery and satisfaction may be shown under the general issue in an action of trespass.

16. *Resseque v. Brownson*, 4 Barb. (N. Y.) 541.

17. *Ill.*—*Straight v. Hanchett*, 23 Ill. App. 584. *Ky.*—*McGowan v. Hoy*, 4 J. J. Marsh. 223. *N. Y.*—*Lawrence v. Bush*, 3 Wend. 305. *Pa.*—See *Woods v. White*, 97 Pa. 222.

18. *Ga.*—*Cook v. Georgia Land Co.*, 120 Ga. 1068, 48 S. E. 378. *Mich.*—*Wheelock v. Rice*, 1 Doug. 267. *Tenn.*—*Wyatt v. Richmond*, 4 Humph. 365. *Can.*—*Harrington v. Witter*, 14 Nova Scotia 183.

But see *Tanner v. Roberts*, 1 Mo.

defendants who were jointly bound.¹⁹

III. NUMBER OF PLEAS.—There can be but one plea puis darrein continuance in the same cause.²⁰

IV. TIME TO FILE.—The plea should be filed before the next term and continuance after the occurrence and knowledge of the facts constituting the defense,²¹ but in some jurisdictions the plea may be filed at any time before trial.²² The court, however, may grant leave to file it nunc pro tunc,²³ but as a general rule, such leave will not be granted after verdict²⁴ or final judgment,²⁵ or after the filing of a referee's report.²⁶ It may properly only be filed in the court of original jurisdiction, and not after the cause has reached an appellate tribunal;²⁷ but, when a cause has been remanded for a new trial by an appellate court, it may be filed prior to the second trial.²⁸

V. LEAVE OF COURT.—Leave of court should be obtained for filing the plea.²⁹ When offered in due season, permission to file is granted as matter of course,³⁰ unless it be pleaded for delay,³¹ or is palpably insufficient.³²

416, that a plea of puis darrein continuance that plaintiff had been discharged under the insolvent act is bad on demurrer.

19. *Carlson's Admr. v. Ruffner*, 12 W. Va. 297.

20. *East St. Louis v. Renshaw*, 153 Ill. 491, 38 N. E. 1048. But see *Gaines v. Conn's Heirs*, 2 Dana (Ky.) 231.

21. *N. Y.*—*Tuffs v. Gibbons*, 19 Wend. 639; *Field v. Goodman*, 3 Wend. 310. *Ohio*.—*Tilton v. Morgaridge*, 12 Ohio St. 98. *Pa.*—*Hostetter v. Kaufman*, 11 Serg. & R. 146. *Can.*—*Vitum v. Stevens*, 13 N. Brunsw. 217, must be filed before the end of the term next ensuing after giving notice of trial.

22. *East St. Louis v. Renshaw*, 153 Ill. 491, 38 N. E. 1048; *Robinson v. Burkell*, 3 Ill. 278.

23. *Me.*—*Cummings v. Smith*, 50 Me. 568, 79 Am. Dec. 629; *Rowell v. Hayden*, 40 Me. 582. *Mich.*—See *Souvais v. Leavitt*, 53 Mich. 577, 19 N. W. 261. *Mo.*—*Thomas v. Van Doren*, 6 Mo. 201; *Nettles v. Sweazea*, 2 Mo. 100. *N. H.*—*Stevens v. Thompson*, 15 N. H. 410; *Rangely v. Webster*, 11 N. H. 299. *N. Y.*—*Tuffs v. Gibbons*, 19 Wend. 639; *Field v. Goodman*, 3 Wend. 310; *Morgan v. Dyer*, 10 Johns. 161. *Ohio*.—*Tilton v. Morgaridge*, 12 Ohio St. 98. And see *Crutchfield v. Carman*, Tapp. 86. *Pa.*—*Lyon v. Marclay*, 1 Watts 271; *Hostetter v. Kaufman*, 11 Serg. & R. 146. *Va.*—*Bradley v. Welch*, 1 Munf. (15 Va.) 284; *Hunt v. Wilkinson*, 2 Call (6 Va.) 49, 1 Am. Dec. 534.

24. *Palmer v. Hutchins*, 1 Cow. (N. Y.) 42; *Alexander v. Fink*, 12 Johns. (N. Y.) 218; *Grumble v. Perley*, 6 N. Brunsw. 512.

25. *Gowen & Co. v. Jones*, 20 Ala. 128; *Gordon v. Robinson*, 3 Ont. Pr. (Can.) 366.

[a] It cannot be pleaded after judgment on demurrer unless there are other issues remaining on the record for trial, and then only as to those issues. *Gordon v. Robinson*, 3 Ont. Pr. (Can.) 366. And see *Wagner v. Imbrie*, 6 Exch. (Eng.) 380, 15 Jur. 405, 20 L. J. Exch. 235, 2 L. M. & P. 333.

26. *Alexander v. Fink*, 12 Johns. (N. Y.) 218.

27. *Weideroder v. Mace*, 184 Ind. 242, 111 N. E. 5; *Vivian Collieries Co. v. Cahall*, 184 Ind. 473, 110 N. E. 672; *Voorhees v. Indianapolis Car & Mfg. Co.*, 140 Ind. 220, 39 N. E. 738.

28. *McGowan v. Hoy*, 4 J. J. Marsh. (Ky.) 223.

29. See *Bate v. Fellowes*, 4 Bosw. (N. Y.) 638; *Morrow v. Morrow*, 1 Tread. Const. (S. C.) 455, 3 Brev. 394.

Leave to file nunc pro tunc see *supra*, IV.

30. *N. H.*—*Stevens v. Thompson*, 15 N. H. 410. *N. Y.*—*Bate v. Fellowes*, 4 Bosw. 638. *Pa.*—*Day v. Hamburg*, 1 Browne 75. *S. C.*—*State v. Moses*, 20 S. C. 465.

31. *Bate v. Fellowes*, 4 Bosw. (N. Y.) 638.

32. *Bate v. Fellowes*, 4 Bosw. (N. Y.) 638.

VI. FORM AND CONTENTS. — If the plea contain facts sufficient to make it one puis darrein continuance, it will be treated as such regardless of what the parties may term it.³³ Being in a sense dilatory,³⁴ the plea should be framed with great strictness.³⁵ It must allege facts from which it appears that the matter of defense occurred after the last continuance,³⁶ setting forth the day of the continuance³⁷ and the time and place where the matter of defense arose.³⁸ It should conclude that the plaintiff should not further maintain his action,³⁹ and if the plea be one in abatement, it must conclude by praying judgment of the writ, and that the writ be quashed;⁴⁰ or if

33. *Ala.*—*State v. Webb*, 110 *Ala.* 214, 20 *So.* 462; *Henry v. Porter*, 29 *Ala.* 619. *Ill.*—*Mount v. Scholes*, 120 *Ill.* 394, 11 *N. E.* 401; *Ross v. Nesbit*, 7 *Ill.* 252; *Donley v. Dougherty*, 97 *Ill.* App. 544; *Miller v. McCormick Harvesting Mach. Co.*, 84 *Ill.* App. 571; *Straight v. Hanchett*, 23 *Ill.* App. 584. *Ind.*—*Prather v. Ruddell*, 8 *Blackf.* 393. *Me.*—*Hilliker v. Simpson*, 92 *Me.* 590, 43 *Atl.* 495. *Pa.* *Vicary v. Moore*, 2 *Watts* 451, 27 *Am. Dec.* 323.

34. *Morrow v. Morrow*, 1 *Tread. Const. (S. C.)* 455, 3 *Brev.* 394.

35. *Mount v. Scholes*, 120 *Ill.* 394, 11 *N. E.* 401; *Donley v. Dougherty*, 97 *Ill.* App. 544. See 4 *STANDARD PROC.* 834.

[a] The precise day on which the thing happened should be alleged. *Cummings v. Smith*, 50 *Me.* 568, 79 *Am. Dec.* 629.

[b] A plea of former adjudication should allege that the former judgment was the result of a trial on the merits and that at the time the plea was filed the judgment was not appealed from, reversed or vacated but remained in full force and effect. *Miller v. McCormick Harvesting Mach. Co.*, 84 *Ill.* App. 571. And see *Paskewie v. East St. Louis & S. Ry. Co.*, 197 *Ill.* App. 1.

[c] A plea of alien enemy should show either that the plaintiff is an alien born and is here without safe conduct, or if a citizen, that he is a resident with the enemy. *Parkinson v. Wentworth*, 11 *Mass.* 26.

[d] If based on accord and satisfaction it must allege a satisfaction of both costs and damages sustained by a breach of contract, as such plea must be to the whole of cause of action. *Goodwin v. Cremer*, 18 *O. B.* 757, 83 *E. C. L.* 756, 22 *L. J. Q. B.* 30,

17 *Jur.* 2, 118 *Eng. Reprint* 286; *Francis v. Crywell*, 5 *B. & Ald.* 886, 1 *D. & R.* 546, 7 *E. C. L.* 481, 106 *Eng. Reprint* 1415; *Ash v. Pouppeville*, *L. R.* 32 *B. (Eng.)* 86, 8 *B. & S.* 825, 37 *L. J. Q. B.* 55, 16 *Wkly Rep.* 191.

36. *Ill.*—*Ross v. Nesbit*, 7 *Ill.* 252; *Straight v. Hanchett*, 23 *Ill.* App. 584. *N. Y.*—*Jackson ex dem. Coldeu Rich*, 7 *Johns.* 194. *S. C.*—*Morrow v. Morrow*, 1 *Tread. Const.* 455, 3 *Brev.* 394.

37. *Ill.*—*Ross v. Nesbit*, 7 *Ill.* 252. *Me.*—*Field v. Cappers*, 81 *Me.* 36, 16 *Atl.* 328, 10 *Am. St. Rep.* 237; *Augusta v. Moulton*, 75 *Me.* 551; *Jewett v. Jewett*, 58 *Me.* 234. *Pa.*—*Vicary v. Moore*, 2 *Watts* 541, 27 *Am. Dec.* 323.

38. *Mount v. Scholes*, 120 *Ill.* 394, 11 *N. E.* 401; *Ross v. Nesbit*, 7 *Ill.* 252; *Field v. Cappers*, 81 *Me.* 36, 16 *Atl.* 328, 10 *Am. St. Rep.* 237; *Cummings v. Smith*, 50 *Me.* 568, 79 *Am. Dec.* 629.

[a] "In pleading a judgment, either the term of the court at which it was recovered, or the exact date of its rendition, should always be stated, and when taken in vacation . . . the time of its entry by the clerk should be stated." *Mount v. Scholes*, 120 *Ill.* 394, 11 *N. E.* 401.

39. *Gibson v. Bourland*, 13 *Ill.* App. 352; *McGowan v. Hoy*, 4 *J. J. Marsh.* 223. See also *Hallowes v. Lucy*, 3 *Lev.* 120, 83 *Eng. Reprint* 608. But see *Broughton v. Bradley*, 34 *Ala.* 694, 73 *Am. Dec.* 474.

40. *Ross v. Nesbit*, 7 *Ill.* 252.

[a] If the plea be one of alien enemy (1) it should conclude that the plaintiff be barred of his action until, etc. (*Parkinson v. Wentworth*, 11 *Mass.* 26), or (2) that the writ remain without day, *donnee terrae fuerint*, until the intercourse or the peace of the two countries shall be restored. *Hutchinson v. Brock*, 11 *Mass.* 119.

the writ abates de facto, by praying judgment if the court will further proceed.⁴¹ The plea is usually required to be verified by affidavit,⁴² though in some jurisdictions, verification of the plea is necessary only when it is pleaded in abatement.⁴³

VII. OBJECTIONS TO PLEA.—A. DEMURRER.—The sufficiency of a plea duly verified can be determined only on demurrer.⁴⁴ Failure to file the plea in time may also be taken advantage of by demurrer.⁴⁵ A general demurrer is sufficient as a rule to reach defects in the form of the plea.⁴⁶

B. MOTION.—When the plea is not filed in due season, the question may be presented by motion to set the plea aside.⁴⁷ If two pleas are permitted to be filed, a motion to strike one of them from the files is proper.⁴⁸ A motion to strike may also be made because the plea is accompanied by another plea that it is not verified,⁴⁹ or improperly verified.⁵⁰ A plea puis darrein continuance regularly pleaded and verified cannot be set aside on motion as false.⁵¹

41. *Ross v. Nesbit*, 7 Ill. 252.

42. *Ala.*—*Lindsay v. Barnett*, 130 Ala. 417, 30 So. 395; *Evans v. Cincinnati, S. & M. Ry. Co.*, 78 Ala. 341. *Ill.*—*Ross v. Nesbit*, 7 Ill. 252. *N. C.*—See *Williams v. Hutton & Bourbonnais Co.*, 164 N. C. 216, 80 S. E. 257. *Pa.*—*Day v. Hamburg*, 1 Browne 75. *S. C.*—*Morrow v. Morrow*, 1 Tread. Const. 455, 3 Brev. 394. *Tenn.*—*Chattanooga v. Neely*, 97 Tenn. 527, 37 S. W. 281; *Caldwell v. Richmond*, 1 Heisk. 468. *Eng.*—*Martin v. Wyvill*, 1 Str. 492, 93 Eng. Reprint 654; *Paris v. Salkeld*, 2 Wils. C. P. 137. *Can.*—*Gordon v. Robinson*, 3 Ont. Pr. 366.

But see *McGowan v. Hoy*, 4 J. J. Marsh. (Ky.) 223.

[a] The purpose of the affidavit is to inform the court and not to give validity to the plea, when therefore the plea has been filed with leave of court, it will be presumed that satisfactory proof had been given to the court, or that it was consented to by the opposite party. *Morrow v. Morrow*, 1 Tread. Const. (S. C.) 455, 3 Brev. 394.

[b] The English courts, prior to the passage of the statute of 4 and 5 Anne, ch. 16, did not require the plea to be verified. *Pierce v. Pakton*, 2 Salk. 519, 91 Eng. Reprint 442; *Hawkins v. Moor*, Cro. Jac. 261, 79 Eng. Reprint 225; and see *Cockaine v. Witnam*, Cro. Eliz. 49, 78 Eng. Reprint 311.

43. *Mound v. Schedes*, 120 Ill. 394, 11 N. E. 401; *Donley v. Dougherty*, 97 Ill. App. 544; *Harding v. Horton*, 79 Ill. App. 123; *Gibson v. Bourland*, 13

Ill. App. 352; *Crutchfield v. Carman*, Tapp. (Ohio) 86.

[a] When pleaded in bar no verification necessary. *Ill.*—*Robinson v. Burkell*, 3 Ill. 278. *N. Y.*—*Jackson v. Peer*, 4 Cow. 418; *Bancker v. Ash*, 9 Johns. 250. *Ohio.*—*Crutchfield v. Carman*, Tapp. 86.

44. *Day v. Hamburg*, 1 Browne (Pa.) 75.

45. *Morgan v. Dyer*, 9 Johns. (N. Y.) 255, 10 Johns. 161. But see *Thomas v. Van Doren*, 6 Mo. 201, that the remedy is by motion to strike, not demurrer. See also, *Rowell v. Hayden*, 40 Me. 582.

46. *Ross v. Nesbit*, 7 Ill. 252.

47. *Me.*—*Rowell v. Hayden*, 40 Me. 582. *Miss.*—*Pool v. Hill*, 44 Miss. 306. *Mo.*—*Thomas v. Van Doren*, 6 Mo. 201. *N. Y.*—*Morgan v. Dyer*, 9 Johns. 255, 10 Johns. 161; *Ludlow v. McCrea*, 1 Wend. 228.

48. *East St. Louis v. Renshaw*, 153 Ill. 491, 38 N. E. 1048.

[a] On appeal, if there be two pleas puis darrein continuance, the first will be regarded as properly filed, and the second as stricken from the files. *East St. Louis v. Renshaw*, 153 Ill. 491, 38 N. E. 1048.

49. *Nicholl v. Mason*, 21 Wend. (N. Y.) 339.

50. *Ala.*—*Wright v. Evans*, 53 Ala. 103; *McCall v. McRae*, 10 Ala. 313. *Ky.*—*McGowan v. Hoy*, 4 J. J. Marsh. 223. *Miss.*—*Pool v. Hill*, 44 Miss. 306.

51. *Gilbert v. Graham*, 14 N. Bruns. (Can.) 202.

VIII. AMENDMENT.—The plea may be amended at any time before trial.⁵² and the amended plea may be entitled as of the term when the original was filed.⁵³ When a demurrer to the plea has been sustained, leave to withdraw the plea may be granted and a former plea reinstated, with or without terms.⁵⁴

IX. REPLICATION TO PLEA.—The adverse party may reply to a plea puis darrein continuance.⁵⁵

X. OPERATION AND EFFECT.—A plea puis darrein continuance in legal effect admits plaintiff's cause of action, except the matter contested by it,⁵⁶ and unless otherwise provided by statute⁵⁷ waives all other pleas,⁵⁸ having the effect by operation of law to cause

52. **U. S.**—*Heye v. Lieman*, 12 Fed. Cas. No. 6,445a. **Ala.**—*Webster v. Wyser*, 1 Stew. 184. **Eng.**—*Holroyd v. Reed*, 5 Q. B. 594, D. & M. 483, 8 Jur. 81, 13 L. J. Q. B. 130, 48 E. C. L. 594, 114 Eng. Reprint 1373.

[a] It may be amended in substance, though demurred to, so as to modify or vary entirely the original plea. *Jackson v. Peer*, 4 Cow. (N. Y.) 418.

53. *Webster v. Wyser*, 1 Stew. (Ala.) 184.

54. *Ripley v. Leverenz*, 183 Ill. 519, 56 N. E. 166, reversing (83 Ill. App. 603); *Horning v. Frank*, 88 Ill. App. 87; *Smith v. Strange*, 2 Manitoba (Can.) 101. Compare, *Tanner v. Roberts*, 1 Mo. 416.

55. *Kingston Bank v. Swift*, 1 How. Pr. (N. Y.) 12.

Propriety of replication generally, see the title "Replication and Reply."

[a] Upon failure to reply, defendant may proceed to judgment non pros for want of replication. *Jackson v. Peer*, 4 Cow. (N. Y.) 418. See also *Wollen v. Smith*, 9 A. & E. 505, 8 L. J. Q. B. 122, 1 P. & D. 374, 2 W. W. & H. 79, 36 E. C. L. 274, 112 Eng. Reprint 1303.

56. **Ill.**—*Elder v. Prussing*, 101 Ill. App. 655; *Horning v. Frank*, 88 Ill. App. 87; *Harding v. Horton*, 79 Ill. App. 123. **N. H.**—*Webb v. Steele*, 13 N. H. 230. **N. Y.**—*Culver v. Barney*, 14 Wend. 161; *Kimball v. Huntington*, 10 Wend. 675, 25 Am. Dec. 590. **Wis.**—*Adams v. Filer*, 7 Wis. 306, 73 Am. Dec. 410; *Adler v. Wise*, 4 Wis. 159.

57. **Ala.**—*Wright v. Evans*, 53 Ala. 103; *Dolberry v. Trice's Exr.*, 49 Ala. 207; *Lacy, Terrell & Co. v. Rockett*, 11 Ala. 1002. But see *Sadler v. Fischer's Admr.*, 3 Ala. 200, decided prior to the statute. **Fla.**—*Parkhill's Admr. v.*

Union Bank, 1 Fla. 110, 128. **Ill.** *People v. Chicago Rys. Co.*, 270 Ill. 87, 104, 110 N. E. 386, Ann. Cas. 1917B, 821. **Mass.**—*Shirley v. Shattuck*, 13 Mete. 256. **Pa.**—*Johns. v. Bolton*, 12 Pa. 339; *South Easton v. Norton*, 2 Pa. Co. Ct. 187, 636. But see *Woods v. White*, 97 Pa. 222. **Tenn.**—*Susong v. Jack*, 1 Heisk. 415. *Sanderlin v. Dandridge*, 3 Humph. (Tenn.) 99, was decided prior to enactment of §4633 of the code.

58. **U. S.**—*Wisdom v. Williams*, Hempst. 460, 30 Fed. Cas. No. 17,904; *Taylor v. Hogan*, Hempst. 16, 23 Fed. Cas. No. 13,794a; *Spafford v. Woodruff*, 2 McLean 191, 22 Fed. Cas. No. 13,198; *Good v. Davis*, Hempst. 16, 10 Fed. Cas. No. 5530a. **Ark.**—*Burton v. Hynson*, 7 Ark. 502. **Ill.**—*Mount v. Scholes*, 120 Ill. 394, 399, 11 N. E. 401; *Elder v. Prussing*, 101 Ill. App. 655; *Donley v. Dougherty*, 97 Ill. App. 544; *Rork v. McDavid*, 91 Ill. App. 262; *Horning v. Frank*, 88 Ill. App. 87; *Chicago & E. I. R. Co. v. Lowry*, 85 Ill. App. 533. But see *People v. Chicago Rys. Co.*, 270 Ill. 87, 104, 110 N. E. 386, Ann. Cas. 1917B, 821, that this is no longer the rule in Illinois. **Ind.** *Prather v. Ruddell*, 8 Blackf. 393; *Scott v. Brokaw*, 6 Blackf. 241. **Me.**—*Hilliker v. Simpson*, 92 Me. 590, 43 Atl. 495; *Morse v. Small*, 73 Me. 565. **Miss.** *Pool v. Hill*, 44 Miss. 306. See also *Heyfron v. Mississippi Union Bank*, 7 Smed. & M. 434. **N. H.**—*True v. Huntoon*, 54 N. H. 121; *Webb v. Steele*, 13 N. H. 230; *Pemigewasset Bank v. Brackett*, 4 N. H. 557. **N. J.**—*Price v. Sanderson*, 18 N. J. L. 426. **N. Y.** *Bate v. Fellows*, 4 Bosw. 638; *Culver v. Barney*, 14 Wend. 161; *Kimball v. Huntington*, 10 Wend. 675, 25 Am. Dec. 590. **N. C.**—*Williams v. Hutton & Bourbonnais Co.*, 164 N. C. 216, 80 S. E. 257; *Greer v. Sheppard*, 2 N. C. 96.

all other pleas to be stricken from the record.⁵⁹ After the filing of the plea, the parties proceed to settle their pleadings *de novo* just as though no pleas had been previously filed in the cause,⁶⁰ and both parties are precluded from presenting any evidence as to the merits of the cause.⁶¹ The aforesaid rule as to waiver of other pleas does not apply when the facts set forth in the plea affect the remedy only and not the cause of action,⁶² nor when it sets up only a partial defense.⁶³

XI. DISPOSITION OF PLEA.—In jurisdictions where the filing of the plea *puis darrein continuance* waives and supersedes all previous pleas, if the matter pleaded be held to be bad, no question remains except the amount of damages.⁶⁴ Whether the plea be in effect one in bar or abatement, or whether on demurrer or after trial, the judgment should be final,⁶⁵ and not *respondeat ouster*,⁶⁶ though by

Ohio.—Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 4 West. L. J. 1. **Pa.** Lyon *v.* Marclay, 1 Watts 271. See Woods *v.* White, 97 Pa. 222. But see Johns *v.* Bolton, 12 Pa. 339, rule changed by statute. **R. I.**—Westerly Probate Court *v.* Potter, 25 R. I. 204, 55 Atl. 524. **S. C.**—Simonton *v.* Younge, 1 Strobb. 17. **Vt.**—Lincoln *v.* Thrall, 26 Vt. 304. **Wis.**—Adams *v.* Filer, 7 Wis. 306, 73 Am. Dec. 410; Adler *v.* Wise, 4 Wis. 159. **Can.**—Ruggles *v.* Victoria Beach R. Co., 35 Nova Scotia 553.

[a] **General issue** (1) waived (**Ill.** Chicago & E. I. R. Co. *v.* Lowry, 85 Ill. App. 533. Rule since changed by practice act, see People *v.* Chicago Rys. Co., 270 Ill. 87, 107, 110 N. E. 386, Ann. Cas. 1917B, 821. **Me.**—Morse *v.* Small, 73 Me. 565. **Vt.**—Lincoln *v.* Thrall, 26 Vt. 304. **Wis.**—Adams *v.* Filer, 7 Wis. 306, 73 Am. Dec. 410), (2) as well as the matters set out in the notice thereto subjoined. Adams *v.* Filer, 7 Wis. 306, 73 Am. Dec. 410.

[b] **If after a plea in bar**, defendant pleads *puis darrein continuance*, his plea in bar is waived, but such plea may be properly pleaded with the general issue, either specially or by brief statement, when no plea has been previously pleaded. True *v.* Huntoon, 54 N. H. 121.

[c] **If the plea be stricken from the files on motion**, there is no such waiver, the matter standing as if no such plea had ever been filed. Dinet *v.* Pürshing, 86 Ill. 83.

59. Donley *v.* Dougherty, 97 Ill. App. 544; Horning *v.* Frank, 88 Ill. App. 87; Harding *v.* Horton, 79 Ill. App. 123; Lincoln *v.* Thrall, 26 Vt.

304. But see People *v.* Chicago Rys. Co., 270 Ill. 87, 104, 110 N. E. 386, Ann. Cas. 1917B, 821, that the practice act has changed this rule.

[a] **A plea puis darrein continuance** (1) is in substitution of all previous pleas (Woods *v.* White, 97 Pa. 222. But see Johns *v.* Bolton, 12 Pa. 339), and (2) supersedes them. East St. Louis *v.* Renshaw, 153 Ill. 491, 38 N. E. 1048.

60. Mount *v.* Scholes, 120 Ill. 394, 11 N. E. 401; Donley *v.* Dougherty, 97 Ill. App. 544. See also Waterbury *v.* McMillan, 46 Miss. 635.

61. Chicago & E. I. R. Co. *v.* Lowry, 85 Ill. App. 533.

62. **N. Y.**—Bate *v.* Fellowes, 4 Bosw. 638; Culver *v.* Barney, 14 Wend. 161; Rayner *v.* Dyett, 2 Wend. 300. **R. I.** Davis *v.* Burgess, 18 R. I. 85, 25 Atl. 848. **Vt.**—Lincoln *v.* Thrall, 26 Vt. 304.

63. **Ill.**—Bennet *v.* Gilbert, 94 Ill. App. 505, *affirmed*, 194 Ill. 403, 62 N. E. 847. **N. Y.**—Morris *v.* Cook, 19 Wend. 699. **R. I.**—Davis *v.* Burgess, 18 R. I. 85, 25 Atl. 848.

64. Ryan *v.* Baltimore & O. R. Co., 60 Ill. App. 612; Morse *v.* Small, 73 Me. 565.

65. **U. S.**—Renner *v.* Marshall, 1 Wheat. 215, 4 L. ed. 74. **Me.**—McKeen *v.* Parker, 51 Me. 389. **N. H.**—Waldo *v.* Mitchell, 24 N. H. 229.

[a] **Whether upon demurrer or verdict** the judgment is final *quod recuperet*. Culver *v.* Barney, 14 Wend. (N. Y.) 161.

66. **Me.**—See McKeen *v.* Parker, 51 Me. 389. But see Field *v.* Cappers, 81 Me. 36, 16 Atl. 328, 10 Am. St. Rep. 237; Augusta *v.* Moulton, 75 Me. 551,

statute in some jurisdictions, the judgment should be respondeat ouster and not quod recuperet.⁶⁷

XII. COSTS.—Costs will as a rule be imposed up to the time of filing the plea.⁶⁸

that the court may in its discretion allow a replader on terms. **N. H.** Waldo *v.* Mitchell, 24 N. H. 229. **N. Y.** Culver *v.* Barney, 14 Wend. 161.

67. McDugald *v.* Mississippi Union Bank, 6 Smed. & M. (Miss.) 333.

68. **U. S.**—Wisdom *v.* Williams, Hempst. 460, 30 Fed. Cas. No. 17,904. **Ala.**—Peck *v.* Karter, 141 Ala. 668, 37 So. 920, overruling State *ex rel.* Sanche

v. Webb, 110 Ala. 214, 20 So. 462, in so far as it conflicts with this principle. **Mo.**—Nettles *v.* Sweazea, 2 Mo. 100. **S. C.**—State *v.* Moses, 20 S. C. 465.

[a] Costs should only be required to be paid when leave to file is not sought at the term subsequent to which it arose but at a subsequent term. Stevens *v.* Thompson, 15 N. H. 410.

PUNISHMENT.—See Pardon; Sentence and Judgment.

PURCHASER WITHOUT NOTICE.—See Fraudulent Conveyances.

PURE FOOD LAWS

By the Editorial Staff.

I. GENERAL STATEMENT, 970

II. CRIMINAL REMEDIES, 970

- A. *In General*, 970
- B. *Who May Prosecute*, 973
- C. *Jurisdiction and Venue*, 973
- D. *Indictment, Information or Complaint*, 974
 - 1. *Generally*, 974
 - 2. *Particular Averments*, 976
 - a. *Office of Complainant*, 976
 - b. *Alleging Notice and Hearing*, 976
 - c. *Description of Defendant*, 976
 - d. *Description of Purchaser*, 976
 - e. *Description of Article and Use*, 977
 - f. *As to Adulteration*, 977
 - g. *As to Misbranding*, 977
 - h. *As to Sale*, 977
 - i. *Knowledge and Intent*, 978
 - 3. *Under Oleomargarine Acts*, 978
 - 4. *For Refusing To Supply Sample for Analysis*, 980
- E. *Pleas of Defendant*, 980
- F. *Trial*, 980
 - 1. *Variance*, 980
 - 2. *Questions of Law and Fact*, 981
 - 3. *Instructions*, 981
- G. *Sentence and Judgment*, 981

III. ACTION FOR PENALTY, 981

- A. *In General*, 981
- B. *Who May Bring*, 982
- C. *Jurisdiction*, 982
- D. *Complaint*, 982
 - 1. *Generally*, 982
 - 2. *Alleging Impurity or Adulteration of Article*, 983

3. *Averments as to Analysis and Standard*, 983
4. *Averments as to Sale*, 984
5. *Averments as to Knowledge and Intent*, 984
6. *Negating Exceptions or Provisos*, 984
- E. *Trial*, 984
- F. *Review*, 985

IV. SEIZURE AND CONDEMNATION UNDER, 985

- A. *In General*, 985
- B. *Who May Bring Proceedings for*, 986
- C. *Jurisdiction*, 986
- D. *The Libel*, 986
- E. *Hearing or Trial*, 987
- F. *Review*, 987

V. POWER OF EQUITY TO ENJOIN ENFORCEMENT OF, 988

VI. REMEDY FOR INJURIES FROM UNWHOLESOME FOOD, 988

- A. *Declaration or Complaint*, 988
- B. *Trial*, 989

CROSS-REFERENCES:

Adulteration; Health;
Intoxicating Liquors.

For forms, see 9 STANDARD PROC. 1012, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. GENERAL STATEMENT.—In most jurisdictions, statutory provisions exist regulating the manufacture, sale and transportation of adulterated or misbranded articles of food, drugs, liquor, and kindred articles.¹ These laws are commonly designated as the pure food acts.²

1. See the statutes, and *Armour & Co. v. State Dairy & Food Comr.*, 159 Mich. 1, 8, 123 N. W. 580; *Ward v. Morehead City Sea Food Co.*, 171 N. C. 33, 87 S. E. 958.
2. **U. S.**—*United States v. Morgan*, 181 Fed. 587. **Ind.**—*Isenhour v. State*, 157 Ind. 517, 520, 62 N. E. 40, 87 Am. St. Rep. 228. **Mich.**—*People v. Jennings*, 132 Mich. 662, 663, 94 N. W. 216. **Ohio.**—*Haas v. State*, 2 Ohio Dec. 177, 1 Ohio N. P. 248. **Pa.**—*Com. v. Kevin*, 202 Pa. 23, 51 Atl. 594, 90 Am. St. Rep. 613; *Com. v. Spencer*, 28 Pa. Super. 301; *Com. v. Hartman*, 19 Pa. Co. Ct. 97. **Wash.**—*Hathaway v.*

The general purpose and object of all pure food and kindred acts is to prevent the manufacture or sale of adulterated or misbranded articles of food and drugs,³ that the health of the people of the state may be protected,⁴ and honesty and fair dealing in the sale of such articles be promoted.⁵ The special object of the federal law, however, is to keep adulterated articles out of the channels of interstate commerce,⁶ or if they enter such commerce, to condemn them while being transported or when they have reached their destination, provided they remain unloaded, unsold, or in original unbroken packages.⁷

II. CRIMINAL REMEDIES. — A. IN GENERAL. — The exposure for sale in open market, or the selling of unwholesome foods, to be used as such, was a misdemeanor and indictable at the common law,⁸ and since offenses at common law are indictable in most states by general statutory provision, the sale of unwholesome articles of food would be indictable in the absence of any special statutory provision.⁹ But under the pure food laws, it is generally made a penal offense not only to sell, or offer for sale, but to manufacture or ship, adulterated

McDonald, 27 Wash. 659, 68 Pac. 376, 91 Am. St. Rep. 889.

3. *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. ed. 1182; *Haas v. State*, 2 Ohio Dec. 177, 1 Ohio N. P. 248. See also: **U. S.**—*Hebe Co. v. Calvert*, 246 Fed. 711. **Ia.**—*State v. Armour Packing Co.*, 124 Iowa 323, 100 N. W. 59. **Pa.**—*Com. v. Miller*, 131 Pa. 118, 18 Atl. 938, 6 L. R. A. 633.

[a] **That Articles Are Properly Branded.**—*United States v. Morgan*, 181 Fed. 587.

4. See the following: **U. S.**—*Hall-Baker Grain Co. v. United States*, 198 Fed. 614, 117 C. C. A. 318; *Hebe Co. v. Calvert*, 246 Fed. 711; *United States v. Johnson*, 177 Fed. 313, 315. **D. C.** *Galt v. United States*, 39 App. Cas. 470. **Minn.**—*Meshbeshier v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428, 131 Am. St. Rep. 441. **N. Y.** *People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452. **Ohio.**—*State v. Capital City Dairy Co.*, 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181; *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163. **Pa.**—*Com. v. Kevin*, 202 Pa. 23, 51 Atl. 594, 90 Am. St. Rep. 613; *Com. v. Arow*, 32 Pa. Super. 1. **Wash.** *Hathaway v. McDonald*, 27 Wash. 659, 68 Pac. 376, 91 Am. St. Rep. 889. **Eng.**—*Parsons v. Birmingham Dairy Co.*, L. R. 9 Q. B. Div. 172.

5. See the following: **U. S.**—*Hall-Baker Grain Co. v. United States*, 198 Fed. 614, 117 C. C. A. 318; *United States v. Amer. Druggists' Syndicate*, 186 Fed. 387; *United States v. Johnson*,

177 Fed. 313. **Neb.**—*State v. Paxton & Gallagher Co.*, 93 Neb. 216, 140 N. W. 167. **N. Y.**—*People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; *People v. Henderson*, 131 N. Y. Supp. 997. **Ohio.**—See *State v. Hutchinson*, 56 Ohio St. 82, 86, 46 N. E. 71. **Pa.**—*Com. v. Kevin*, 202 Pa. 23, 51 Atl. 594, 90 Am. St. Rep. 613; *Com. v. Arow*, 32 Pa. Super. 1.

6. *United States v. Lexington Mill & Elev. Co.*, 232 U. S. 399, 409, 34 Sup. Ct. 337, 58 L. ed. 658, L. R. A. 1915B, 774; *Savage v. Jones*, 225 U. S. 501, 529, 32 Sup. Ct. 715, 56 L. ed. 1182; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 54, 31 Sup. Ct. 364, 55 L. ed. 364; *Hall-Baker Grain Co. v. United States*, 198 Fed. 614, 117 C. C. A. 318; *United States v. Five Boxes of Asafoetida*, 181 Fed. 561.

7. *Savage v. Jones*, 225 U. S. 501, 529, 32 Sup. Ct. 715, 56 L. ed. 1182; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 54, 31 Sup. Ct. 364, 55 L. ed. 364.

8. **Mo.**—*State v. Snyder*, 44 Mo. App. 429. **N. H.**—*State v. Buckman*, 8 N. H. 203, 29 Am. Dec. 646. **N. C.** *State v. Norton*, 24 N. C. 40; *State v. Smith*, 10 N. C. 378, 14 Am. Dec. 594. **Ohio.**—*Haas v. State*, 2 Ohio Dec. 177, 1 Ohio N. P. 248.

[a] **Exhibition or Sale Necessary To Offense.**—*Haas v. State*, 2 Ohio Dec. 177, 1 Ohio N. P. 248. But see *State v. Buckman*, 8 N. H. 203, 29 Am. Dec. 646.

9. *State v. Snyder*, 44 Mo. App. 429.

or misbranded articles of food or drink.¹⁰ Since the offense described in such laws is not an infamous offense, however, prosecution may be either by indictment,¹¹ or by information filed by the proper district attorney.¹²

The practice followed in prosecutions under the federal act must be in accord with recognized procedure.¹³

Notice and Hearing.—Statutes sometimes provide that, when an article is found to be adulterated or misbranded upon an examination or investigation provided for therein,¹⁴ notice shall be given to the party from whom the sample was obtained of such fact;¹⁵ and an opportunity afforded the person notified, for such hearing as is provided for in the act.¹⁶ It is held, however, under the federal act, that such

10. See the statutes, and the following cases: **U. S.**—United States *v.* Morgan, 222 U. S. 274, 279, 32 Sup. Ct. 81, 56 L. ed. 198; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 51, 31 Sup. Ct. 364, 55 L. ed. 364; United States *v.* Twenty Cases of Grape Juice, 189 Fed. 331, 333, 111 C. C. A. 63; United States *v.* Hopkins & Co., 199 Fed. 649, 651; United States *v.* Mayfield, 177 Fed. 765, 768. **Neb.**—Lansing *v.* State, 73 Neb. 124, 102 N. W. 254, under ch. 99, laws of 1897. **N. C.** Ward *v.* Morehead City Sea Food Co., 171 N. C. 33, 87 S. E. 958.

[a] **Any person**, whether a manufacturer or a dealer not protected by a guarantee, violating the provisions of these acts is guilty of the offense stated therein. See the statutes and the following cases: United States *v.* Morgan, 222 U. S. 274, 279, 32 Sup. Ct. 81, 56 L. ed. 198; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. ed. 364; United States *v.* Twenty Cases of Grape Juice, 189 Fed. 331, 333, 111 C. C. A. 63; United States *v.* Hopkins & Co., 199 Fed. 649; United States *v.* Mayfield, 177 Fed. 765, 768.

[b] **Where the acts do not specifically provide for their enforcement**, it is nevertheless held that a criminal prosecution in accordance with the general statutory provisions is contemplated. See *State v. Horgan*, 55 Minn. 183, 56 N. W. 688.

11. United States *v.* Lindsay Wells Co., 186 Fed. 248. See also *Com. v. Haynes*, 107 Mass. 194.

[a] **Prosecution against corporation is by action for fine and not by indictment or information under Kentucky statute.** *Small & Co. v. Com.*, 134 Ky. 272, 120 S. W. 361.

12. United States *v.* J. L. Hopkins

& Co., 228 Fed. 173; United States *v.* Wells, 225 Fed. 320; United States *v.* Lindsay Wells Co., 186 Fed. 248.

[a] **Leave of court to file an information** (1) for a violation of the food and drug act is required in some jurisdictions. See United States *v.* Simon, 248 Fed. 980; United States *v.* J. L. Hopkins & Co., 228 Fed. 173; United States *v.* Wells, 225 Fed. 320. (2) Such leave will be denied when it is doubtful whether there has been a violation of the statute, and the defendants have acted in good faith and are willing to comply with the law. United States *v.* Schurman, 177 Fed. 581. As to necessity for leave of court generally, see 12 STANDARD PROC. 112, et seq.

13. United States *v.* Simon, 248 Fed. 980, and it must not be within the inhibition of the federal constitution.

14. See the several statutes, and United States *v.* One Hundred Barrels of Vinegar, 183 Fed. 471, 475, investigation provided for in §4 of the federal act refers to cases of criminal prosecution under §5 for the enforcement of the penalties referred to in §2; it has no reference to proceedings for condemnation under §10, since the necessities of proceedings under §10 could not abide the delay caused by an investigation such as prescribed in §4.

15. See the statutes, and the following cases: United States *v.* Morgan, 222 U. S. 274, 280, 32 Sup. Ct. 81, 56 L. ed. 198; United States *v.* Seventy-Five Boxes of Alleged Pepper, 198 Fed. 934; United States *v.* Seventy-Five Barrels of Vinegar, 192 Fed. 350; United States *v.* Seventy-Four Cases of Grape Juice, 181 Fed. 629.

16. See the statutes, and the following cases: United States *v.* Mor-

steps are not conditions precedent to an enforcement of the penalties for a violation of such acts.¹⁷

B. WHO MAY PROSECUTE. — Proceedings for the prosecution and enforcement of all violations of the pure food laws are generally made at the instance of the government, federal or state.¹⁸ It is generally made the duty of a specified officer to certify the fact of a violation of the laws to the prosecutor, in whose district prosecution should be had.¹⁹ It is then the duty of such person to prosecute the offender.²⁰ While such statutes by terms impose the duty of enforcing the provisions thereof upon a certain person or body, unless they expressly restrict such enforcement to the particular person or body designated, they do not prevent any one from instituting a prosecution for its enforcement.²¹

C. JURISDICTION AND VENUE.²² — Prosecutions for violations of the pure food laws must be had in the district in which prosecution is authorized and jurisdiction given by the statute.²³ Under the fed-

gan, 222 U. S. 274, 280, 32 Sup. Ct. 81, 56 L. ed. 198; *United States v. Hopkins & Co.*, 199 Fed. 649, 652; *United States v. Seventy-Five Boxes of Alleged Pepper*, 198 Fed. 934; *United States v. Seventy-Five Barrels of Vinegar*, 192 Fed. 350; *United States v. Seventy-Four Cases of Grape Juice*, 181 Fed. 629.

17. *United States v. Morgan*, 222 U. S. 274, 32 Sup. Ct. 81, 56 L. ed. 198 (reversing 181 Fed. 587); *United States v. Seventy-Five Boxes of Alleged Pepper*, 198 Fed. 934; *United States v. Seventy-Five Barrels of Vinegar*, 192 Fed. 350, 353, on a libel for forfeiture. See also *United States v. Fifty Barrels of Whiskey*, 165 Fed. 966, affirmed in *United States v. Sixty-Five Casks Liquid Extracts*, 170 Fed. 449, 454, and cited in *United States v. Nine Barrels of Olives*, 179 Fed. 983, 984. This question was the result of a conflict of authority, however, and in *United States v. Certain Cans of Syrup*, 192 Fed. 79, decided November 17, 1911 (prior to decision in *United States v. Morgan, supra*), the district court, for the eastern district of Pennsylvania, held that the notice and hearing provided for were conditions precedent to a libel, when suit was brought at the instance of the Department of Agriculture, following the decision of the circuit court of appeals, second circuit, in *United States v. Twenty Cases of Grape Juice*, 189 Fed. 331, 111 C. C. A. 63. And see *United States v. Seventy-Four Cases of Grape Juice*, 181 Fed. 629, 631, to same effect.

18. See the cases cited *infra*, this section.

19. See the statutes, and *United States v. Hopkins & Co.*, 199 Fed. 649, 651, under §4, federal act, providing that the secretary of agriculture shall certify the fact of adulteration or misbranding to the proper United States district attorney.

20. *United States v. Morgan*, 222 U. S. 274, 281, 32 Sup. Ct. 81, 56 L. ed. 198; *United States v. Twenty Cases of Grape Juice*, 189 Fed. 331, 333, 111 C. C. A. 63; *United States v. Seventy-Five Barrels of Vinegar*, 192 Fed. 350.

[a] **United States district attorney** has no discretion but to proceed as directed in the act. *United States v. Seventy-Five Barrels of Vinegar*, 192 Fed. 350. But the fact that the act compels him to act in such cases does not deprive him of the power voluntarily to proceed under his general powers to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States." *United States v. Morgan*, 222 U. S. 274, 281, 32 Sup. Ct. 81, 56 L. ed. 198.

21. See *Mass.—Com. v. Mullen*, 176 Mass. 132, 57 N. E. 331; *Com. v. McDonnell*, 157 Mass. 407, 32 N. E. 361. *N. Y.—People v. Beaman*, 102 App. Div. 151, 92 N. Y. Supp. 295. *R. I. State v. Entwistle*, 38 R. I. 417, 96 Atl. 306.

See also the cases cited in 1 STAND-ARD PROC. 582, note 7.

22. See generally the titles "Jurisdiction;" "Venue."

23. See the statutes, and *United*

eral act, since the crime is the shipping or delivering for shipment at the place in which the commerce is instituted by the physical act of shipment,²⁴ prosecution should be brought in this jurisdiction.²⁵ Under the state acts, however, an offender may be prosecuted in any county of the state where a sale is made contrary to its provisions.²⁶ The court in which the prosecution is brought depends largely upon the laws of the particular jurisdiction.²⁷

D. INDICTMENT, INFORMATION OR COMPLAINT.—1. Generally.²⁸ The indictment, information or complaint must distinctly allege all the elements essential to the offense under the particular statute involved.²⁹ But the general rule obtains that an indictment, information or complaint in the language of the statute creating the offense,³⁰ or in language substantially the same or equivalent thereto,³¹ is ordi-

States v. Hopkins & Co., 199 Fed. 649, 651, holding that the question of regulation, or the manner of administration of the federal act in the department of agriculture, could not prevail over the express language of the statute. See also the title "**United States Courts.**"

24. *United States v. Hopkins & Co.*, 199 Fed. 649, while the act makes the crime as indicated in the text, it prohibits the introduction into another state by interstate commerce; no jurisdiction can be acquired except through the existence of interstate commerce.

25. *United States v. Hopkins & Co.*, 199 Fed. 649, 652, wherein it was contended that the prosecution should be in the district of the domicile of the defendant corporation. The provision of the constitution, that the trial of all crimes shall be by jury, and such trial held in the state where the crime shall have been committed, does not in any way affect prosecution under the federal act, for the state in which prosecution is to be had is clearly defined by the statute itself. Nor does a provision in the act, for the seizure of goods within any district where found, determine in what jurisdiction a criminal proceeding can be brought.

[a] An objection to the jurisdiction of the court cannot be raised by a plea based upon the wording of the information. *United States v. Hopkins & Co.*, 199 Fed. 649, 651.

26. See *infra*, this note.

[a] A general manager of a corporation engaged in the business of wholesaling food supplies, who, in conducting said business, kept in stock and sold, through traveling salesmen employed for the purpose, an adulterated

article of food, was held to be a principal offender in violating the provisions of a statute prohibiting the manufacture and sale of impure and adulterated articles of food, and might be prosecuted for such offense in any county of the state where a sale was made. *Bissman v. State*, 6 Ohio Cir. Dec. 712, 9 Ohio Cir. Ct. 714.

27. See the statutes, and *Huyler v. Houston*, 41 App. Cas. (D. C.) 452; *Queen v. Smith*, 1896, 1 Q. B. (Eng.) 596. Also the cases cited 1 STANDARD PROC. 582, note 8.

28. See the title "**Indictment and Information.**"

29. See the following: **Mass.**—*Com. v. O'Donnell*, 1 Allen 593. **Mo.**—*State v. Markus* (Mo. App.), 153 S. W. 488. **N. Y.**—*People v. Harris*, 54 Hun 638, 7 N. Y. Supp. 773, 28 N. Y. St. 297, 4 Silv. 531, *affirmed* in 123 N. Y. 70, 25 N. E. 317. **Wash.**—*State v. Henderson*, 15 Wash. 598, 47 Pac. 19.

See also 1 STANDARD PROC. 582, et seq.

[a] **Indictment Held Sufficient Under Meat Inspection Act.**—*United States v. Cudahy Packing Co.*, 243 Fed. 441.

30. See the following: **U. S.**—*United States v. Joyce*, 138 Fed. 457. **Ia.**—*State v. Snow*, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355. **Mo.**—*St. Louis v. Bippen*, 201 Mo. 528, 100 S. W. 1048. **Neb.**—*State v. Thorp*, 94 Neb. 310, 143 N. W. 202, Ann. Cas. 1914D, 180.

See generally 12 STANDARD PROC. 442, et seq.

31. See the following: **Ind.**—*State v. Closser*, 179 Ind. 230, 99 N. E. 1057. **Mass.**—*Com. v. Fenton*, 139 Mass. 195, 29 N. E. 653. **Mich.**—*People v. Hinshaw*, 135 Mich. 378, 380, 97 N. W.

narily sufficient. So also, the necessity for negating exceptions or provisos in the statute is governed by the general rule that only those exceptions which enter into or form part of the definition of the offense, or qualify the language creating or defining it, need be negated by the indictment or information.³² Nor need matters of defense be negated.³³

Duplicity and Joinder.—The ordinary rules as to joinder³⁴ and duplicity³⁵ are applicable to indictments or informations under the pure food and kindred laws.

Verification of Information.³⁶ —An information in a prosecution un-

758. **Mo.**—*State v. Stocker*, 80 Mo. App. 354. **N. J.**—*Vandegrift v. Miehla*, 66 N. J. L. 92, 49 Atl. 16. **N. Y.** *People v. West*, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452 (*affirming* 44 Hun 162, 6 N. Y. Cr. 382, 7 N. Y. St. 843); *People v. Burns*, 53 Hun 274, 6 N. Y. Supp. 611, 7 N. Y. Cr. 92, 25 N. Y. St. 97, under ch. 183, Laws of 1885, for selling and exposing for sale unclean, impure, unhealthy, adulterated and unwholesome milk. **R. I.**—*State v. Luther*, 20 R. I. 472, 40 Atl. 9.

See generally 12 STANDARD PROC. 442, et seq.

[a] **Phrase "with the intent to sell"** as used in an indictment is regarded as equivalent to the language "for the purpose of sale" as used in the statute defining the offense. *Com. v. Raymond*, 97 Mass. 567.

[b] **Otherwise Where Statute Does Not Sufficiently Describe Offense.** *Schmidt v. State*, 78 Ind. 41.

32. See the following: **Ind.**—*Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228. **Mo.**—*State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *State v. Stocker*, 80 Mo. App. 354. **Ohio.**—*Haas v. State*, 2 Ohio Dec. 177, 1 Ohio N. P. 248. **Wis.**—*Splinter v. State*, 140 Wis. 567, 123 N. W. 97.

See also 1 STANDARD PROC. 585, and generally 12 STANDARD PROC. 458, et seq.

[a] An indictment or information, under a statute making it an offense to adulterate any substance intended for food, with any substance injurious to health, but providing that the sale of a mixture of two articles not injurious to health may be made, when the articles are properly labeled as a mixture, should negative the fact that such substances or articles of food, when combined so as to produce a wholesome article of food, were properly labeled. *Dorsey v. State*, 38 Tex.

Crim. 527, 44 S. W. 514, 70 Am. St. Rep. 762, 40 L. R. A. 201.

33. **Ind.**—*State v. Closser*, 179 Ind. 230, 99 N. E. 1057. **Md.**—*Rasch v. State*, 89 Md. 755, 43 Atl. 931. **Pa.**—*Com. v. Arow*, 32 Pa. Super. 1.

See also 1 STANDARD PROC. 584, and generally 12 STANDARD PROC. 350, et seq.

[a] **Defense that article sold in original package** in which it was imported into the state need not be negated. *Rasch v. State*, 89 Md. 755, 43 Atl. 931.

34. See *State v. Burk*, 188 Mo. App. 683, 176 S. W. 487, also 1 STANDARD PROC. 584, et seq., and generally the title "Indictment and Information."

35. See 1 STANDARD PROC. 584, et seq., and generally the title "Indictment and Information."

[a] An indictment is not bad for duplicity (1) as charging two felonies, one, the act of defrauding, and the other, the attempt to defraud, where it charges in a single count in the terms of the statute that the defendant did "defraud and attempt to defraud." *May v. United States*, 199 Fed. 53, 60, 117 C. C. A. 431. So also, (2) an indictment or information charging that the defendant did "sell and deliver" at a time and place and to a person named a designated article without marking and branding the same was held sufficient against the objection of duplicity, since the commission of either the sale or delivery, or both constitutes the statutory offense. *Goll v. United States*, 166 Fed. 419, 92 C. C. A. 171.

[b] **An offer to sell and a sale** in violation of a pure food law may be charged in one count without objection on the ground of duplicity. *Com. v. Kolb*, 13 Pa. Super. 317, 333.

36. See generally 12 STANDARD PROC. 262, et seq.

der the pure food laws must usually be verified.³⁷

2. **Particular Averments.**³⁸ — a. *Office of Complainant.* — Where the statutes provide that certain persons may prosecute violations thereof, the office of the complainant should be alleged.³⁹

b. *Alleging Notice and Hearing.* — Since the investigation for the purpose of ascertaining whether articles of food or drugs are adulterated or misbranded, the notice of the findings and the hearing thereon, as provided for in some acts, are not generally prerequisites to a prosecution for violations of the acts,⁴⁰ the indictment or information need not allege a preliminary investigation, a notice of the findings thereof, and that defendant was afforded an opportunity to be heard.⁴¹

c. *Description of Defendant.*⁴² — It was not necessary to allege in an indictment at the common law that the defendant was a dealer or trader in the particular article alleged to have been sold.⁴³

In describing the offense under some statutes, however, it is necessary to aver that the defendant was a manufacturer or dealer in the articles upon which the indictment is laid.⁴⁴

Where the principal is made liable for the acts of his agent in making sales contrary to the food laws, it is sufficient to charge that the offense was committed by the defendant.⁴⁵

d. *Description of Purchaser.* — An indictment or information for the unlawful sale of an unwholesome article of food should allege the name of the purchaser, if known,⁴⁶ or if it can with reasonable dili-

37. *United States v. Wells*, 225 Fed. 320, signature by district attorney is not sufficient. See also *United States v. Baumert*, 179 Fed. 735. Compare *Weeks v. United States*, 216 Fed. 292, 132 C. C. A. 436, Ann. Cas. 1917C, 524, L. R. A. 1915B, 651.

38. In prosecution for adulteration, see 1 STANDARD PROC. 585, et seq.

39. *Com. v. Mullen*, 176 Mass. 132, 57 N. E. 331, but failure to so allege is at most a formal defect; not sufficient ground for a motion to quash.

Who may prosecute, see *supra*, II, B. See also *Com. v. Alden*, 143 Mass. 113, 9 N. E. 15.

40. See *supra*, II, A.

41. *United States v. Morgan*, 222 U. S. 274, 32 Sup. Ct. 81, 56 L. ed. 198 (reversing 181 Fed. 587, on other grounds); *Schraubstadter v. United States*, 199 Fed. 568, 118 C. C. A. 42. But see *United States v. Seventy-Four Cases of Grape Juice*, 181 Fed. 629.

42. See generally 12 STANDARD PROC. 361, et seq.

43. *State v. Smith*, 10 N. C. 378, 14 Am. Dec. 594, since the selling of unwholesome foods was an indictable offense regardless of who committed it.

44. See 1 STANDARD PROC. 588, and *infra*, this note.

[a] An indictment under the oleomargarine act should describe the defendant as either a manufacturer or a dealer, as the case may be. *Morris v. United States*, 168 Fed. 682, 94 C. C. A. 168.

Description of person adulterating article, see 1 STANDARD PROC. 586.

45. *Com. v. Gray*, 150 Mass. 327, 23 N. E. 47, without alleging the manner in which he committed it, as whether by himself, or by an agent for whom he was responsible. But see *Heider v. State*, 4 Ohio Dec. 227.

46. *Marxen v. State*, 44 Tex. Crim. 41, 68 S. W. 277. See also 1 STANDARD PROC. 588.

[a] **Sale to Agent.** — Since, when a purchase is made by an agent, of whose agency the seller has not sufficient notice, express or implied, the sale may be regarded in law as made to the agent, it may be so alleged in an indictment charging a sale of adulterated food. *Com. v. Farren*, 9 Allen (Mass.) 489, 491, wherein the indictment charged the defendant with the sale of adulterated milk to one "Bridget

gence be ascertained;⁴⁷ and if the name of the purchaser is unknown, such fact should be alleged.⁴⁸

e. *Description of Article and Use*.—The article alleged to have been adulterated must be sufficiently described.⁴⁹ But it is not necessary to allege the use which the purchaser intended to make of the unwholesome article sold to him.⁵⁰

f. *As to Adulteration*.—An indictment or information for selling an adulterated article in violation of the pure food laws must state how the adulteration in the particular case was made.⁵¹ But an indictment or information for selling an article not complying with a fixed standard need not aver that the article was adulterated.⁵²

g. *As to Misbranding*.—An indictment or information for misbranding must allege facts sufficient to show such wrongful branding.⁵³

h. *As to Sale*.—In some jurisdictions, the indictment or information need not allege that the article was sold for food.⁵⁴ In other

Donegan," and the proof showed that in making the purchase she acted as the agent of her husband, the question arising upon an objection that there was a variance.

47. *Marxen v. State*, 44 Tex. Crim. 41, 68 S. W. 277.

48. *Goodrich v. People*, 19 N. Y. 574. See also 1 STANDARD PROC. 588.

49. See 1 STANDARD PROC. 586, and *infra*, this note.

[a] **Words Descriptive of Article Not To Be Rejected as Surplusage.** Though an indictment alleges that the defendant had in his possession one pint of adulterated milk "to which milk water had been added," with intent to sell the same, the words "to which milk water had been added" were essentially descriptive of the article which the defendant was alleged to have in his possession and were held not to be rejected as surplusage. *Com. v. Luskomb*, 130 Mass. 42.

[b] **Where the quality of an article of food or drugs is made an essential part of the description of the offense, the information or indictment should directly charge the quality of the article alleged to have been sold contrary to the provisions of the statute.** *District of Columbia v. Thompson*, 37 App. Cas. (D. C.) 420.

50. *Com. v. Raymond*, 97 Mass. 567.

51. See 1 STANDARD PROC. 586, et seq.; also *District of Columbia v. Thompson*, 37 App. Cas. (D. C.) 420; *State v. Meyer*, 94 Kan. 647, 146 Pac. 1007. But see *Com. v. Fenton*, 139 Mass. 195, 29 N. E. 653; *Goodrich v. People*, 19 N. Y. 574.

[a] **Alleging One of Several Causes Producing Adulteration Sufficient.**—*State v. Luther*, 20 R. I. 472, 40 Atl. 9. See also *Vandegrift v. Miehla*, 66 N. J. L. 92, 49 Atl. 16.

52. *State v. Meyer*, 94 Kan. 647, 146 Pac. 1007.

53. See *infra*, this note.

[a] **Thus, (1) averments that a fluid was labeled "Flavor of Lemon and Citral—A Pure Flavor," and that it did not contain an appreciable quantity of lemon oil which was an essential ingredient of a pure lemon flavor, do not state facts sufficient to show a misbranding under the federal act, because they fail to show that the fluid was labeled a pure flavor of lemon, or that lemon oil was an essential element of a pure flavor of lemon and citral.** *Nave-McCord Mercantile Co. v. United States*, 182 Fed. 46, 104 C. C. A. 486. (2) An averment that one who branded an article with a label whose accepted and usual signification correctly describes it intended that the public or purchasers should understand that the label had an opposite and unusual significance fails to disclose any misbranding. *Nave-McCord Mercantile Co. v. United States*, 182 Fed. 46, 104 C. C. A. 486.

54. *Ind.*—*State v. Closser*, 179 Ind. 230, 99 N. E. 1057. *Ohio.*—*State v. Smith*, 69 Ohio St. 196, 68 N. E. 1044; *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163. *Neb.*—*Lansing v. State*, 73 Neb. 124, 126, 102 N. W. 254.

[a] **Charging that defendant "unlawfully" sold an article of food sufficiently negatives a sale for any other**

jurisdictions, it would seem that such an allegation is necessary.⁵⁵

i. *Knowledge and Intent*.—In accordance with the general rules, where intent⁵⁶ and knowledge⁵⁷ are essential elements of the offense as defined by the pure food laws, they must be alleged. It is otherwise where the statutes do not require an intent or knowledge on the part of the seller of the article to make the offense complete.⁵⁸

3. *Under Oleomargarine Acts*.—The general rules governing indictments and informations obtain in prosecutions under the oleomargarine acts.⁵⁹ Thus facts sufficient to constitute a crime under the act must be charged in the indictment or information.⁶⁰ But it is

purpose than for food. *State v. Closser*, 179 Ind. 220, 99 N. E. 1057.

55. See *Goodrich v. People*, 19 N. Y. 574.

[a] Where the statute makes it an offense to sell or offer for sale any oleaginous substances as an article of food, the information should allege that the accused sold such substance as an article of food. *State v. Fayette*, 17 Mo. App. 587.

[b] *Sale of Milk as Food*.—*Lansing v. State*, 73 Neb. 124, 102 N. W. 254, noted 1 STANDARD PROC. 586.

[c] *Allegation of Butter as Article of Food*.—Under a statute making it an offense to sell, etc., "any article of food," an indictment, charging that the defendants sold a certain substance "as and for, and under the name of pure butter," is a sufficient charge, after verdict, of an offense of offering the same "as an article of food," since the general use of "butter" as "food" is of common knowledge. *Com. v. Kolb*, 13 Pa. Super. 347.

[d] *Alleging Sale of Wine as Beverage*.—See *Vester v. State*, 1 Ohio N. P. 240, 2 Ohio Dec. 170, noted 1 STANDARD PROC. 586.

56. See 1 STANDARD PROC. 586, and generally 12 STANDARD PROC. 402, et seq.

57. *Com. v. Raymond*, 97 Mass. 567 (allegation held sufficient); *Com. v. Flannelly*, 15 Gray (Mass.) 195; *Com. v. Boynton*, 12 Cush. (Mass.) 499; *State v. Falk*, 38 Mo. App. 554. See also 1 STANDARD PROC. 586, and generally 12 STANDARD PROC. 399, et seq.

[a] *Sufficient Charge of Knowledge*. (1) Under a statute providing that whoever sells, or has in his possession with the intent to sell, the meat of any diseased or injured animal shall be fined, etc., an indictment charging that the defendant did "unlawfully and knowingly have in his possession

... , with the unlawful intent to sell," etc., sufficiently charges guilty knowledge on his part, the word "knowingly" supplying the place of a positive averment that the accused knew the facts subsequently stated, in accordance with the liberal rule of certainty in criminal pleading adopted by the codes of some states. *Brown v. State*, 14 Ind. App. 24, 42 N. E. 244.

(2) Where the charge was that the defendant did "knowingly" kill for the purpose of selling for food the animals mentioned therein, it was held to sufficiently charge that the defendant knew the animals to be sick, diseased or injured at the time they were killed, and that he had or knew of the purpose to sell them for food. *Moeschke v. State*, 14 Ind. App. 393, 42 N. E. 1029.

[b] *Use of Word Unlawfully for Knowingly*.—The use of the word "unlawfully" in an indictment for having in one's possession, with intent to sell, an unwholesome article of food, does not meet the requirement that the defendant must be alleged to have "knowingly" had the article in his possession. *Schmidt v. State*, 78 Ind. 41.

58. *Mass*.—*Com. v. Warren*, 160 Mass. 533, 36 N. E. 308; *Com. v. Smith*, 103 Mass. 444, 445. See *Com. v. Gray*, 150 Mass. 327, 329, 23 N. E. 47. *Mich*. *People v. Snowberger*, 113 Mich. 86, 92, 71 N. W. 497, 67 Am. St. Rep. 449. See *People v. Morse*, 131 Mich. 68. *Neb*. *State v. Thorp*, 94 Neb. 310, 143 N. W. 202, Ann. Cas. 1914D, 180. *N. J*. *Waterbury v. Newton*, 50 N. J. L. 534, 14 Atl. 604.

See also 1 STANDARD PROC. 586, and 12 STANDARD PROC. 399, et seq.

59. See generally the title "*Indictment and Information*."

60. See *infra*, this note.

[a] Thus under a statute making it

generally sufficient to follow the language of the statute, or language substantially equivalent thereto.⁶¹ Only where the act uses technical

unlawful for any person to sell any oleaginous substance, or compound, not produced at the time of manufacture from unadulterated milk or cream from the same, with or without harmless coloring matter, which shall be in imitation of yellow butter produced from pure unadulterated milk or the cream from the same, it is necessary that the complaint should show that the oleaginous matter had been produced or colored so as to imitate yellow butter manufactured from unadulterated milk or the cream from the same, and that said oleaginous substance was not produced at the time of its manufacture from unadulterated milk or the cream from the same; a complaint failing to charge one of the facts fails to charge facts necessary to constitute the crime. *State v. Henderson*, 15 Wash. 598, 47 Pac. 19.

[b] Under the oleomargarine act, whenever any stamped package containing oleomargarine is emptied, it shall be the duty of the person in whose hands the same is to destroy utterly the stamps thereon, under a penalty for a failure so to do. An indictment under this act is not fatally defective because it merely charges that the accused had in his possession an empty package which previously contained colored oleomargarine, and willfully neglected and refused to destroy the stamp thereon, without alleging that the package was emptied while in the possession of accused. *Ripper v. United States*, 178 Fed. 24, 101 C. C. A. 152.

[c] Where an act punishes one for having oleomargarine in his possession without being stamped, with intent to sell it, and also punishes one who sells it at retail, without delivering to the purchaser, a label bearing the word oleomargarine, an indictment which charges a defendant with having in his possession an article known as oleomargarine, with "intent to sell the same without delivering to the purchaser, a printed label bearing the word 'oleomargarine,'" does not charge either of the offenses, nor in fact any offense prescribed by the act. *Pierce v. State*, 63 Md. 592.

[d] Where the descriptive words contained in an affidavit, charging the

accused with having sold oleomargarine which contained coloring matter, did not wholly describe "oleomargarine" as defined in the statute, but did not contradict the charge as made, the affidavit was not defective, since whether the words completely described the substance sold or not, they neither added to nor subtracted from the meaning of the charge, and were but surplusage. *State v. Arata*, 69 Ohio St. 211, 68 N. E. 1046.

[e] **Immaterial Facts Need Not Be Averred.**—Under a statute making it an offense to combine any articles with any substance in imitation of butter, and with the effect of imparting thereto a yellow color, in imitation thereof, it is not necessary that the information allege the substance which was added to the compound to give it a color in imitation of butter. *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *State v. Stocker*, 80 Mo. App. 354.

[f] **Sufficient indictment for removing brands under oleomargarine act.** *Wilkins v. United States*, 96 Fed. 837, 37 C. C. A. 588.

[g] **Counts charging a failure to make returns of sales held not bad for uncertainty.** *United States v. Lamson*, 173 Fed. 673.

61. See the following: **U. S.**—*United States v. Joyce*, 138 Fed. 455. **Ala.** *Cook v. State*, 110 Ala. 40, 20 So. 360. **Md.**—*Fox v. State*, 94 Md. 143, 50 Atl. 700, 89 Am. St. Rep. 419. **Pa.**—*Com. v. Kolb*, 13 Pa. Super. 347.

See also *State v. Maurer*, 255 Mo. 152, 164 S. W. 551, Ann. Cas. 1915C, 178; *State v. Fayette*, 17 Mo. App. 587.

[a] **Even Where the Statutes Describe the Offense Cumulatively.**—*May v. United States*, 199 Fed. 53, 117 C. C. A. 431; *Goll v. United States*, 166 Fed. 419, 92 C. C. A. 171.

[b] **But since the particular offense relied upon should be stated in the affidavit or complaint positively, where several offenses are charged in an oleomargarine act in the disjunctive, an affidavit which follows the language of the statute is bad, since it alleges different offenses in the disjunctive.** *Ryan v. State*, 5 Ohio Cir. Ct. 486, 3 Ohio Cir. Dec. 238.

[c] **Insufficient Indictment.**—An in-

words as a part of the description of the offense are they necessary in the indictment or information.⁶² No averment of knowledge or intent is necessary where neither are essential ingredients of the offense.⁶³ The name of the purchaser of oleomargarine is not a necessary allegation in charging the offense of selling the same under the pretense that it is butter.⁶⁴ nor need the information specify the pretense under which the sales were made.⁶⁵

4. For Refusing To Supply Sample for Analysis.—The information or complaint in a prosecution under a statute making it an offense to refuse to supply an article of food for the purpose of analysis should allege the name of the party who demanded the article for an analysis,⁶⁶ and describe the article so demanded.⁶⁷

E. PLEAS OF DEFENDANT.—In a prosecution under the pure food the kindred acts, defendant's pleas must be either in abatement, in bar, or the general issue.⁶⁸

F. TRIAL.⁶⁹ — **1. Variance.**—The general rules governing vari-

dietment, charging generally, that the defendants did knowingly, willfully, and unlawfully sell and offer for sale, deliver, and offer to deliver, oleomargarine in other form than in new, wooden, or paper packages, marked, stamped and branded as required by law, and following somewhat the language of §56 of the oleomargarine act, creating the offense, was held insufficient in *United States v. Joyce*, 138 Fed. 457, since it did not give such additional particulars as would individuate the offense charged and enable the defendants to prepare to meet it. It should have alleged whether the sale was at wholesale or retail, in what respects the packages were not in the prescribed form, and what stamps, marks, or brands required by law they failed to have on them. And for the same reason, a count in an indictment, charging the defendant with removing and defacing the stamps, marks and brands upon two certain packages of oleomargarine (contrary to §15 of the oleomargarine act), without alleging that the stamp, mark or brand removed or defaced was of the character required by statute, was held insufficient. *United States v. Joyce*, 138 Fed. 457.

62. See *infra*, this note.

[a] Thus where a statute provided that any person who by himself or his agents or as the agent of any other person sells or offers to any person who asks for butter, any oleomargarine, with or without coloring matter shall be guilty of a fraud, since the statute does not provide that whoever fraudulently sells shall be punished, but that

whoever sells (without the use of any qualifying adjective whatever) shall be guilty of a fraud, it was not necessary to allege that the sale was fraudulent or made with intent to defraud. *Fox v. State*, 94 Md. 143, 50 Atl. 700, 89 Am. St. Rep. 419.

63. *State v. Maurer*, 255 Mo. 152, 164 S. W. 551, Ann. Cas. 1915C, 178.

64. *State v. Maurer*, 255 Mo. 152, 164 S. W. 551, Ann. Cas. 1915C, 178.

65. *State v. Maurer*, 255 Mo. 152, 164 S. W. 551, Ann. Cas. 1915C, 178.

66. *Margolius v. State*, 1 Ohio N. P. 264, 4 Ohio Dec. 354.

67. *Margolius v. State*, 1 Ohio N. P. 264, 4 Ohio Dec. 354.

68. See *United States v. J. L. Hopkins & Co.*, 228 Fed. 173. And generally the title "Arraignment and Plea."

[a] Where a defendant was indicted under the oleomargarine act of Maryland, and he relied upon defeating the state law under the decision in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. ed. 49, which held the Pennsylvania act invalid to the extent that it prohibited the introduction of oleomargarine from another state, and its sale in the original package, it was held that the plea was insufficient in that there was an entire absence of any averment that the sale was in the original package in which it was imported into the state. *Rasch v. State*, 89 Md. 755, 43 Atl. 931.

69. See generally the title "Trial."

ance are applicable in prosecutions under the laws regulating the sale of food, drugs and kindred articles.⁷⁰

2. Questions of Law and Fact.—The general rule that all questions of fact are to be submitted to the jury is applicable in prosecutions under laws regulating the sale of food, drugs and kindred articles.⁷¹

3. Instructions should be given in accordance with the general rules governing that subject.⁷²

G. SENTENCE AND JUDGMENT.—In accordance with the general rule, where the statute makes a definite and specific disposal of the penalty to be imposed for a violation thereof, the judgment of conviction need not contain an express award to that effect.⁷³

III. ACTION FOR PENALTY.⁷⁴—A. IN GENERAL.—Statutes

70. See generally the title "**Variance and Failure of Proof;**" also 1 STANDARD PROC. 588, et seq.

[a] **There was no variance** between the allegations and the proofs (1) where the complaint alleged a sale to a certain person and the proof showed that the adulterated article was actually used by a partnership of which this person was a member, since such person as a partner acquired an interest therein. *State v. Miller*, 87 Kan. 454, 124 Pac. 361. (2) Nor where the complaint charged that to a certain article a certain foreign substance, a further description whereof is unknown to the complainant, was added, while the proof showed the real nature of the substance added. *Com. v. Graustein & Co.*, 209 Mass. 38, 95 N. E. 97. (3) So also where defendant was described as agent of a corporation, proof that company was a partnership did not constitute a fatal variance. *Cogdell v. State* (Tex. Crim.), 193 S. W. 675.

71. See *infra*, this note, and generally the title "**Province of Judge and Jury.**"

[a] **Thus**, (1) the question of the sale. See *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559, and (2) whether the article conformed to the standard prescribed by the statute. See *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559, should be submitted to the jury. So (3) whether or not flour bleached by chemical processes is flour within the language of the statute (§7 of Federal Act) "whereby inferiority is concealed," and "contains added poisonous ingredients which may render such article (flour) injurious to health," was held a proper question for the jury in *Shaw-*

nee Milling Co. v. Temple, 179 Fed. 517, 520. (4) Where the offense consists in having in one's possession, with intent to sell, oleomargarine in a tub not marked as required, it is a question of fact in all cases whether the defendant had in his possession with intent to sell packages of oleomargarine not marked as required by the statutes. *Com. v. Mills*, 157 Mass. 405, 32 N. E. 360. (5) Where the complaint is for selling milk not of the standard quality of pure milk, and the defendant had a right under the law to sell skimmed milk, which was not of the standard quality of pure milk, from cans marked in a certain manner, the question whether the defendant sold the milk as skimmed milk or as pure milk was held a question of fact for the jury upon all the evidence. *Com. v. Smith*, 149 Mass. 9, 20 N. E. 161.

[b] **Of what an article of food consists** a question for jury. *F. B. Washburn & Co. v. United States*, 224 Fed. 395, 140 C. C. A. 81.

[c] **Whether article misbranded** question for jury in *F. B. Washburn & Co. v. United States*, 224 Fed. 395, 140 C. C. A. 81.

[d] **Reasonableness of acts regulating manufacture and sale of articles of food** is a question for legislature. *People v. Worden Grocer Co.*, 118 Mich. 604, 608, 77 N. W. 315.

72. See the title "**Instructions,**" and 1 STANDARD PROC. 589, et seq.

73. See *Vandegrift v. Michla*, 66 N. J. L. 92, 49 Atl. 16. And generally the title "**Sentence and Judgment.**"

74. See generally the title "**Penalties, Forfeitures and Fines.**"

sometimes impose a penalty, recoverable in a civil action, for the violation of any laws regulating the manufacture and sale of food, drugs and kindred products.⁷⁵ Since the action to recover such a penalty is of a civil rather than criminal character, the rules of procedure peculiar to civil causes are applicable.⁷⁶

Injunctive Relief. — In some jurisdictions, an application may also be made in an action for a penalty for a violation of the food laws for an injunction to prevent further violations of the laws.⁷⁷

B. WHO MAY BRING.—Actions or proceedings to recover such penalties are usually brought in the name of the people, by some designated officer of the state for the use and benefit thereof.⁷⁸ But under some statutes for the prevention of fraud and deceit in the sale of articles of food, the action for the penalty must be brought by or in the name of the persons defrauded or injured by such fraud or deceit.⁷⁹

C. JURISDICTION.—The court having jurisdiction of an action for a statutory penalty for a violation of laws regulating the manufacture and sale of food products, depends upon the local statutes.⁸⁰

D. COMPLAINT:—1. Generally.⁸¹—The complaint must allege facts sufficient to bring the case within the provisions of the statute prescribing the penalty,⁸² in plain and concise language.⁸³ But a complaint which follows substantially the language of the statute has been held sufficient.⁸⁴ In accordance with the usual rule, when a complaint states several causes of action, each must be stated sepa-

75. See the statutes, and *Bayles v. Newton*, 50 N. J. L. 549, 18 Atl. 77.

[a] **Accumulative penalties** can be recovered in a single action. *People v. Koster*, 121 App. Div. 852, 106 N. Y. Supp. 793.

76. *Board of Health v. Vandruens*, 77 N. J. L. 443, 72 Atl. 125.

77. See the statutes, and *People v. Sheriff*, 78 App. Div. 40, 79 N. Y. Supp. 783; *People v. Windholz*, 68 App. Div. 552, 74 N. Y. Supp. 241.

78. See the statutes, and *Bayles v. Newton*, 50 N. J. L. 549, 18 Atl. 77, wherein state dairy commissioner brought the action.

79. See the statutes, and *Tabor v. Herriek*, 54 Vt. 630.

80. See the statutes, and *Bayles v. Newton*, 50 N. J. L. 549, 18 Atl. 77.

81. See generally the title "**Declaration and Complaint.**"

82. *People v. Armour*, 18 App. Div. 584, 46 N. Y. Supp. 317; *People v. Redding*, 126 N. Y. Supp. 977.

[a] See *People v. Berghoff*, 112 App. Div. 772, 99 N. Y. Supp. 201, wherein the pleadings did not present the question whether a label conformed with

the statute, the charge being simply that the packages were not "labeled with a statement giving ingredients of which it was made."

[b] **Alleging Office of Person Bringing Action.**—In those states, where the cause of action, under statutes creating penalties for the violation of the food laws accrues to the people upon a violation thereof, it is not necessary to allege in the complaint that the action was caused to be brought by the person entitled thereunder to sue on behalf of the state. *People v. Lamb*, 85 Hun 171, 32 N. Y. Supp. 584.

83. *People v. Lewis*, 131 App. Div. 336, 115 N. Y. Supp. 909.

[a] **For the purposes of a demurrer**, all facts well pleaded must be taken as true. *People v. Luke*, 122 App. Div. 64, 106 N. Y. Supp. 621; *People v. Spees*, 18 App. Div. 617, 46 N. Y. Supp. 995.

84. *Bayles v. Newton*, 50 N. J. L. 549, 554, 18 Atl. 77, *affirmed* in 51 N. J. L. 553 (*Oleomargarine Act*); *People v. Windholz*, 92 App. Div. 569, 86 N. Y. Supp. 1015, complaint for selling adulterated vinegar.

ately,⁸⁵ and be complete within itself.⁸⁶

Joinder of Actions. — A complaint, which improperly unites several independent causes of action, is subject to demurrer, where misjoinder is one of the grounds under the code.⁸⁷

Election Between Counts. — Under statutes in some states, when the complaint charges a violation of more than one provision of the food laws, the plaintiff shall not be compelled to elect between the counts under such different provisions.⁸⁸

2. Alleging Impurity or Adulteration of Article. — The complaint should allege in what respect the article was impure or adulterated.⁸⁹

3. Averments as to Analysis and Standard. — The complaint need

85. *People v. Sheriff*, 78 App. Div. 40, 79 N. Y. Supp. 783; *People v. Koster*, 50 Misc. 46, 97 N. Y. Supp. 829.

[a] **Alleging Indefinite Number of Sales.**—Where a complaint alleges “that the plaintiff does not know, and for that reason cannot state, the precise number of barrels or casks contained in each sale and purchase of vinegar; but the plaintiff alleges they are entitled to recover a penalty of one hundred dollars (\$100) for each separate and distinct purchase of vinegar, whether the same contained one or more barrels or casks of vinegar,” it was held bad, since by implication, an indefinite number of sales were alleged, for any one of which the plaintiff had a cause of action against the defendant making the sale. The rule of criminal pleading, that, where an offense may be committed by doing one of several prohibited things, an indictment may in a single count group them together, and charge the defendant with having committed them all, and a conviction had on proof of the commission of any one of the things, without proof as to the others, was held not applicable, since the plaintiff had not complied therewith, and grouped the facts in a single count, and alleged that the defendants had committed them all, for which they incurred the penalty, but had set out the facts separately, and alleged them as separate causes of action. *People v. Sheriff*, 78 App. Div. 40, 79 N. Y. Supp. 783.

[b] Though a statute declares that the sale of each one of several packages of an adulterated or impure article of food shall constitute a separate violation of the act, it has been held that a sale of several cans of impure and adulterated milk at one time and place, and to one person, as a single trans-

action, should be alleged in the complaint as one cause of action; and that a complaint so alleging is not objectionable upon the ground that it unites two or more causes of action, without separately stating and numbering the same. *People v. Buell*, 85 App. Div. 141, 83 N. Y. Supp. 143; *People v. Liberman Dairy Co.*, 109 N. Y. Supp. 1067.

86. *People v. Koster*, 50 Misc. 46, 97 N. Y. Supp. 829, wherein the second and each succeeding cause of action was not complete within itself, since they did not repeat nor make any reference to the essential facts set forth in the first cause of action.

87. See *People v. Koster*, 50 Misc. 46, 97 N. Y. Supp. 829, and generally the title “Demurrer.”

88. See *infra*, this note.

[a] **Thus**, under a statute imposing a penalty in one section thereof, for having in one's possession, with intent to sell any oleaginous substance, and in another section, for selling the same, as butter, it was held that a motion, that the plaintiff be required to elect upon which one of the causes of action based upon the statute he would proceed, having charged both in his complaint for the penalty, was addressed to the discretion of the trial court. *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820.

89. See *People v. Spees*, 18 App. Div. 617, 46 N. Y. Supp. 995.

[a] **A reference only to the statute defining what amounts to an adulteration**, is not a sufficient allegation of how the article was adulterated, especially where there are several different provisions by which, and for the violation of which, a penalty may be incurred. *People v. Koster*, 50 Misc. 46, 97 N. Y. Supp. 829.

not contain averments as to the results of analyses taken as the basis of the action for a penalty.⁹⁰ Nor need the complaint aver any standard or quality of article, the statute specifying none.⁹¹

4. **Averments as to Sale.** — Certain averments as to the sale of the article are sometimes necessary.⁹²

5. **Averments as to knowledge and intent** are necessary or not depending upon the statute prescribing the penalty.⁹³

6. **Negating Exceptions or Provisos.** — The complaint need not negative exceptions or provisos not constituting a part of the statutory description of the act for which the penalty is recoverable.⁹⁴

E. **TRIAL.**⁹⁵ — The right to a trial by jury in actions to recover penalties under pure food and kindred laws depends upon local constitutional and statutory provisions.⁹⁶

Questions of Law and Fact. — The general rule obtains that where the evidence is conflicting, questions of fact are for the jury to determine.⁹⁷

90. See *infra*, this note.

[a] **Thus**, where the statute provides for the taking of samples of milk, and provides that when the inspector shall take such a sample from the creamery, factory, platform, or other place where the same is delivered by the producer for manufacture, or from a milk vendor who produces the milk which he sells, with a view of prosecuting the producer of such milk for delivering, selling or offering for sale adulterated milk, he shall within ten days take a sample of the mixed milk of the herd of cows from which the first sample was taken, and upon an analysis showing that the herd sample contains more milk solids than the first sample, the action for the penalty may be instituted. The complaint in an action for such penalty need not set forth the analysis of the first sample, and then state that a herd sample had been taken, and that the first sample was not as good as the herd sample, since the crime under the statute is the selling of impure and adulterated milk, and the provision of the statute for an inspection is a mere means of furnishing evidence by which it can be proved that the milk was adulterated, impure and unwholesome. *People v. Bailey*, 136 App. Div. 130, 120 N. Y. Supp. 618. See also *People v. Woodbeck*, 55 App. Div. 277, 67 N. Y. Supp. 38, 15 N. Y. Crim. 250.

91. *St. Louis v. Ameln*, 235 Mo. 669, 139 S. W. 429.

92. See *infra*, this note.

[a] **Averring Sale or Exposure for**

Sale as an Article of Food.—*Com. v. Schmidt*, 13 Pa. Co. Ct. 28.

[b] **Alleging Sale Within State.** *People v. Abramson*, 137 App. Div. 549, 122 N. Y. Supp. 115.

93. See *infra*, this note.

[a] **Thus**, (1) if under the statute it is essential that there be an intent on the part of the defendant to sell the oleaginous substance therein prescribed as genuine butter or cheese, the complaint, in an action for the penalty, must allege such intent. *People v. Laning*, 40 App. Div. 227, 57 N. Y. Supp. 1057. (2) Under the rule that no criminal intent is necessary to constitute the offense under acts forbidding the sale of oleomargarine or other imitations of dairy products unless express notice be given to the purchaser, a complaint for the statutory penalty is not defective, because it does not set out that the defendant knowingly committed the act. *Bayles v. Newton*, 50 N. J. L. 549, 554, 18 Atl. 77.

94. *People v. Lewis*, 131 App. Div. 336, 115 N. Y. Supp. 909; *People v. Spees*, 18 App. Div. 617, 46 N. Y. Supp. 995.

95. See generally the title "**Trial.**"

96. See the statutes, and *Carter v. Camden Dist. Ct.*, 49 N. J. L. 600, 10 Atl. 108. See also generally 16 **STANDARD PROC.** 895, and the title "**Penalties, Forfeitures and Fines.**"

97. See the following: *People v. Berghoff*, 112 App. Div. 772, 99 N. Y. Supp. 201 (whether defendant manufactured for sale, sold and exposed for sale an adulterated article); *People v. Braested*, 30 App. Div. 401, 51 N. Y. Supp.

Directing Verdict. — It is not error for the court to direct a verdict in such an action, where the testimony is of such a character as to warrant the direction.⁹⁸

F. REVIEW.⁹⁹ — Under statutes in some states, an appeal may be taken from the judgment in an action for a penalty under the pure food laws.¹

IV. SEIZURE AND CONDEMNATION UNDER.² — **A. IN GENERAL.** — The pure food and kindred acts generally provide that articles sold or transported in violation thereof shall be liable to seizure and condemnation.³ A criminal prosecution need not precede the seizure where the statute provides for both.⁴ In fact, it has been held that

824 (whether facts constituting violation of pure food law have been established for jury); and generally the title "Province of Judge and Jury."

[a] **Fairness of sample taken for purpose of examination** is question for jury ordinarily. *People v. Butler*, 140 App. Div. 705, 125 N. Y. Supp. 556; *People v. Weaver*, 116 App. Div. 594, 101 N. Y. Supp. 961. This is not an invariable rule, however, since the method of taking the sample may be established like any other fact; if the proof shows that the specific requirements of the statute were strictly complied with, and there is no countervailing proof, there is no question for the jury. *People v. Butler*, 140 App. Div. 705, 125 N. Y. Supp. 556; *People v. Laesser*, 79 App. Div. 384, 79 N. Y. Supp. 470.

98. *Board of Health v. Vandruens*, 77 N. J. L. 443, 72 Atl. 125, wherein the prosecutor contended that the direction of a verdict deprived him of a right to a jury trial.

As to directing verdict generally, see the title "Verdict."

99. See generally the titles "Appeals;" "Certiorari;" "Writ of Error."

1. *State Board of Health v. McCue* (N. J.), 60 Atl. 1094.

[a] **Where appeal taken, certiorari will not thereafter lie.** *Maguire v. Goldberger*, 71 N. J. L. 173, 58 Atl. 167.

[b] **Sufficiency of Signing of Appeal Notice.**—Where it is provided that an appeal may be taken by filing with the court in which the judgment was rendered a notice thereof, signed by the appealing party, a notice of appeal by a party whose name appeared in the body of the notice was sufficiently signed to fulfill the design and direction of the statute. *State Board*

of Health *v. McCue* (N. J.), 60 Atl. 1094.

[c] **Questions directed to discretion of trial court** will not be reviewed upon appeal. *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820, wherein it was held that motions to separate the allegations of a complaint charging possession of a prohibited article of food, and the sale of it, so as to present them as separate and distinct causes of action; that the plaintiff be required to elect upon which one of such causes he would rely in his action; and to direct a separation of a cause of action based upon the provisions of one section of a statute from that within those of another section, were addressed to the discretion of the trial court, and not reviewable upon appeal.

2. See generally the title "Penalties, Forfeitures and Fines."

3. See the statutes, and *Hipolite Egg Co. v. United States*, 220 U. S. 45, 57, 31 Sup. Ct. 364, 55 L. ed. 364 (under federal act); *United States v. Twenty Cases of Grape Juice*, 189 Fed. 331, 333, 111 C. C. A. 63; *United States v. Five Boxes of Asafoetida*, 181 Fed. 561, 564; *Armour Packing Co. v. Snyder*, 84 Fed. 136, 139, under Minnesota statute, forbidding sale, exposure for sale, etc., of any article in imitation of butter, and providing that the dairy and food commissioner may seize such article, and upon the order of a court having jurisdiction, sell the same for any purpose other than for food.

4. *United States v. Five Boxes of Asafoetida*, 181 Fed. 561, §§2 and 10 of the federal act are entirely independent. But see *Armour Packing Co. v. Snyder*, 84 Fed. 136, under Minnesota act forbidding sale of butter imitations and providing for a seizure thereof.

statutes or ordinances providing for the seizure and condemnation, without previous hearing, of unwholesome articles of food, are not unconstitutional on that ground,⁵ though the owner cannot be deprived of a hearing.⁶

B. WHO MAY BRING PROCEEDINGS FOR. — All proceedings for a seizure and condemnation under the federal act must be at the suit of and in the name of the government.⁷

C. JURISDICTION.⁸ — Under the federal act, the district court within the district in which the articles subject to seizure and condemnation are found is given jurisdiction of the proceeding therefor.⁹ But a seizure need not take place prior to the filing of the libel in order to give the court jurisdiction over proceedings for confiscation,¹⁰ though the act provides that such proceedings shall conform as near as possible to proceedings in admiralty.¹¹

D. THE LIBEL. — In those jurisdictions in which it is held that the preliminary steps of notice and hearing, provided for in some acts, are not conditions precedent to the seizure and condemnation of articles, violative of these acts,¹² a libel for such condemnation need not allege that these steps have been taken,¹³ especially where the proceeding is at the instigation of the proper district attorney, without any steps on the part of the investigating department.¹⁴ Nor is a libel brought under the federal act insufficient where it fails to state the

5. *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. ed. 195, as depriving a person of property without due process of law.

6. See *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. ed. 195, hearing after seizure may be had.

7. §10, Act of 1906; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 51, 31 Sup. Ct. 364, 55 L. ed. 364. See *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302, holding seizure by private person cannot be made.

8. See generally the title "Jurisdiction."

9. §10, Act of 1906; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 51, 31 Sup. Ct. 364, 55 L. ed. 364; *United States v. Hopkins & Co.*, 199 Fed. 649, 651; *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302, 306.

[a] Under the Federal Act, the jurisdiction of the federal government to seize adulterated or misbranded articles of food or drugs, extends beyond the state limits, and to their point of destination in the original, unbroken packages. *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. ed. 364; *United States*

v. Two Barrels of Desiccated Eggs, 185 Fed. 302, 308.

10. *United States v. One Hundred Barrels of Vinegar*, 188 Fed. 471, 475, citing *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302; *United States v. George Spraul & Co.*, 185 Fed. 405, 107 C. C. A. 569.

11. §10, Act of 1906; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 51, 31 Sup. Ct. 364, 55 L. ed. 364; *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302, 304; *United States v. Spraul & Co.*, 185 Fed. 405, 406, 107 C. C. A. 569.

As to proceedings in admiralty, see the title "Admiralty."

[a] Strict conformity is not required. *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302.

12. See *supra*, II, A.

13. *United States v. Fifty Barrels of Whisky*, 165 Fed. 966. See *United States v. One Hundred Barrels of Vinegar*, 188 Fed. 471, 475. But see *United States v. Seventy-Four Cases of Grape Juice*, 181 Fed. 629, holding that where the proceedings are instituted at instance of department of agriculture, libel should allege these facts, since they are prerequisites to proceedings.

14. *United States v. Seventy-Four Cases of Grape Juice*, 181 Fed. 629.

time when the article was shipped.¹⁵ Since, the federal act, providing for a seizure and condemnation of adulterated or misbranded articles of food or drugs, contemplates the seizure thereof, not only when shipped in interstate commerce for sale, but when, having been transported, they remain unloaded, unsold, or in unbroken packages, a libel for the condemnation of unfit articles in the original and unbroken package, need not describe them as "transported for sale."¹⁶ Where the charge, in a libel for forfeiture, is that the article was misbranded, it is essential that the libel should set forth the branding and facts inconsistent therewith.¹⁷

The want of a sufficient verification to the libel, by which it is sought to condemn articles under the pure food laws, is no ground for exception or demurrer to its substance.¹⁸

E. HEARING OR TRIAL.¹⁹ — By express provision of the federal act, in condemnation proceedings, either party may demand a trial by jury of any issue of fact joined therein.²⁰

The general rule obtains that where the evidence is conflicting, questions of fact are for the jury.²¹

F. REVIEW. — Since under the constitution, no fact tried by a jury shall be otherwise examined in any court of the United States, than according to the rules of the common law, a condemnation proceeding under the federal act, tried by a jury, is reviewable only upon writ of error.²²

15. See *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302, at least, against the objection to the libel by exception, since if it was made before the federal act was passed, such is matter of defense to be raised by answer.

16. *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. ed. 364; *United States v. Three Hundred Cans of Frozen Eggs*, 189 Fed. 351, 354, 111 C. C. A. 83 (*questioning United States v. Forty-Six Packages & Bags of Sugar*, 183 Fed. 642, holding a complaint failing to so allege fatally defective); *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302, 307.

17. *United States v. Six Hundred and Fifty Cases of Tomato Catsup*, 166 Fed. 773, 775. See also *Goode v. United States*, 44 App. Cas. (D. C.) 162.

[a] **Variance.** — Where the particular in which the branding was false is specified, it is not permissible to prove falsity in another particular. *Lexington Mill & Elevator Co. v. United States*, 202 Fed. 615, 121 C. C. A. 23.

18. *United States v. Two Barrels of Desiccated Eggs*, 185 Fed. 302, 307,

under the admiralty rules in force in the federal courts, libels on behalf of the United States need not be verified.

19. See generally the title "**Trial.**"

20. §10, Act 1906; *United States v. 779 cases of molasses*, 174 Fed. 325, 98 C. C. A. 197. The right to a trial by jury granted by this act on demand of either party is absolute, and means a trial by jury according to the established practice in courts of common law.

21. See *Lexington Mill & Elevator Co. v. United States*, 202 Fed. 615, and generally the title "**Province of Judge and Jury.**"

[a] **Whether the substance added to an article was a poisonous or deleterious ingredient which might render the article injurious to health was a question of fact for the jury.** *United States v. Forty Barrels, etc., Coca Cola Co.*, 241 U. S. 265, 36 Sup. Ct. 573, 60 L. ed. 995, Ann. Cas. 1917C, 487. See also *Lexington Mill & Elevator Co. v. United States*, 202 Fed. 615, 121 C. C. A. 23.

22. *United States v. 779 Cases of Molasses*, 174 Fed. 325, 327, 98 C. C. A. 197. See *Lexington Mill & Elevator Co. v. United States*, 202 Fed. 615, 121

V. POWER OF EQUITY TO ENJOIN ENFORCEMENT OF.

In accordance with the well settled rule that a court of equity will not restrain a criminal prosecution under a valid statute even though property interests are involved, the enforcement of pure food laws by the officer designated for that purpose cannot generally be enjoined.²³

VI. REMEDY FOR INJURIES FROM UNWHOLESOME FOOD.

A. DECLARATION OR COMPLAINT.—The declaration or complaint in an action for injuries from unwholesome food must state facts to constitute a cause of action.²⁴ In such a case it is sufficient to set forth the facts from which the duty springs, the neglect of that duty, and the resulting injury.²⁵ It is not necessary to aver in terms the existence of the relation which in law casts the duty upon the vendor,²⁶ or that he knew of the injurious quality of the food.²⁷ Where the facts are pleaded from which the warranty of the wholesomeness of the food is implied, it is not necessary to plead the warranty as a legal conclusion.²⁸ In some jurisdictions, the particular negligence, which it is claimed constituted the actionable wrong in the supplying of unfit articles of food, should be alleged with particularity.²⁹ The declaration or complaint need not allege that the plaintiff paid for the article of

C. C. A. 23. See generally the title "Writ of Error."

23. See *Cobb v. French*, 111 Minn. 429, 127 N. W. 415; *The Pre-Digested Food Co. v. McNeal*, 1 Ohio N. P. 266, 4 Ohio Dec. 356. Also 1 STANDARD PROC. 590; and generally the title "Suits and Actions."

[a] But equity will enjoin the continued seizure and destruction of articles of food upon a proper case being presented. *Nelson v. City of Minneapolis*, 112 Minn. 16, 127 N. W. 445.

24. See generally the title "Declaration and Complaint."

[a] For complaint in an action for negligently furnishing unwholesome articles of food, see *Greenwood Cafe v. Lovinggood*, 197 Ala. 34, 72 So. 354; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; *Meshbesh v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428, 131 Am. St. Rep. 441 (complaint under pure food act); *Haley v. Swift & Co.*, 152 Wis. 570, 140 N. W. 292.

25. *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; *Flesscher v. Carstens Packing Co.*, 93 Wash. 48, 160 Pac. 14.

26. *Bishop v. Weber*, 139 Mass. 411, 418, 1 N. E. 154, 52 Am. Rep. 715; *Flesscher v. Carstens Packing Co.*, 93 Wash. 48, 160 Pac. 14.

27. *Mass.*—*Bishop v. Weber*, 139 Mass. 411, 418, 1 N. E. 154, 52 Am. Rep. 715. *N. J.*—*Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923, reversing 74 N. J. L. 274, 65 Atl. 883. *Wash.* *Flesscher v. Carstens Packing Co.*, 93 Wash. 48, 160 Pac. 14.

[a] It is sufficient if it appears that he ought to have known of it, and was negligent in furnishing unwholesome food, by reason whereof the plaintiff was injured. *Bishop v. Weber*, 139 Mass. 411, 418, 1 N. E. 154, 52 Am. Rep. 715. See *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923, reversing 74 N. J. L. 274, 65 Atl. 883.

28. *Flesscher v. Carstens Packing Co.*, 93 Wash. 48, 160 Pac. 14.

29. *Salmon v. Libby, McNeill & Libby*, 219 Ill. 421, 76 N. E. 573. But where the declaration, in an action for damages for death caused by the furnishing of improperly prepared mincemeat, described or charged in general terms that the meat was poisonous as a consequence of defendant's negligence and improper preparation, this averment, taken in connection with a statute pleaded therein, and which authorized an action for a death caused by the wrongful act or omission of another, showed the existence of an actionable wrong, though upon demurrer, the lack of particular-

food;³⁰ nor need it allege any special damage.³¹ Where the action is against the manufacturer of the unwholesome article, though such action depends upon an existing pure food statute prohibiting a person from doing an act or imposing a duty upon him if he neglects to perform the duty, it is not necessary to plead the statute, as it is a public act.³²

B. TRIAL.³³ — The general rules as to variance obtain in actions for injuries from unwholesome food.³⁴ So also the general rule obtains that all questions of fact upon which the evidence is conflicting are for the jury to determine.³⁵

ity in the averments of negligence was fatal.

30. *Peckham v. Holman*, 11 Pick. (Mass.) 484, holding that though the plaintiff might have resisted payment for the article, in case it was unpaid for, yet he had a right to affirm the contract and claim damages for the fraud.

31. *Peckham v. Holman*, 11 Pick. (Mass.) 484, in which it was contended that since the article had not been paid for and the defendant could not have collected for it, that the plaintiff had not suffered any damage; but the court held that when provisions are purchased, it must be presumed that the purchaser expected to derive some benefit from the purchase, and if he was wrongfully and fraudulently deprived of the expected benefit, he suffered damage, though he need not plead it specially.

32. *Meshbesh v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428, 131 Am. St. Rep. 441, it being sufficient to show a neglect to discharge the duty imposed by the pure food statute and a violation of its prohibitions by the defendant.

33. See generally the title "**Trial.**"

34. See *infra*, this note, and generally the title "**Variance and Failure of Proof.**"

[a] Immaterial variance between

declaration and proof is not fatal. *Boyd v. Coca Cola Bottling Works*, 132 Tenn. 23, 177 S. W. 80.

35. See *infra*, this note, and generally the title "**Province of Judge and Jury.**"

[a] Thus, (1) whether or not a defendant was so careless that he should be held responsible for the consequences of his own acts, or those of his servants. (*Craft v. Parker, Webb & Co.*, 96 Mich. 245, 248, 55 N. W. 812, 21 L. R. A. 139), whether or not (2) the plaintiff exercised due care on his part in using such unwholesome food, when he observed the fact of its unfitness for use. (*Sloan v. F. W. Woolworth Co.*, 193 Ill. App. 620; *Craft v. Parker, Webb & Co.*, 96 Mich. 245, 248, 55 N. W. 812, 21 L. R. A. 139), are proper questions for the jury. (3) So also whether an article of food was properly prepared for use by its manufacturer was held properly left to the jury. (*Wilson v. Ferguson Co.*, 214 Mass. 265, 101 N. E. 381), as was (4) the question of the wholesomeness of the article. *Flesscher v. Carstens Packing Co.*, 93 Wash. 48, 160 Pac. 14. (5) Whether plaintiff's illness was caused by the eating of food purchased of defendant is a question of fact for jury. *Chapman v. Roggenkamp*, 182 Ill. App. 117; *Flesscher v. Carstens Packing Co.*, 93 Wash. 48, 160 Pac. 14.

PURPRESTURE. — See Navigable Waters; Public Lands; Wharves.

QUANTUM MERUIT. — See Assumpsit; Choice and Election of Remedies; Debt; Implied and Express Agreements; Joinder of Actions; Master and Servant; Work and Labor.

QUANTUM VALEBANT. — See **Assumpsit**; **Choice and Election of Remedies**; **Sales**.

QUASHING. — See **Indictment and Information**; **Judgments and Decrees, Enforcement of**; **Motions**; **Process**; **Service of Process and Papers**.

QUESTION CERTIFIED, RESERVED OR REPORTED. — See **Case** and **Question Certified, Reserved or Reported**.

QUESTIONS OF LAW AND FACT. — See **Province of Judge and Jury**.

QUIA TIMET

By the Editorial Staff.

I. DEFINITION, NATURE AND SCOPE, 991

II. NATURE AND FORM OF RELIEF GRANTED, 992

CROSS-REFERENCES:

Bills and Answers; Equity Jurisdiction and Procedure.

For forms, see 9 STANDARD PROC. 1012.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITION, NATURE AND SCOPE.—A bill quia timet is a preventive remedy designed to protect the rights and interests of the plaintiff from apprehended or threatened injury,¹ not to rectify an injury which has already occurred.² It is one of the auxiliary

1. **U. S.**—See the following cases: *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. ed. 52; *Southern R. Co. v. North Carolina R. Co.*, 81 Fed. 595. **Cal.**—*Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343; *Hager v. Shindler*, 29 Cal. 47. **Md.** *Whitridge v. Durkee's Exrs.*, 2 Md. Ch. 442; *Drury v. Roberts*, 2 Md. Ch. 157. **Minn.**—*Mankato v. Willard*, 13 Minn. 13, 97 Am. Dec. 208. **Miss.**—*Green v. Hankinson's Admrs.*, Walk. 487. **N. Y.**—*Champlin v. Champlin*, 4 Edw. Ch. 228; *Mt. Morris v. King*, 8 App. Div. 495, 40 N. Y. Supp. 709, 75 N. Y. St. 113. **Ohio.**—*Thomas v. White*, 2 Ohio St. 540. **Tex.**—*Jones v. Perkins*, 8 Tex. 337. **Va.**—*Stephenson v. Taverners*, 9 Gratt. (50 Va.) 398. **Wash.** *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784. **Eng.**—*Ranelaugh v. Hayes*, 1 Vern. 189, 23 Eng. Reprint 405.

[a] **Other Definitions.**—A bill quia timet is a bill filed by one who “is apprehensive of being subjected to a future inconvenience, probable, or even possible, to happen, or be occasioned by the neglect, inadvertence or culpability of another, or where

any property is bequeathed to one after the death of another, and which the former is desirous of having secured safely for his use,” or where a surety is fearful of injury from the neglect of his principal to pay the debt.” *Randolph's Admx. v. Kinney*, 3 Rand. (24 Va.) 394.

[b] **Writs of Prevention.**—“Bills of quia timet are also known in the practice of equity as writs of prevention, and are used to accomplish the ends of precautionary justice.” *Bailey v. Southwick*, 6 Lans. (N. Y.) 356, affirmed 56 N. Y. 407.

[c] **The name of the bill** is taken from the expression of the plaintiff's fears in the application—quia timet, because he fears. *Bailey v. Southwick*, 6 Lans. (N. Y.) 356, affirmed 56 N. Y. 407.

2. **Ala.**—*Bryant v. Peters*, 3 Ala. 160. **Md.**—*Drury v. Roberts*, 2 Md. Ch. 157. **N. Y.**—*Bailey v. Southwick*, 6 Lans. 356, affirmed 56 N. Y. 407.

[a] “**Its object** (1) is to secure the preservation of property to its appropriate uses where there is future or contingent danger of its being diminished or converted to other uses, or lost by gross neglect, without the interpo-

equity remedies,³ analogous to a bill of peace,⁴ and to the ancient common law writs of prevention.⁵ It is available to prevent threatened injuries as well to rights in personalty⁶ as to rights in realty.⁷

II. NATURE AND FORM OF RELIEF GRANTED.—The nature of the relief granted depends upon the circumstances under which it is sought.⁸ Thus the purpose of a bill quia timet may be to quiet title,⁹ to prevent waste,¹⁰ to exonerate a surety,¹¹ to prevent the

sition of the court.” *Bailey v. Southwick*, 6 Lans. (N. Y.) 356, *affirmed* 56 N. Y. 407. (2) The party who files a bill quia timet seeks the aid of equity because he fears some future probable injury to his rights or interests, and not because any injury has already occurred which requires compensation or any other relief. *Bryant v. Peters*, 3 Ala. 160.

[b] **The statement of facts in a bill quia timet**, (1) should be sufficient to satisfy the court that the parties stand in a situation in which they will be damnified in the event of the act being done, for the prevention of which they pray the intervention of the court. *Green v. Hankinson's Admrs.*, Walk. 487. (2) The bill must state facts showing wrongs or anticipated mischiefs which should be forestalled or prevented. *Bailey v. Briggs*, 56 N. Y. 407, *affirming* *Bailey v. Southwick*, 6 Lans. 356. See generally the title “**Equity Jurisdiction and Procedure**” and the particular title involved.

3. See 8 STANDARD PROC. 443.

4. *Bailey v. Southwick*, 6 Lans. (N. Y.) 356, *affirmed*. 56 N. Y. 407.

[a] **Distinguished From Bill of Peace.**—A bill quia timet to quiet title differs from a bill of peace in that it does not seek so much to put an end to vexatious litigation as to prevent future litigation. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. ed. 52.

5. *Southern R. Co. v. North Carolina R. Co.*, 81 Fed. 595.

6. Md.—See *Whitridge v. Durkee's Exrs.*, 2 Md. Ch. 442. Miss.—*Green v. Hankinson's Admrs.*, Walk. 487. N. Y.—*Bailey v. Southwick*, 6 Lans. 356, *affirmed*, 56 N. Y. 407.

7. See the following cases: Cal. *Hager v. Shindler*, 29 Cal. 47. Md. *Polk v. Rose*, 25 Md. 153, 89 Am. Dec. 773. Minn.—*Mankato v. Willard*, 13 Minn. 13, 97 Am. Dec. 208. Ohio. *Thomas v. White*, 2 Ohio St. 540. Tenn.—*Williams v. Williams*, 7 Baxt.

116. Wash.—*Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784.

[a] **Necessity of Possession of Realty.**—(1) To maintain a bill quia timet to quiet title it was generally necessary that the plaintiff should be in possession of the property (*Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. ed. 52), but (2) statutory changes make it possible in certain jurisdictions to maintain such a bill whether the plaintiff is in or out of possession. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. ed. 52 (Nev.); *Southern R. Co. v. North Carolina R. Co.*, 81 Fed. 595 (N. C.); *Grand Rapids & I. R. Co. v. Sparrow*, 36 Fed. 210, 1 L. R. A. 480 (Mich.).

8. See the cases cited *infra*, this section.

[a] **Bill to remove cloud and preserve homestead rights** by wife in possession, see *Williams v. Williams*, 7 Baxt. (Tenn.) 116. See also 11 STANDARD PROC. 380.

[b] **It is not available** (1) to procure a judicial determination and construction of a will (*Bailey v. Southwick*, 6 Lans. (N. Y.) 356, *affirmed*, 56 N. Y. 407) nor (2) to enforce a trust. *McDougald v. Dougherty*, 11 Ga. 570.

9. Cal.—*Hager v. Shindler*, 29 Cal. 47. Ohio.—*Thomas v. White*, 2 Ohio St. 540. Wash.—See *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784.

See the title “**Quieting Title.**”

10. *Randolph's Admx. v. Kinney*, 3 Rand. (24 Va.) 394. See the title “**Waste.**”

[a] **A remainderman's remedy** to prevent diversion and squandering of property by a life tenant is by bill quia timet. *Sanderson v. Jones*, 6 Fla. 430, 63 Am. Dec. 217.

11. *Randolph's Admx. v. Kinney*, 3 Rand. (24 Va.) 394.

[a] **By a surety** against the creditor and the debtor, after the debt is

misapplication of property,¹² or to nulify the effect of fraud;¹³ and the relief granted frequently takes the form of the appointment of a receiver,¹⁴ the granting of an injunction,¹⁵ and an order to furnish security,¹⁶ or to pay money into court.¹⁷

due, to compel the latter to pay the debt and so exonerate himself from liability. *Stephenson v. Taverners*, 9 Gratt. (50 Va.) 398.

12. See *Bailey v. Southwick*, 6 Lans. (N. Y.) 356 (*affirmed*, 56 N. Y. 407); *Randolph's Admx. v. Kinney*, 3 Rand. (24 Va.) 394.

13. *Hager v. Shindler*, 29 Cal. 47. See *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784.

14. *Drury v. Roberts*, 2 Md. Ch. 157; *Davis v. D. of Marlborough*, 1 Swanst. 74, 83, 36 Eng. Reprint 303. See generally the title "Receivers."

[a] A bill quia timet is applicable

as against executors and administrators, trustees and corporations, where there is danger of devastation, waste or collusion, by which estates may be diminished, and where the appointment of a receiver is necessary. *Bailey v. Southwick*, 6 Lans. (N. Y.) 356, *affirmed*, 56 N. Y. 407.

15. *Drury v. Roberts*, 2 Md. Ch. 157; *Hendriks v. Montague*, 17 Ch. Div. (Eng.) 638. See the title "Injunctions."

16. *Rous v. Noble*, 2 Vern. 249, 23 Eng. Reprint 761.

17. *Leigh v. Macaulay*, 1 Y. & C. Ch. 260. See generally the title "Deposit in Court."

QUIETING TITLE

By the Editorial Staff.

I. NATURE AND EXTENT OF REMEDY, 995

- A. *In General*, 995
- B. *Nature of Adverse Claim*, 995

II. PROCEEDINGS TO OBTAIN, 998

- A. *Form of*, 998
 - 1. *Bill in Equity*, 998
 - 2. *Statutory Actions*, 999
- B. *In What County Brought*, 1000
- C. *Parties*, 1001
 - 1. *In General*, 1001
 - 2. *Plaintiff*, 1001
 - a. *Interest Necessary*, 1001
 - (I.) *In General*, 1001
 - (II.) *Legal or Equitable Title*, 1003
 - (III.) *Possession*, 1004
 - (A.) *Necessity for*, 1004
 - (B.) *Character of*, 1006
 - b. *Application of Rules to Particular Persons*, 1007
 - 3. *Defendant*, 1009
 - 4. *Intervenor*, 1010
 - 5. *Joinder of Parties*, 1010
 - a. *Plaintiff*, 1010
 - b. *Defendants*, 1010
- D. *Process*, 1011
- E. *Pleading*, 1011
 - 1. *Bill, Petition or Complaint*, 1011
 - a. *In General*, 1011
 - b. *Title*, 1012
 - c. *Possession*, 1013
 - d. *Adverse Claim*, 1015
 - e. *Description of Property*, 1016
 - f. *Offer To Do Equity*, 1016
 - g. *Prayer for Relief*, 1017
 - 2. *Plea or Answer*, 1017
 - 3. *Cross-Complaint and Counterclaim*, 1018
 - 4. *Replication or Reply*, 1018
- F. *Trial or Hearing*, 1019
 - 1. *Variance*, 1019

2. *Directing Issues to Jury*, 1019
3. *Dismissal and Disclaimer*, 1020
4. *Findings*, 1020

G. *Judgment or Decree*, 1021

1. *In General*, 1021
2. *Nature and Extent of Relief*, 1022
3. *Costs*, 1023
4. *Operation and Effect*, 1023

H. *Enforcement of Judgment or Decree*, 1023

III. STATUTORY PROCEEDING TO COMPEL CLAIMANT TO TRY TITLE, 1024

CROSS-REFERENCES:

Ejectment;	Quia Timet;
Mines and Minerals;	Trespass To Try Title.

For forms, see 9 STANDARD PROC. 1013, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. NATURE AND EXTENT OF REMEDY. — A. **IN GENERAL.** Generally an action to quiet title is maintainable only in reference to title to real property,¹ and, except when authorized by statute,² or where because of exceptional circumstances plaintiff has no adequate remedy at law,³ is not warranted in respect to personality.⁴

B. **NATURE OF ADVERSE CLAIM.** — To constitute a cloud upon title

1. **Ariz.**—*Arizona Mine Supply Co. v. Bolman*, 15 Ariz. 504, 140 Pac. 490. **Cal.**—*Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 4 Pac. 1024; *Townsend v. Driver*, 5 Cal. App. 581, 90 Pac. 1071. **Colo.**—*New Brantner Ditch Co. v. Kramer*, 57 Colo. 218, 141 Pac. 498, Ann. Cas. 1916B, 1225. **Mo.**—*State v. Wood*, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596. **N. J.**—*Whitlock v. Greacen*, 48 N. J. Eq. 359, 21 Atl. 944. [a] **Title to easements quieted.** *Hipes v. Doherty*, 176 Ind. 379, 96 N. E. 152; *Humphrey v. Krutz*, 77 Wash. 152, 137 Pac. 806. But see *Whitlock v. Greacen*, 48 N. J. Eq. 359, 21 Atl. 944.
2. **Ariz.**—*Arizona Mine Supply Co. v. Bolman*, 15 Ariz. 504, 140 Pac. 490. **Cal.**—*Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 4 Pac. 1024; *Townsend v. Driver*, 5 Cal. App. 581, 90 Pac. 1071. **Colo.**—*New Brantner Ditch Co. v. Kramer*, 57 Colo. 218, 141 Pac. 498, Ann. Cas. 1916B, 1225. **Mo.**—*State v. Wood*, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596. **N. J.**—*Whitlock v. Greacen*, 48 N. J. Eq. 359, 21 Atl. 944. [a] **Title to easements quieted.** *Hipes v. Doherty*, 176 Ind. 379, 96 N. E. 152; *Humphrey v. Krutz*, 77 Wash. 152, 137 Pac. 806. But see *Whitlock v. Greacen*, 48 N. J. Eq. 359, 21 Atl. 944.
3. **Colo.**—*Central Sav. Bank & Tr. Co. v. Amalgamated Soc.*, 24 Colo. App. 438, 134 Pac. 1007. **Ohio.**—*Voss v. Murray*, 50 Ohio St. 19, 32 N. E. 1112. **R. I.**—*O'Donnell v. Brown*, 35 R. I. 522, 87 Atl. 311.
4. **Cal.**—*Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 29, 4 Pac. 1024. **Colo.**—*Central Sav. Bank & Tr. Co. v. Amalgamated Soc.*, 24 Colo. App. 438, 134 Pac. 1007. **Mo.**—*Red Diamond Clothing Co. v. Steidemann*, 141 Pac. 498, Ann. Cas. 1916B, 1225.

the adverse claim need not be founded upon a writing⁵ unless the particular estate or interest set up can derive validity only through a written instrument.⁶ If the claim is based upon a writing the latter must be such as might create an interest in the land,⁷ and must be free from patent invalidity, for, although equity will assume jurisdiction to remove as a cloud upon title any instrument or record, the invalidity of which can only be established by extrinsic evidence,⁸ it will not un-

120 Mo. App. 519, 97 S. W. 220. **N. J.** Whitlock v. Greacen, 48 N. J. Eq. 359, 21 Atl. 944.

5. Satterwhite v. Gallagher, 173 N. C. 525, 92 S. E. 369.

6. Devine v. Los Angeles, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. ed. 1046.

7. Eagleston v. Goodykoontz, 182 Ill. App. 318; Hicks v. Rupp, 49 Mont. 40, 140 Pac. 97.

[a] Recording a contract to pay money which gives no interest in the land does not make it a cloud upon title which may be removed by an action to quiet title. Eagleston v. Goodykoontz, 182 Ill. App. 318.

8. **U. S.**—Graves v. Ashburn, 215 U. S. 331, 30 Sup. Ct. 108, 54 L. ed. 217; Johnston v. Kramer, Bros. & Co., 203 Fed. 733. **Ala.**—Parker v. Miller-Brent Lumber Co., 157 Ala. 282, 47 So. 580. **Ark.**—Lawrence v. Zimpleman, 37 Ark. 643. **Cal.**—Smith v. Matthews, 81 Cal. 120, 22 Pac. 409. **Fla.**—Pettit v. Coachman, 51 Fla. 521, 41 So. 401; Matheson v. Thompson, 20 Fla. 790. **Ga.** Echols v. Green, 140 Ga. 678, 79 S. E. 557. **Ill.**—McCarty v. McCarty, 275 Ill. 573, 114 N. E. 322; Taylor v. Marshall, 255 Ill. 545, 99 N. W. 638; Culver v. Phelps, 130 Ill. 217, 22 N. E. 809. **Ind.**—Sherrin v. Flinn, 155 Ind. 422, 58 N. E. 549. **Ia.**—Cranston v. McQuiston, 127 Iowa 104, 102 N. W. 785. **Kan.**—Westbrook v. Schmaus, 51 Kan. 558, 33 Pac. 306. **Ky.**—Bowling v. Bowling, 118 S. W. 923; Murphy v. Metz, 25 Ky. L. Rep. 1124, 77 S. W. 191. **Me.**—Spear v. Spear, 97 Me. 498, 54 Atl. 1106. **Mass.**—McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162. **Mich.**—Monroe v. Carter, 167 Mich. 325, 132 N. W. 1023; Casgrain v. Hammond, 134 Mich. 419, 96 N. W. 510, 104 Am. St. Rep. 610; Woodward v. Gorton, 46 Mich. 324, 9 N. W. 434. **Minn.**—Meyers v. Markham, 99 Minn. 230, 96 N. W. 335, 787; Butman v. James, 34 Minn. 547, 27 N. W. 66. **Miss.**—Vicksburg R. Co.

v. Ragsdale, 54 Miss. 200. **Mo.** Jewett v. Boardman, 181 Mo. 647, 81 S. W. 186. **Neb.**—Reynolds v. Rick-gauer, 75 Neb. 163, 106 N. W. 175. **N. H.**—Hallett v. Parker, 69 N. H. 134, 39 Atl. 583. **N. J.**—Foley v. Kirk, 33 N. J. Eq. 170. **N. Y.**—Rector St. Stephen's Church v. Rector Church of Transfigu-ration, 201 N. Y. 1, 94 N. E. 191; Meyer v. Wilcox, 136 N. Y. Supp. 337; Rumble v. Smith, 66 Misc. 298, 121 N. Y. Supp. 501. **N. C.**—McArthur v. Griffith, 147 N. C. 545, 61 S. E. 519. **Ohio.**—Lowmiller v. Fouser, 52 Ohio St. 123, 39 N. E. 419. **Okla.** Ross v. Sanderson, 162 Pac. 709. **Ore.** Richards v. Mohr, 73 Ore. 57, 143 Pac. 1102; Deckenbach v. Deckenbach, 65 Ore. 160, 130 Pac. 729. **Pa.**—Ullom v. Hughes, 204 Pa. 305, 54 Atl. 23. **S. C.** Kittles v. Williams, 64 S. C. 229, 41 S. E. 975. **S. D.**—Fitzgerald v. Mil-ler, 7 S. D. 61, 63 N. W. 221. **Va.** Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. 1020. **Wash.**—Wil-son v. Stone, 90 Wash. 365, 156 Pac. 12; King v. Branscheid, 32 Wash. 634, 73 Pac. 668. **W. Va.**—Jones v. Crim & Peck, 66 W. Va. 301, 66 S. E. 367; Smith v. O'Keefe, 43 W. Va. 172, 27 S. E. 353. **Wis.**—Suring v. Rollman, 145 Wis. 490, 130 N. W. 485; Hoffman v. Wheelock, 62 Wis. 434, 22 N. W. 713, 716.

[a] (1) "A cloud on a title is a semblance of a title, either legal or equitable, or a claim of an interest in lands appearing in some legal form but which is, in fact, unfounded." Dodsworth v. Dodsworth, 254 Ill. 49, 98 N. E. 279. (2) If the title against which relief is prayed be of such a character as that, if asserted would drive the other party to the production of his own title to establish a defense it constitutes a cloud. Lick v. Ray, 43 Cal. 83.

[b] Forged instrument constitutes such a cloud upon title. Clark v. Cove-nant Mut. L. Ins. Co., 52 Mo. 272; Byerly v. Humphrey, 95 N. C. 151.

less special circumstances are shown,⁹ relieve against an instrument¹⁰

[c] **Mortgage.**—**Ala.**—King Lumber Co. v. Spragner, 176 Ala. 564, 58 So. 920; Richardson v. Stephens, 122 Ala. 301; 25 So. 39. **Ariz.**—Provident Mut. Bldg.-Loan Assn. v. Schwertner, 15 Ariz. 517, 140 Pac. 495. **Minn.**—New England Mut. Life Ins. Co. v. Capehart, 63 Minn. 120, 65 N. W. 258. **N. Y.**—Swarthout v. Ranier, 143 N. Y. 499, 38 N. E. 726; Stokes v. Houghton, 16 App. Div. 381, 45 N. Y. Supp. 21. **N. C.**—Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842. **Wis.**—Pritchard v. Lewis, 125 Wis. 604, 104 N. W. 989, 110 Am. St. Rep. 873, 1 L. R. A. (N. S.) 565.

[d] **Where the instrument was originally valid but has by subsequent events become of no effect, an action may be maintained to quiet title.** **Ill.**—Skinner v. Baker, 79 Ill. 496. **Mass.**—McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162. **Mich.**—Pendill v. Union Min. Co., 64 Mich. 172, 31 N. W. 100. **N. J.**—Foley v. Kirk, 33 N. J. Eq. 170.

[e] **Agreements for the sale of real property which are not void upon their face are clouds upon title giving rise to interference of equity.** **U. S.**—Beamer v. Werner, 159 Fed. 99, 86 C. C. A. 289. **Ill.**—Kesner v. Miesch, 204 Ill. 320, 68 N. E. 405. **Ia.**—Smith v. Van Campen, 40 Iowa 411. **Kan.**—Westbrook v. Schmaus, 51 Kan. 558, 33 Pac. 306. **Minn.**—Meyers v. Markham, 90 Minn. 230, 96 N. W. 335, 787. **Miss.**—Vicksburg R. R. Co. v. Ragsdale, 54 Miss. 200. **Neb.**—Warnick v. Latta, 44 Neb. 807, 62 N. W. 1097. **Okla.**—Ross v. Sanderson, 162 Pac. 709. **Pa.**—Ullom v. Hughes, 204 Pa. 305, 54 Atl. 23.

[f] **Lease which has terminated.** **Ventriniglia v. Eichner**, 155 App. Div. 236, 149 N. Y. Supp. 395; **Nickerson v. Canton Marble Co.**, 35 App. Div. 111, 54 N. Y. Supp. 705.

[g] **Mechanic's lien which has become forfeited.** **Sheets v. Prosser**, 16 N. D. 180, 112 N. W. 72.

[h] **Judgment Lien.**—**Fla.**—Clements v. Henderson, 70 Fla. 260, 70 So. 439. **Ill.**—Culver v. Phelps, 130 Ill. 217, 22 N. E. 809. **Ia.**—French v. Bartel, 164 Iowa 677, 116 N. W. 754. **Minn.**—Barton v. Drake, 21 Minn. 299. **Mo.**—McLaughlin v. McLaughlin, 228

Mo. 635, 129 S. W. 21, 137 Am. St. Rep. 680. **Neb.**—Smith v. Neufeld, 57 Neb. 660, 78 N. W. 278. **N. Y.**—Bernstein v. Schoenfeld, 37 Misc. 610, 76 N. Y. Supp. 140. **N. D.**—Klemmens v. First Nat. Bank of Cassopolis, 22 N. D. 304, 133 N. W. 1044. **Ore.**—Skelton v. Newberg, 76 Ore. 126, 148 Pac. 53. **S. D.**—Hale v. Grigsby, 12 S. D. 198, 80 N. W. 199. **Va.**—Wicks v. Scull, 102 Va. 290, 46 S. E. 297. **Wash.**—Wilson v. Stone, 90 Wash. 365, 156 Pac. 12. **W. Va.**—Ambler v. Leach, 15 W. Va. 677. But see **McLean v. Shaw**, 125 N. C. 491, 34 S. E. 634.

[i] **Attachment Lien.**—**Anderson v. Moline Plow Co.**, 101 Iowa 747, 69 N. W. 1028, 63 Am. St. Rep. 424.

[j] **Assessment Lien.**—**U. S.**—Kansas City, Ft. S. & M. R. Co. v. King, 120 Fed. 614, 57 C. C. A. 278. **Ala.**—Birmingham v. Coffman, 173 Ala. 213, 55 So. 500, Ann. Cas. 1914A, 887. **Cal.**—Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 33. **Colo.**—Dumars v. Denver, 16 Colo. App. 375, 65 Pac. 580. **D. C.**—Buchanan v. MacFarland, 31 App. Cas. 6. **Minn.**—Mayall v. St. Paul, 30 Minn. 294, 15 N. W. 170. **Mo.**—Perkins v. Baer, 95 Mo. App. 70, 68 S. W. 939; Bayha v. Taylor, 36 Mo. App. 427. **N. H.**—Perham v. Haverhill Fiber Co., 64 N. H. 2, 3 Atl. 312. **N. J.**—Ludington v. Elizabeth, 34 N. J. Eq. 357. **N. Y.**—Sayer v. New York, 208 N. Y. 159, 101 N. E. 764; Marsh v. Brooklyn, 59 N. Y. 280; Trumbull v. Palmer, 104 App. Div. 51, 93 N. Y. Supp. 349. **Wash.**—Kinsman v. Spokane, 20 Wash. 118, 54 Pac. 934, 72 Am. St. Rep. 24. **W. Va.**—Tygart's Val. Bank v. Philippi, 38 W. Va. 219, 18 S. E. 489.

[k] **Tax Deed.**—**Russ & Sons Co. v. Crichton**, 117 Cal. 695, 49 Pac. 1043; **Buchanan v. MacFarland**, 31 App. Cas. (D. C.) 6.

9. **Goodman v. Wren**, 34 App. Cas. (D. C.) 516.

10. **U. S.**—**Ashburn v. Graves**, 149 Fed. 968, 79 C. C. A. 478. **Ala.**—**Prestwood v. Horn**, 195 Ala. 450, 70 So. 134. **Cal.**—**Bothin v. California Title Ins. & Tr. Co.**, 153 Cal. 718, 96 Pac. 500, Ann. Cas. 1914D, 634. **D. C.**—**Welden v. Stickney**, 1 App. Cas. 343. **Fla.**—**Reyes v. Middleton**, 36 Fla. 99, 17 So. 937, 51 Am. St. Rep. 17. 29 L. R. A. 66. **Ga.**—**Thompson v. Etowah**

or judicial record¹¹ invalid upon its face.

II. PROCEEDINGS TO OBTAIN.—A. FORM OF.¹²—1. Bill in Equity.¹³—Equity has an inherent jurisdiction to quiet title,¹⁴ or

Iron Co., 91 Ga. 538, 17 S. E. 663. **Ill.** Kesner v. Miesch, 204 Ill. 320, 68 N. E. 405; Glos v. Furman, 164 Ill. 585, 45 N. E. 1019. **Kan.**—Banister v. Fallis, 85 Kan. 320, 116 Pac. 822. **Mass.** Nickerson v. Loud, 115 Mass. 94. **Mich.**—Purdy v. Law, 132 Mich. 622, 94 N. W. 182. **Minn.**—Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261. **Mo.**—Hannibal & St. J. R. Co. v. Norton, 154 Mo. 142, 55 S. W. 220. **Mont.**—Hicks v. Rupp, 49 Mont. 40, 140 Pac. 97. **Neb.**—Best v. Grist, 95 N. W. 836. **Nev.**—Low v. Staples, 2 Nev. 209. **N. Y.**—Hotchkiss v. Elting, 36 Barb. 38; Ward v. Dewey, 16 N. Y. 519. **N. C.**—McArthur v. Griffith, 147 N. C. 545, 61 S. E. 519; Byerly v. Humphrey, 95 N. C. 151. **Ore.**—Richards v. Mohr, 73 Ore. 57, 143 Pac. 1102. **Wash.**—Pacific Coast Pipe Co. v. Hedican, 61 Wash. 576, 112 Pac. 655, Ann. Cas. 1912C, 833. **W. Va.**—Whitehouse v. Jones, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49. **Wis.**—Cornish v. Frees, 74 Wis. 490, 43 N. W. 507.

But see **N. C.**—Christman v. Hilliard, 167 N. C. 4, 82 S. E. 949. **Wash.** Pacific Coast Pipe Co. v. Hedican, 61 Wash. 576, 112 Pac. 655, Ann. Cas. 1912C, 833; Cordiner v. Finch Inv. Co., 54 Wash. 574, 103 Pac. 829. **W. Va.** Whitehouse v. Jones, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49.

[a] **Void Tax Deed.**—**Ark.**—Beardsley v. Hill, 85 Ark. 4, 106 S. W. 1169. **Colo.**—Dumars v. Denver, 16 Colo. App. 375, 65 Pac. 580. **Mich.**—Detroit v. Martin, 34 Mich. 170, 22 Am. Rep. 512.

11. **U. S.**—Sowles v. Rugg, 55 Fed. 163. **Ala.**—Drum v. Bryan, 193 Ala. 395, 69 So. 483; Curry v. Peebles, 83 Ala. 225, 3 So. 622. **Ark.**—Haggart v. Chapman & D. Land Co., 77 Ark. 527, 92 S. W. 792. **Fla.**—Sloan v. Sloan, 25 Fla. 53, 5 So. 603. **Ill.**—West v. Schnebly, 54 Ill. 523. **Kan.**—Douglass v. Nuzum, 16 Kan. 515. **Mich.**—Griswold v. Fuller, 33 Mich. 268. **Minn.** Maloney v. Finnegan, 38 Minn. 70, 35 N. W. 723. **Mo.**—Fontaine v. Hudson, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515. **N. Y.**—Ward v. Dewey, 16 N. Y.

519. **Tex.**—Heath v. First Nat. Bank (Tex. Civ. App.), 32 S. W. 778.

[a] **Void Execution Sale.**—**U. S.** Sowles v. Rugg, 55 Fed. 163. **Ala.** Henderson v. Holman, 193 Ala. 268, 69 So. 424. **Ill.**—West v. Schnebly, 54 Ill. 523. **Miss.**—Boyd v. Thornton, 13 Smed. & M. 338.

[b] **Void Judicial Sale.**—**Ala.** Mitchell v. Spence, 62 Ala. 450; Florence v. Paschal, 50 Ala. 28. **Fla.** Sloan v. Sloan, 25 Fla. 53, 5 So. 603. **Mich.**—Griswold v. Fuller, 33 Mich. 268. **N. Y.**—Whitney v. Considine Inv. Co., 176 App. Div. 157, 162 N. Y. Supp. 507.

[c] **An attachment lien levied upon plaintiff's property by virtue of a writ issued in an action to which the plaintiff was not a party is not a cloud removable by a suit in equity.** Heath v. First Nat. Bank (Tex. Civ. App.), 32 S. W. 778.

12. Remedies at law, see "Ejectment;" "Trespass To Try Title," and see *infra*, II, A, 2.

13. See the title "Quia Timet."

14. **U. S.**—Richardson v. Pennsylvania Coal Co., 203 Fed. 743. **Ala.** Plant v. Barclay, 56 Ala. 561. **Ariz.** Costello v. Muheim, 9 Ariz. 422, 84 Pac. 906. **Ark.**—Lawrence v. Zimpleman, 37 Ark. 643. **Fla.**—Benner v. Kendall, 21 Fla. 584. **Ill.**—Booth v. Wiley, 102 Ill. 84; Johnson v. McChesney, 33 Ill. App. 526. **Ky.**—Louisville v. Gray, 1 Litt. 146. **Md.**—Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773. **Mass.**—Hinchley v. Greany, 118 Mass. 595. **Mich.**—Flint & P. M. Ry. Co. v. Gordon, 41 Mich. 420, 2 N. W. 648; Eaton v. Trowbridge, 38 Mich. 454. **Minn.**—Hamilton v. Batlin, 8 Minn. 403, 83 Am. Dec. 787. **Mo.**—Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326. **Neb.**—Smith v. Dean, 15 Neb. 432, 19 N. W. 642. **Nev.**—Low v. Staples, 2 Nev. 209. **N. J.**—Albro v. Dayton, 50 N. J. Eq. 574, 25 Atl. 937. **N. Y.**—Letson v. Letson, 81 App. Div. 556, 80 N. Y. Supp. 1032; Center v. Weed, 63 Hun 560, 18 N. Y. Supp. 554, 44 N. Y. St. 463. **N. C.**—Byerly v. Humphrey, 95 N. C. 151. **Ore.**—Johnson v. Tomlinson, 41

to remove a cloud therefrom.¹⁵ It must appear that the remedy at law is inadequate,¹⁶ or that the interposition of equity is warranted on some other ground, as, for example, to prevent multiplicity of suits.¹⁷

2. Statutory Actions.¹⁸—The statutes in general provide an action to quiet title, which enlarges the scope of the equitable remedy predicated upon the bill quia timet,¹⁹ but which is cumulative there-

Ore. 198, 68 Pac. 406. **Tenn.**—Almony v. Hicks, 3 Head 39. **Va.**—Sulphur Mines Co. v. Boswell, 94 Va. 480, 27 S. E. 24. **W. Va.**—De Camp v. Carnahan, 26 W. Va. 839. **Wis.**—Suring v. Rollman, 145 Wis. 490, 130 N. W. 485; Kruczinski v. Neuendorf, 99 Wis. 264, 74 N. W. 974.

15. U. S.—Richardson v. Pennsylvania Coal Co., 203 Fed. 743. **Ala.**—Cowan & Co. v. Sapp, 74 Ala. 44. **Ark.**—Shell v. Martin, 19 Ark. 139. **Conn.**—Munson v. Munson, 28 Conn. 582, 73 Am. Dec. 603. **Fla.**—Graham v. Florida Land & Mtg. Co., 33 Fla. 356, 14 So. 796. **Ga.**—Smith v. Burrus, 139 Ga. 10, 76 S. E. 362. **Ill.**—Schnellbacher v. Jobst, 271 Ill. 319, 111 N. E. 138. **Ind.**—Zimmerman v. Marchland, 23 Ind. 474. **Ia.**—Blair v. Hemphill, 111 Iowa 226, 82 N. W. 501. **Ky.**—Lyon v. Ross, 1 Bibb 466. **Me.**—Freeman v. Weld, 38 Me. 313. **Md.**—Hol-land v. Baltimore, 11 Md. 186, 69 Am. Dec. 195. **Mass.**—McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162. **Mich.**—Cleland v. Casgrain, 92 Mich. 139, 52 N. W. 460. **Minn.**—Scot-field v. Quinn, 54 Minn. 9, 55 N. W. 745. **Miss.**—Forniquet v. Forstall, 34 Miss. 87. **Mo.**—Shelton v. Horrell, 232 Mo. 358, 134 S. W. 988, 137 S. W. 264. **Mont.**—Hicks v. Rupp, 49 Mont. 40, 140 Pac. 97. **Neb.**—Smith v. Neufeld, 57 Neb. 660, 78 N. W. 278. **N. H.**—Downing v. Wherrin, 19 N. H. 9, 49 Am. Dec. 139. **N. J.**—Smith v. Smith's Admr., 30 N. J. Eq. 564. **N. Y.**—Stokes v. Houghton, 16 App. Div. 381, 45 N. Y. Supp. 21. **N. C.**—Byerly v. Humphrey, 95 N. C. 151. **Ohio.**—Low-miller v. Fouser, 52 Ohio St. 123, 39 N. E. 419. **Pa.**—Eckman v. Eckman, 55 Pa. 269. **B. I.**—Roberts v. White, 32 R. I. 522, 80 Atl. 123. **Tenn.**—New York Nat. B. & L. Assn. v. Cannon, 99 Tenn. 344, 41 S. W. 1054. **Vt.**—Eld-ridge v. Smith, 34 Vt. 484. **W. Va.**—Tenant's Heirs v. Fretts, 67 W. Va. 569, 68 S. E. 387, 140 Am. St. Rep. 979, 29 L. R. A. (N. S.) 625.

16. Ala.—Teague v. Martin, 87 Ala. 500, 6 So. 362, 13 Am. St. Rep. 63. **Ark.**—Bryan v. Winburn, 43 Ark. 28. **Conn.**—Miles v. Strong, 62 Conn. 95, 25 Atl. 459. **Fla.**—Hughes v. Han-nah, 39 Fla. 365, 22 So. 613. **Ill.**—Mor-ri-son v. Morrison, 140 Ill. 560, 30 N. E. 768. **Ia.**—Powers v. Bowman, 53 Iowa 359, 5 N. W. 566. **Ky.**—Louisville v. Gray, 1 Litt. 146. **Md.**—Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773. **Mass.**—Russell v. Barstow, 144 Mass. 130, 10 N. E. 746. **Mich.**—Byles v. Rowe, 64 Mich. 522, 31 N. W. 463. **Miss.**—Phelps v. Har-ris, 51 Miss. 789. **Mo.**—Sneathen v. Snea-then, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326. **Neb.**—Smith v. Dean, 15 Neb. 432, 19 N. W. 642. **N. H.**—Brooks v. Howland, 58 N. H. 98. **N. J.**—Essex County Nat. Bank v. Har-rison, 57 N. J. Eq. 91, 40 Atl. 209. **N. Y.**—Boeckes v. Lansing, 74 N. Y. 437. **N. C.**—Byerly v. Humphrey, 95 N. C. 151. **Ohio.**—Haff v. Fuller, 45 Ohio St. 495, 15 N. E. 479. **Ore.**—Johnson v. Tomlinson, 41 Ore. 198, 68 Pac. 406. **Pa.**—Leininger v. Summit B. R. Co., 180 Pa. 287, 36 Atl. 738. **Vt.**—Langdon v. Templeton, 61 Vt. 119, 17 Atl. 839. **Va.**—Virginia Coal & Iron Co. v. Kelly, 93 Va. 332, 24 S. E. 1020. **Wis.**—Grignon v. Black, 76 Wis. 674, 45 N. W. 122, 938.

17. U. S.—Preteca v. Maxwell Land Grant Co., 50 Fed. 674, 1 C. C. A. 607. **Ky.**—Boyd v. Clarke, 22 Ky. L. Rep. 1018, 59 S. W. 511. **Md.**—Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773. **Mo.**—Tucker v. Wadlow, 184 S. W. 69. **Wis.**—Franke v. H. P. Nelson Co., 157 Wis. 241, 147 N. W. 13.

See generally the title "Multiplicity of Suits."

18. Statutory proceeding to compel claimant to try title see *infra*, III.

19. Ariz.—Costello v. Muheim, 9 Ariz. 422, 84 Pac. 906. **Cal.**—Wolf v. Gall, 174 Cal. 140, 162 Pac. 115. **Colo.**—Empire Ranch & C. Co. v. Chapin, 22 Colo. App. 538, 126 Pac. 1107. **Conn.**—Middletown Sav. Bank v. Bacharach,

with.²⁰ While such statutes are highly remedial and beneficial and therefore should be construed liberally,²¹ their operation cannot be extended beyond their express terms.²²

The federal courts will enforce the statutory remedy to quiet title.²³

B. IN WHAT COUNTY BROUGHT.²⁴—Proceedings to quiet title to lands must, as a rule, be instituted in the county where the lands lie,²⁵ even though the defendant reside in another state.²⁶ If the action is

46 Conn. 513. **Ill.**—Hooper v. Bank of Two Rivers, 263 Ill. 400, 105 N. E. 311. **Ind.**—Green v. Glynn, 71 Ind. 336. **Ky.**—Armitage v. Wickliffe, 12 B. Mon. 488. **Mich.**—King v. Carpenter, 37 Mich. 363. **Minn.**—Mathews v. Lightner, 85 Minn. 333, 88 N. W. 992, 89 Am. St. Rep. 558. **Miss.**—Phelps v. Harris, 51 Miss. 789. **Mont.**—Montana Ore Purchasing Co. v. Boston & M. C. C. & S. Min. Co., 27 Mont. 288, 70 Pac. 1114. **Neb.**—Hanson v. Hanson, 78 Neb. 584, 111 N. W. 368. **N. H.**—Walker v. Walker, 63 N. H. 321, 56 Am. Rep. 514. **N. J.**—Albro v. Dayton, 50 N. J. Eq. 574, 25 Atl. 937. **N. M.**—Holthoff v. Freudenthal, 22 N. M. 377, 162 Pac. 173. **Ore.**—O'Hara v. Parker, 27 Ore. 156, 39 Pac. 1004. **P. R.**—Mereelis v. Wilson, 6 Porto Rico Fed. 42. **Wis.**—Kimball v. Baker Land & Title Co., 152 Wis. 441, 140 N. W. 47.

[a] The action is one at law if the issues tried are issues of law and one in equity if the issues tried are equitable in character. Coulson v. Le Plant (Mo.), 196 S. W. 1144.

20. **Mass.**—McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162. **Mich.**—Ormsby v. Barr, 22 Mich. 80. **Mo.**—Hudson v. Wright, 204 Mo. 412, 103 S. W. 8. **N. J.**—McGrath v. Norcross, 71 N. J. Eq. 763, 65 Atl. 998. **N. Y.**—Meyer v. Wilcox, 136 N. Y. Supp. 337. **Ore.**—Hodgkin v. Boswell, 57 Ore. 88, 110 Pac. 487. **Pa.**—Hutchinson v. Dennis, 217 Pa. 290, 66 Atl. 524; Ullom v. Hughes, 204 Pa. 305, 54 Atl. 23. **W. Va.**—Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682. **Wis.**—Kimball v. Baker Land & Title Co., 152 Wis. 441, 140 N. W. 47.

21. Christman v. Hilliard, 167 N. C. 4, 82 S. E. 949.

22. Gill v. Moore (Ala.), 76 So. 453.

23. Prentice v. Duluth Storage & F. Co., 58 Fed. 437, 7 C. C. A. 293; Baum v. Longwell, 200 Fed. 450.

See generally the title "United States Courts."

24. See generally the title "Venue."

25. **Cal.**—Miller v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836; Fritts v. Camp, 94 Cal. 393, 29 Pac. 867. **Miss.**—Nugent v. Powell, 63 Miss. 99. **Neb.**—Rakow v. Tate, 93 Neb. 198, 140 N. W. 162. **N. H.**—Baneroff v. Conant, 64 N. H. 151, 5 Atl. 836. **N. D.**—Wilson v. Kryger, 29 N. D. 28, 149 N. W. 721. **Okla.**—Brown v. Trent, 36 Okla. 239, 128 Pac. 895. **Tex.**—Russell v. Texas & P. Ry. Co., 68 Tex. 646, 5 S. W. 686.

26. **U. S.**—Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918. **Ark.**—McLaughlin v. McCrory, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56. **Cal.**—Emery v. Kipp, 154 Cal. 83, 97 Pac. 17, 19 L. R. A. (N. S.) 983. **D. C.**—Philadelphia Co. v. Dickinson, 33 App. Cas. 338. **Ill.**—Cloyd v. Trotter, 118 Ill. 391, 9 N. E. 507. **Ind.**—Essing v. Lower, 120 Ind. 239, 21 N. E. 1090. **Ia.**—Ruppin v. McLachlan, 122 Iowa 343, 98 N. W. 153. **Kan.**—Oldham v. Stephens, 45 Kan. 369, 25 Pac. 863. **La.**—Robbins v. Martin, 43 La. Ann. 488, 9 So. 108. **Mass.**—Short v. Caldwell, 155 Mass. 57, 28 N. E. 1124. **Minn.**—Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212. **Mo.**—Mitchner v. Holmes, 117 Mo. 185, 22 S. W. 1070. **Neb.**—Scarborough v. Myrick, 47 Neb. 794, 66 N. W. 867. **Nev.**—Robinson v. Kind, 23 Nev. 330, 47 Pac. 1. **N. H.**—Baneroff v. Conant, 64 N. H. 151, 5 Atl. 836. **Ore.**—Kieffer v. Victor Land Co., 53 Ore. 174, 90 Pac. 582, 98 Pac. 877. **Tex.**—American Bldg. & L. Assn. v. Mathews, 13 Tex. Civ. App. 425, 35 S. W. 690. **W. Va.**—Tennant's Heirs v. Fretts, 67 W. Va. 569, 68 S. E. 387, 140 Am. St. Rep. 979, 29 L. R. A. (N. S.) 625.

[a] An action to quiet title against a mortgagee on the ground of fraud does not come within the purview of such statute but is transitory. Slouse

improperly brought in another county, the proper remedy is a motion to dismiss where the matter is regarded as jurisdictional;²⁷ otherwise, however, a motion for change of venue should be made.²⁸

C. PARTIES. — 1. In General. — All persons interested in the property are proper parties and should be brought in,²⁹ or be permitted to intervene.³⁰ But persons asserting claims to the property, who, though proper, are not necessary parties, need not be joined;³¹ and those only are necessary parties without whom no effective decree can be rendered or whose interests will necessarily be affected by the decree sought.³²

2. Plaintiff. — a. Interest Necessary. — (I.) In General. — The plaintiff must recover solely upon the strength of his own title and not upon the weakness of that of his adversary,³³ and so he should have

v. Taylor, 115 Ky. 22, 72 S. W. 324.

27. *Fritts v. Camp*, 94 Cal. 393, 29 Pac. 867; *Pennie v. Visser*, 94 Cal. 323, 29 Pac. 711.

28. See 5 STANDARD PROC. 8, and the title "**Venue.**"

29. **U. S.**—*Prentice v. Duluth Storage & F. Co.*, 58 Fed. 437, 7 C. C. A. 293. **Ala.**—*Bromberg v. Yukers*, 108 Ala. 577, 19 So. 49. **Cal.**—*Birch v. Cooper*, 136 Cal. 636, 69 Pac. 420. **Colo.** *Wells v. Brown*, 23 Colo. App. 190, 128 Pac. 869. **D. C.**—*Johnson v. Thomas*, 23 App. Cas. 141. **Fla.**—*Florida Land Rock P. Co. v. Anderson*, 50 Fla. 501, 516, 39 So. 392. **Ill.**—*Dorman v. Brereton*, 140 Ill. 153, 29 N. E. 703. **Ind.**—*Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334. **Mich.**—*Jenness v. Smith*, 58 Mich. 280, 25 N. W. 191. **Miss.**—*Terry v. Unknown Heirs of Gibson*, 108 Miss. 749, 67 So. 209. **Mo.** *Spicer v. Spicer*, 249 Mo. 582, 155 S. W. 832, Ann. Cas. 1914D, 238. **Neb.** *Keens v. Gaslin*, 24 Neb. 310, 38 N. W. 797. **N. Y.**—*Lally v. New York Cent. & H. R. R. Co.*, 123 App. Div. 35, 107 N. Y. Supp. 868. **Okla.**—*Crow v. Hardridge*, 43 Okla. 463, 143 Pac. 183. **S. C.**—*Green v. Niver*, 43 S. C. 359, 21 S. E. 263. **Va.**—*Buchanan Co. v. Smith's Heirs*, 115 Va. 704, 80 S. E. 794. **Wis.**—*Leinenkugel v. Kehl*, 73 Wis. 238, 40 N. W. 683.

See 8 STANDARD PROC. 455, and the title "**Parties.**"

[a] One who does not assert a claim of title to the property is not a proper party. *People v. Firth*, 88 Misc. 217, 151 N. Y. Supp. 705.

30. See *infra*, II, C, 4.

31. **Colo.**—*Wells v. Brown*, 23 Colo. App. 190, 128 Pac. 869. **Ind.**—*Allen*

v. Indianapolis Oil Co., 27 Ind. App. 158, 60 N. E. 1003. **Ia.**—*Cunningham v. Cunningham*, 125 Iowa 681, 101 N. W. 470. **Mo.**—*Garrison v. Frazier*, 165 Mo. 40, 65 S. W. 229. **R. I.**—*Sprague v. Stevens*, 37 R. I. 1, 91 Atl. 43. **S. D.** *Newton v. McGee*, 31 S. D. 216, 140 N. W. 252. **W. Va.**—*Castle Brook Carbon Black Co. v. Ferrell*, 76 W. Va. 300, 85 S. E. 544. **Wis.**—*Mitchell v. Lyons*, 163 Wis. 399, 158 N. W. 70.

[a] It is no concern of defendant that others might have outstanding titles which would constitute a cloud upon plaintiff's title. *Mitchell v. Knott*, 43 Colo. 135, 95 Pac. 335.

32. *Peralta v. Simon*, 5 Cal. 313; *Dorman v. Brereton*, 140 Ill. 153, 29 N. E. 703. See generally the title "**Parties.**"

33. **U. S.**—*Ripinsky v. Hinchman*, 181 Fed. 786, 105 C. C. A. 462. **Ariz.** *Hardinge v. Empire Zinc Co.*, 17 Ariz. 75, 148 Pac. 306. **Ark.**—*Reynolds v. Snyder*, 121 Ark. 33, 180 S. W. 752, 183 S. W. 979; *Horne v. Jarrett*, 99 Ark. 154, 137 S. W. 820; *Wilson v. Rogers*, 97 Ark. 369, 134 S. W. 318. **Cal.**—*Di Nola v. Allison*, 143 Cal. 106, 76 Pac. 976, 101 Am. St. Rep. 84, 65 L. R. A. 419. **Colo.**—*Johnson v. Gibson*, 24 Colo. App. 392, 133 Pac. 1052. **Fla.**—*Houston v. McKinney*, 54 Fla. 600, 45 So. 480. **Ind.**—*Donaldson v. State*, 182 Ind. 615, 101 N. E. 485; *Wilson v. Johnson*, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930; *Brady v. Gregory*, 49 Ind. App. 355, 97 N. E. 452. **Ia.** *Dwight v. Des Moines*, 174 Iowa 178, 156 N. W. 336; *Morrow v. Mutz*, 159 Iowa 652, 140 N. W. 896; *Mohn v. Mohn*, 148 Iowa 288, 126 N. W. 1127. **Ky.**—*Slone v. Hall*, 145 Ky. 232, 140 S. W. 188. **Miss.**—*Ricks v. Baskett*,

a substantial and subsisting interest in the title to the property.³⁴ A party in possession having title,³⁵ or one in adverse possession,³⁶

68 Miss. 250, 8 So. 514. **Mo.**—Senter *v.* Wisconsin Lumber Co., 255 Mo. 590, 164 S. W. 501; Felker *v.* Breece, 226 Mo. 220, 126 S. W. 424. **Neb.**—Stull *v.* Goold, 96 Neb. 263, 147 N. W. 468; Blodgett *v.* McMurtry, 39 Neb. 210, 57 N. W. 985. **N. Y.**—Townsend *v.* Brookhaven, 97 App. Div. 316, 89 N. Y. Supp. 982. **N. D.**—O'Leary *v.* Schoenfeld, 30 N. D. 374, 152 N. W. 679; Brown *v.* Comonow, 17 N. D. 84, 114 N. W. 728. **Okla.**—Phillips *v.* Byrd, 43 Okla. 556, 143 Pac. 684; Wilson *v.* Bombeck, 38 Okla. 498, 134 Pac. 382. **Ore.**—Sears *v.* Murdock, 59 Ore. 211, 117 Pac. 305. **S. D.**—Flisrand *v.* Madson, 35 S. D. 457, 152 N. W. 796; Morse *v.* Pickler, 28 S. D. 612, 134 N. W. 809. **Tex.**—Chinn *v.* Taylor, 64 Tex. 385. **W. Va.**—Perry *v.* McDonald, 69 W. Va. 619, 72 S. E. 745.

34. **Ark.**—Norman *v.* Pugh, 75 Ark. 52, 86 S. W. 833. **Calo.**—Munson *v.* Marks, 52 Colo. 553, 124 Pac. 187. **Idaho.**—Coleman *v.* Jagggers, 12 Idaho 125, 85 Pac. 894, 118 Am. St. Rep. 207. **Ill.**—Casstevens *v.* Casstevens, 227 Ill. 547, 81 N. E. 709, 118 Am. St. Rep. 291; Hemstreet *v.* Burbick, 90 Ill. 444. **Ind.**—Stout *v.* Duncan, 87 Ind. 383. **Miss.**—Jones *v.* Rogers, 85 Miss. 802, 38 So. 742. **Mont.**—Van Vranken *v.* Granite County, 35 Mont. 427, 90 Pac. 164. **Neb.**—Tracy *v.* Grezard, 3 Neb. (Unof.) 890, 93 N. W. 214. **N. M.**—Holthoff *v.* Freudenthal, 22 N. M. 377, 162 Pac. 173. **N. Y.**—Mitchell *v.* Einstein, 42 Misc. 358, 86 N. Y. Supp. 759. **N. D.**—Adams *v.* Hartzell, 18 N. D. 221, 119 N. W. 635. **Ohio.**—Hamilton *v.* Stone, 13 Ohio Cir. Ct. (N. S.) 556. **Okla.**—Wilson *v.* Bombeck, 38 Okla. 498, 134 Pac. 382. **Ore.**—Maxcall *v.* Murray, 76 Ore. 637, 149 Pac. 517; Holmes *v.* Wolfard, 47 Ore. 93, 81 Pac. 819. **Tenn.**—Coal Creek Min. & Mfg. Co. *v.* Ross, 12 Lea 1. **Wash.**—Brodsky *v.* Nelson, 57 Wash. 671, 107 Pac. 840; Bloomingdale *v.* Weil, 29 Wash. 611, 70 Pac. 94.

[a] A mere right to purchase real property does not authorize the owner of such right to maintain an action to quiet title before taking steps to perfect it. San Jose Land & W. Co. *v.* San Jose Ranch Co., 189 U. S. 177, 23 Sup. Ct. 487, 47 L. ed. 765.

35. **Ala.**—Kelly *v.* Martin, 107 Ala.

479, 18 So. 132. **Ark.**—Branch *v.* Mitchell, 24 Ark. 431. **Calo.**—Baca *v.* Wootton, 8 Colo. App. 94, 44 Pac. 850. **Ia.**—Standish *v.* Dow, 21 Iowa 363. **Mass.**—Russell *v.* Deshon, 124 Mass. 342. **Mich.**—Dale *v.* Turner, 34 Mich. 405. **Wis.**—Grignon *v.* Black, 76 Wis. 674, 45 N. W. 122, 938.

36. **Cal.**—Morris *v.* Clarkin, 156 Cal. 16, 103 Pac. 180, against trespasser. **Calo.**—Mitchell *v.* Trowbridge, 47 Colo. 6, 105 Pac. 878. **Kan.**—Wood *v.* Missouri, K. & T. Ry. Co., 11 Kan. 323. **N. J.**—Powell *v.* Mayo, 24 N. J. Eq. 178. **N. Y.**—Schroeder *v.* Gurney, 10 Hun 413. **Wash.**—Bird *v.* Winyer, 24 Wash. 269, 64 Pac. 178.

[a] Suit to remove a cloud (1) may be maintained (**Ala.**—Moore *v.* Empire Land Co., 181 Ala. 344, 61 So. 940; Clemmons *v.* Cox, 116 Ala. 567, 23 So. 79. **Ariz.**—Pacheco *v.* Wilson, 2 Ariz. 411, 18 Pac. 597. **Ark.**—Van Etten *v.* Dougherty, 83 Ark. 534, 103 S. W. 737. **Ill.**—Bellefontaine Imp. Co. *v.* Neidringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Harms *v.* Kransz, 167 Ill. 421, 47 N. E. 746. **Ind.**—Howard *v.* Twibell, 179 Ind. 67, 100 N. E. 372, Ann. Cas. 1915C, 93. **Ia.**—Severson *v.* Gremm, 124 Iowa 729, 100 N. W. 862. **Kan.**—Knickerbocker *v.* Bangs, 93 Kan. 733, 145 Pac. 820. **Ky.**—Le Moyné *v.* Hays, 145 Ky. 415, 140 S. W. 552; Vallandingham *v.* Taylor, 23 Ky. L. Rep. 1059, 64 S. W. 725. **Mich.**—Olsen *v.* Williams, 172 Mich. 316, 137 N. W. 687. **Minn.**—Dean *v.* Goddard, 55 Minn. 290, 56 N. W. 1060. **Mo.**—McRee *v.* Gardner, 131 Mo. 599, 33 S. W. 166. **Neb.**—South Omaha *v.* Meehan, 71 Neb. 230, 98 N. W. 691. **N. Y.**—Weeks *v.* Dominy, 161 App. Div. 414, 146 N. Y. Supp. 624; Hawkes *v.* Warren, 140 App. Div. 712, 125 N. Y. Supp. 820. **N. C.**—Marshall *v.* Corbet, 137 N. C. 555, 50 S. E. 210. **Ohio.**—Buchanan *v.* Roy's Lessee, 2 Ohio St. 251. **Tex.**—Moody *v.* Holcomb, 26 Tex. 714) even (2) as against holder of record title. **U. S.**—Sharon *v.* Tucker, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. ed. 532. **Ala.**—Clemmons *v.* Cox, 114 Ala. 350, 21 So. 426. **Cal.**—Arrington *v.* Liscom, 34 Cal. 365, 94 Am. Dec. 722. **Tex.**—Moody *v.* Holcomb, 26 Tex. 714.

and under some statutes one having possession alone,³⁷ provided that such possession is actual,³⁸ may maintain the suit. But possession alone without title ordinarily does not authorize the maintenance of an action to quiet title.³⁹

(II.) Legal or Equitable Title. — A bill to remove a cloud can be maintained by the holder of an equitable title;⁴⁰ but in the absence of statute, legal title is necessary to support a suit to quiet title.⁴¹ Statutes⁴² have quite generally extended the right to quiet title to one

[b] Suit to quiet title may be maintained. *Pacheco v. Wilson*, 2 Ariz. 411, 18 Pac. 597; *Earle v. Bryant*, 12 Cal. App. 553, 107 Pac. 1018.

37. Colo.—*Denny v. Ashley*, 12 Colo. 165, 20 Pac. 331. Mont.—*Wolverton v. Nichols*, 5 Mont. 89, 2 Pac. 308. N. H.—*Walker v. Walker*, 63 N. H. 321, 56 Am. Rep. 514. N. J.—*Albro v. Dayton*, 50 N. J. Eq. 574, 25 Atl. 937. N. Y.—*Parmely v. Showdy*, 86 Misc. 634, 148 N. Y. Supp. 1086. Okla.—*Christy v. Springs*, 11 Okla. 710, 69 Pac. 864. Ore.—*O'Hara v. Parker*, 27 Ore. 156, 39 Pac. 1004. S. D.—*Newton v. McGee*, 31 S. D. 216, 140 N. W. 252.

38. Alaska.—*Delaney's Est. v. Kieran*, 3 Alaska 191. Colo.—*Lambert v. Murray*, 52 Colo. 156, 120 Pac. 415. Ill.—*Adams v. Black*, 183 Ill. 377, 55 N. E. 887. Kan.—*Douglass v. Nuzum*, 16 Kan. 515. Ky.—*Dupoyster v. Turk*, 22 Ky. L. Rep. 320, 110 S. W. 260. Mich.—*Watson v. Lion Brewing Co.*, 61 Mich. 595, 28 N. W. 726. Minn.—*Greene v. Dwyer*, 33 Minn. 403, 23 N. W. 546. Mo.—*Candlin v. Holladay-Klotz L. & L. Co.*, 151 Mo. 159, 52 S. W. 247. N. J.—*Sheppard v. Nixon*, 43 N. J. Eq. 627, 13 Atl. 617. N. Y.—*Boyleston v. Wheeler*, 61 N. Y. 521; *Churchill v. Onderdonk*, 59 N. Y. 134; *Hamilton v. Hamilton*, 78 Misc. 557. 139 N. Y. Supp. 1095. W. Va.—*Mackey v. Maxin*, 63 W. Va. 14, 59 S. E. 742; *Carberry v. West Virginia & P. R. Co.*, 44 W. Va. 290, 28 S. E. 694. Wis.—*Stridde v. Saroni*, 21 Wis. 173.

[a] That plaintiff has the right to immediate possession is sufficient to bring plaintiff within such statute. *Lytle v. Hollins*, 25 Cal. 437.

39. Cal.—*City of San Diego v. Al-Han*, 46 Cal. 102. Kan.—*Northrop v. Andrews*, 29 Kan. 567, 18 Pac. 510; *Wood v. Missouri, K. & T. Ry. Co.*, 11 Kan. 203. N. D.—*Jackson v. La Moore*, 1 N. D. 238, 46 N. W. 449.

[a] A settler on government lands

cannot maintain an action to quiet title until the title to the lands has passed to him from the United States. *Moore v. Halliday*, 43 Ore. 243, 72 Pac. 801, 99 Am. St. Rep. 724.

Adverse possession under color of title, see *supra*, this subsection.

40. Cal.—*Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806. Colo.—*Munson v. Marks*, 52 Colo. 553, 124 Pac. 187. Mo.—*Mason v. Black*, 87 Mo. 329. N. Y.—*Lounsbury v. Purdy*, 18 N. Y. 515. Tex.—*Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613.

41. Cal.—*Wilson v. Madison*, 55 Cal. 5. Colo.—*Morris v. St. Louis Nat. Bank*, 17 Colo. 231, 89 Pac. 802. Kan.—*Neve v. Allen*, 55 Kan. 638, 41 Pac. 966. Neb.—*Eays v. Nason*, 54 Neb. 143, 74 N. W. 408.

42. Ala.—*Randolph v. Vails*, 180 Ala. 82, 60 So. 159. Ark.—*Bowling v. Stough*, 101 Ark. 398, 142 S. W. 512. Colo.—*Munson v. Marks*, 52 Colo. 553, 124 Pac. 187. Fla.—*Sloan v. Sloan*, 25 Fla. 53, 5 So. 603. Idaho.—*Coleman v. Jaggars*, 12 Idaho 125, 85 Pac. 894, 118 Am. St. Rep. 207. Ill.—*Coel v. Glos*, 232 Ill. 142, 83 N. E. 529, 15 L. R. A. (N. S.) 413. Ind.—*Stanley v. Holliday*, 130 Ind. 464, 30 N. E. 634. See *Donaldson v. State*, 182 Ind. 615, 101 N. E. 485, real party in interest. Ia.—*O'Neill v. Wilcox*, 115 Iowa 15, 87 N. W. 742. Kan.—*Neve v. Allen*, 55 Kan. 638, 41 Pac. 966. Mich.—*Vier v. Detroit*, 111 Mich. 646, 70 N. W. 139. Miss.—*Jones v. Rogers*, 85 Miss. 802, 38 So. 742. Mo.—*Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656. Mont.—*Van Vranken v. Granite County*, 35 Mont. 427, 90 Pac. 164. Neb.—*Eays v. Nason*, 54 Neb. 143, 74 N. W. 408. Ore.—*Mason v. Murray*, 70 Ore. 637, 149 Pac. 517. S. D.—*Mitchell v. Black Eagle Min. Co.*, 26 S. D. 200, 125 N. W. 159, Ann. Cas. 1915B, 85. Vt.—*Blondin v. Brooks*, 83 Vt. 172, 76 Atl. 184. Va.—*Buchanan Co. v. Smith*, 115

who has the equitable title, and in some jurisdictions,⁴³ but not in others,⁴⁴ the holder of an equitable title may bring an action against the holder of the legal title.

(III.) Possession.⁴⁵ — (A.) NECESSITY FOR. — Statutes may permit suits to quiet title irrespective of any possession in the plaintiff.⁴⁶ Where no such statutes exist, however, title will not ordinarily be quieted at the instance of one not in possession, since he has an adequate remedy at law by ejectment,⁴⁷ and the fact that he is the holder of the legal

Va. 704, 80 S. E. 794. **Wash.**—*Bloomington v. Weil*, 29 Wash. 611, 70 Pac. 94. **W. Va.**—*Harman v. Lambert*, 76 W. Va. 370, 85 S. E. 660. **Wis.**—*Siedschlag v. Griffin*, 132 Wis. 106, 112 N. W. 18.

[a] A beneficiary may maintain an action to quiet title although the title stands in the name of the trustee. *Munson v. Marks*, 52 Colo. 553, 124 Pac. 187; *Wells v. Brown*, 23 Colo. App. 190, 128 Pac. 869.

43. **Ala.**—*Freeman v. Brown*, 96 Ala. 301, 11 So. 249. **Ark.**—*Bowling v. Stough*, 101 Ark. 398, 142 S. W. 512. **Colo.**—*Consolidated Plaster Co. v. Wild*, 42 Colo. 202, 94 Pac. 285. **Idaho.**—*Coleman v. Jagers*, 12 Idaho 125, 85 Pac. 894, 118 Am. St. Rep. 207. **Ill.**—*Casstevens v. Casstevens*, 227 Ill. 547, 81 N. E. 709, 118 Am. St. Rep. 291. **Mo.**—*Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656. **Ore.**—*Holmes v. Wolfard*, 47 Ore. 93, 81 Pac. 819. **S. D.**—*Mitchell v. Black Eagle Min. Co.*, 26 S. D. 260, 128 N. W. 159, Ann. Cas. 1913B, 85.

44. *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 159 Pac. 158; *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806; *Spotswood v. Spotswood*, 4 Cal. App. 711, 89 Pac. 362.

[a] One who has a mortgage lien cannot maintain an action to determine adverse claims against the holder of the legal title. *Fields v. Cobbey*, 22 Utah 415, 62 Pac. 1020.

45. Sufficiency of possession without title, see *supra*, II, C, 1.

46. **U. S.**—*More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. 1067, 32 L. ed. 51; *Baum v. Longwell*, 200 Fed. 450. **Ariz.**—*Costello v. Muheim*, 9 Ariz. 422, 84 Pac. 906. **Cal.**—*Hyatt v. Colkins*, 174 Cal. 580, 163 Pac. 1007; *Phillips v. Menotti*, 167 Cal. 328, 139 Pac. 796; *Larsen v. All Persons*, 165 Cal. 407, 132 Pac. 751. **Fla.**—*Johnson v. Baker*, 74 So. 210. **Ind.**—*Gibbs v. Potter*, 166 Ind. 471, 77 N. E. 942; *Huntington v.*

Townsend, 29 Ind. App. 269, 63 N. E. 36. **Ia.**—*Lees v. Wetmore*, 58 Iowa 170, 12 N. W. 238. **La.**—*Baltimore v. Lucher*, 135 La. 873, 66 So. 253. **Miss.**—*Wofford v. Bailey*, 57 Miss. 239. **Mo.**—*Mann v. Doerr*, 222 Mo. 1, 121 S. W. 86. **Neb.**—*Hanson v. Hanson*, 78 Neb. 584, 111 N. W. 368; *Ross v. McManigal*, 61 Neb. 90, 84 N. W. 610. **N. Y.**—*People v. Firth*, 88 Misc. 217, 151 N. Y. Supp. 705. **N. C.**—*Christman v. Hilliard*, 167 N. C. 4, 82 S. E. 949; *Speas v. Woodhouse*, 162 N. C. 66, 77 S. E. 1000; *Swindell v. Smaw*, 156 N. C. 1, 72 S. E. 1. **N. D.**—*Burke v. Scharf*, 19 N. D. 127, 124 N. W. 79. **Okla.**—*Koch v. Deere*, 50 Okla. 783, 150 Pac. 1102. **Ore.**—*Kingsley v. Kressly*, 60 Ore. 167, 111 Pac. 385, 118 Pac. 678, Ann. Cas. 1913E, 746. **Tenn.**—*Stearns Coal & Lumb. Co. v. Patton*, 134 Tenn. 556, 184 S. W. 855. **Utah.**—*Gibson v. McGurrian*, 37 Utah 158, 106 Pac. 669. **Wash.**—*White v. McSorley*, 47 Wash. 18, 91 Pac. 243; *Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748.

47. **U. S.**—*Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. ed. 1010; *Buchanan Co. v. Adkins*, 175 Fed. 692, 99 C. C. A. 246; *Baum v. Longwell*, 200 Fed. 450. **Ala.**—*Randolph v. Vails*, 180 Ala. 82, 60 So. 159; *Barry v. Stephens*, 176 Ala. 93, 57 So. 467; *Hardeman v. Donaghey*, 170 Ala. 362, 54 So. 172. **Alaska.**—*Pioneer Min. Co. v. Pacific Coal Co.*, 4 Alaska 388; *Elbing v. Hastings*, 3 Alaska 125. **Ark.**—*St. Louis Refrigerator & W. G. Co. v. Thornton*, 74 Ark. 383, 86 S. W. 852. **Calo.**—*Buckland v. Fielder*, 48 Colo. 153, 109 Pac. 262. **Idaho.**—*Branca v. Ferrin*, 10 Idaho 239, 77 Pac. 636. **Ill.**—*Stephens v. Johnson*, 255 Ill. 610, 99 N. E. 642; *Glos v. Kenealy*, 220 Ill. 540, 77 N. E. 146. **Kan.**—*Pierce v. Thompson*, 26 Kan. 714. **Ky.**—*Collins v. Adams*, 167 Ky. 228, 180 S. W. 374; *Nugent v. Mallory*, 145 Ky. 824, 141 S. W. 850. **Me.**—*Annis v. Butterfield*, 99 Me. 181, 58 Atl. 898. **Md.**—*Carswell*

title does not alter the rule.⁴⁸ But though the plaintiff is out of possession he may maintain suit to quiet title where under the circumstances he has no adequate remedy at law,⁴⁹ as for example where his title is an equitable one,⁵⁰ or where he is a remainderman or reversion-

- v. Swindell*, 102 Md. 636, 62 Atl. 956. **Mass.**—*Preston v. Newton*, 213 Mass. 483, 100 N. E. 641. **Mich.**—*Longcor v. Turner*, 191 Mich. 240, 157 N. W. 564; *Donnelly v. Lyons*, 173 Mich. 515, 139 N. W. 246; *Dolph v. Norton*, 158 Mich. 417, 123 N. W. 13. **Minn.**—*Bausman v. Kelley*, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661. **Mont.**—*Sklower v. Abbott*, 19 Mont. 228, 47 Pac. 901. **N. J.**—*Meeker v. Warren*, 66 N. J. Eq. 146, 57 Atl. 421. **N. Y.**—*Moore v. Townshend*, 102 N. Y. 387, 7 N. E. 401; *Rumble v. Smith*, 66 Misc. 298, 121 N. Y. Supp. 501. **Ohio.**—*Raymond v. Toledo, St. L. & K. C. R. Co.*, 57 Ohio St. 271, 48 N. E. 1093. **Okla.**—*Christy v. Springs*, 11 Okla. 710, 69 Pac. 864. **Pa.**—*Goss v. Spencer*, 245 Pa. 12, 91 Atl. 215. **P. R.**—*Mercelis v. Wilson*, 6 Porto Rico Fed. 42. **S. C.**—*Pollitzer v. Beinkempfen*, 76 S. C. 517, 57 S. E. 475. **Tex.**—*Herrington v. Williams*, 31 Tex. 448. **Va.**—*Meade v. King*, 111 Va. 283, 68 S. E. 997; *Glenn v. West*, 103 Va. 521, 49 S. E. 671. **W. Va.**—*Grass v. Beard*, 73 W. Va. 309, 80 S. E. 835; *Whitehouse v. Jones*, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49. **Wis.**—*Thomas v. McKay*, 143 Wis. 524, 128 N. W. 59.
- [a] **Possession for at least a year** is essential under the New York statute. *Parmely v. Showdy*, 86 Misc. 634, 148 N. Y. Supp. 1086.
- [b] **Possession of defendant forcibly acquired from plaintiff.** *Stephens v. Johnson*, 255 Ill. 610, 99 N. E. 642.
- [c] **Possession procured by fraud** will not avail as ground for the maintenance of an action to remove a cloud. *Holden v. Holden*, 24 Ill. App. 106.
- [d] **Waiver of the requirement that plaintiff be in possession**, occurs where the defendant sets up his own title and asks affirmative relief. **U. S.**—*Campbell v. Farmers' Mfg. Co.*, 203 Fed. 571. **Ark.**—*Goodrum v. Ayers*, 56 Ark. 93, 19 S. W. 97. **Ky.**—*Vance v. Gray*, 142 Ky. 267, 134 S. W. 181. **Neb.**—*Baumann v. Franse*, 37 Neb. 807, 56 N. W. 395. **Ore.**—*Bradtt v. Sharkey*, 58 Ore. 153, 113 Pac. 653. **Wis.**—*Siedschlag v. Griffin*, 132 Wis. 106, 112 N. W. 18.
48. **U. S.**—*United States v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. ed. 110. **Ala.**—*Daniel v. Stewart*, 55 Ala. 278. **Ark.**—*Miller v. Neiman*, 27 Ark. 233. **Conn.**—*Munson v. Munson*, 28 Conn. 582, 73 Am. Dec. 693. **Ill.**—*Delaney v. O'Donnell*, 234 Ill. 109, 84 N. E. 668. **Ky.**—*Collins v. Adams*, 167 Ky. 228, 180 S. W. 374 (under statute); *Floyd v. Louisville R. Co.*, 25 Ky. L. Rep. 2147, 80 S. W. 204, under statute. **Md.**—*Rosenthal v. Donnelly*, 126 Md. 147, 94 Atl. 1030. **Mass.**—*Preston v. Newton*, 213 Mass. 43, 100 N. E. 641. **Mich.**—*Deer Lake Co. v. Michigan Land & Iron Co.*, 83 Mich. 11, 46 N. W. 1024. **N. Y.**—*Vanderveer Crossings v. Rapalje*, 133 App. Div. 203, 117 N. Y. Supp. 485, under statute. **Va.**—*Buchanan Co. v. Smith's Heirs*, 115 Va. 704, 80 S. E. 794; *Meade v. King*, 111 Va. 283, 68 S. E. 997; *Glenn v. West*, 103 Va. 521, 49 S. E. 671. **W. Va.**—*Big Huff Coal Co. v. Thomas*, 76 W. Va. 161, 85 S. E. 171. **Wis.**—*Jones v. Collins*, 16 Wis. 594.
49. See *infra*, this note.
- [a] **Suit To Remove Cloud.**—**Kan.**—*Grove v. Jennings*, 46 Kan. 366, 26 Pac. 738. **Ky.**—*Tucker v. Witherbee*, 130 Ky. 269, 113 S. W. 123. **Mo.**—*Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326. **N. Y.**—*Letson v. Letson*, 81 App. Div. 556, 80 N. Y. Supp. 1032. **W. Va.**—*Swick v. Rease*, 62 W. Va. 557, 59 S. E. 510. **Wis.**—*Davenport v. Stephens*, 95 Wis. 456, 70 N. W. 661.
50. **Ala.**—*Randolph v. Vails*, 180 Ala. 82, 60 S. W. 159; *Barry v. Stephens*, 176 Ala. 93, 57 So. 467. **Ark.**—*St. Louis Refrigerator & W. G. Co. v. Thornton*, 74 Ark. 383, 86 S. W. 852. **Colo.**—*Munson v. Marks*, 52 Colo. 553, 124 Pac. 187; *Consolidated Plaster Co. v. Wild*, 42 Colo. 202, 94 Pac. 285. **Fla.**—*Sloan v. Sloan*, 25 Fla. 53, 5 So. 603. **Ill.**—*Mitchell v. Shortt*, 113 Ill. 251, 1 N. E. 909. **Mich.**—*Nisbett v. Milner*, 159 Mich. 337, 124 N. W. 22. **Mo.**—*Graves v. Ewart*, 99 Mo. 13, 11 S. W. 971. **Vt.**—*Blondin v. Brooks*, 83 Vt. 472, 76 Atl. 184. **Va.**—*Buchanan Co.*

er.⁵¹ or where the land is vacant, unoccupied and unimproved and neither party is in possession,⁵² or where repeated ejectment suits prove unavailing.⁵³ Moreover, when equity has acquired jurisdiction on some other ground it will, as incidental relief, quiet plaintiff's title or remove a cloud therefor though he be out of possession.⁵⁴

(B.) CHARACTER OF. — Where possession is required to support a suit to quiet title mere constructive possession is generally not sufficient,⁵⁵

v. Smith's Heirs, 115 Va. 704, 80 S. E. 794; *Jefferson v. Gregory*, 113 Va. 61, 73 S. E. 452. Wash.—*Brodsky v. Nelson*, 57 Wash. 671, 107 Pac. 840. Wis. *Kimball v. Baker Land & Title Co.*, 152 Wis. 441, 140 N. W. 47; *Siedschlag v. Griffin*, 132 Wis. 106, 112 N. W. 18.

51. Ala.—*Lewis v. Alston*, 184 Ala. 339, 63 So. 1008; *Fies v. Rosser*, 162 Ala. 504, 50 So. 287, 136 Am. St. Rep. 61. Ind.—*Schori v. Stephens*, 62 Ind. 441, under statute. Ky.—*Alley v. Alley*, 28 Ky. L. Rep. 1073, 91 S. W. 291. Neb.—*First Nat. Bank of Perry v. Pilger*, 78 Neb. 168, 110 N. W. 704, 126 Am. St. Rep. 592. R. I.—*Keyes v. Ketrick*, 25 R. I. 468, 56 Atl. 770.

52. U. S.—*Prentice v. Duluth Storage & F. Co.*, 58 Fed. 437, 7 C. C. A. 293; *Ennis-Brown Co. v. Central Pac. Ry. Co.*, 228 Fed. 46. Ark.—*Moore v. Morris*, 118 Ark. 516, 177 S. W. 6. Colo.—*Eagan v. Mahoney*, 24 Colo. App. 285, 134 Pac. 156. Fla.—*Morgan v. Dunwoody*, 66 Fla. 522, 63 So. 905. Ill.—*Stephens v. Johnson*, 255 Ill. 610, 99 N. E. 642; *Le Sourd v. Edwards*, 236 Ill. 169, 86 N. E. 212, 127 Am. St. Rep. 287. Kan.—*Hoffman v. Woods*, 40 Kan. 382, 19 Pac. 805. Md.—*Baumgardner v. Fowler*, 82 Md. 631, 34 Atl. 537. Mich.—*Messenger v. Peter*, 129 Mich. 93, 88 N. W. 209. N. Y.—*Whitman v. New York*, 85 App. Div. 468, 83 N. Y. Supp. 465. Okla.—*Christy v. Springs*, 11 Okla. 710, 69 Pac. 864. Pa. *Heppenstall v. Leng*, 217 Pa. 491, 66 Atl. 991, 12 L. R. A. (N. S.) 652.

53. U. S.—*Stark v. Starrs*, 6 Wall. 402, 18 L. ed. 925. Ala.—*Ashurst v. McKenzie*, 92 Ala. 484, 9 So. 262. D. C. *Marks v. Main*, 4 Mackey 559. Ill. *Woodward v. Seely*, 11 Ill. 157, 50 Am. Dec. 445. Ky.—*Scott v. Means*, 80 Ky. 460. Miss.—*Huntington v. Allen*, 44 Miss. 654. Mo.—*Patterson v. McCamant*, 28 Mo. 210. Nev.—*Low v. Staples*, 2 Nev. 209. N. J.—*American Dock & Imp. Co. v. Public School*, 37 N. J. Eq. 266. N. Y.—*Huntington v.*

Nicoll, 3 Johns. 566. Ohio.—*Marsh v. Reed*, 10 Ohio 347. W. Va.—*Whitehouse v. Jones*, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49.

[a] No precise number of trials is necessary. *Marsh v. Reed*, 10 Ohio 347.

54. U. S.—*Woods v. Woods*, 184 Fed. 159. Ala.—*Barry v. Stephens*, 176 Ala. 93, 57 So. 467; *Fies v. Rosser*, 162 Ala. 504, 50 So. 287, 136 Am. St. Rep. 57; *Peoples v. Burns*, 77 Ala. 290; *Plant v. Barclay*, 56 Ala. 561. Ark.—*Sale v. McLean*, 29 Ark. 612. Fla.—*Conant v. Buesing*, 23 Fla. 559, 2 So. 882. Ga. *Smith v. Burrus*, 139 Ga. 10, 76 S. E. 362. Ill.—*Ward v. Clendenning*, 245 Ill. 206, 91 N. E. 1028; *Booth v. Wiley*, 102 Ill. 84. Ky.—*Engle v. Bond Foley Lumb. Co.*, 173 Ky. 35, 189 S. W. 1146; *Cumberland Co. v. Kelly*, 156 Ky. 397, 160 S. W. 1077; *Newsome v. Hamilton*, 142 Ky. 5, 133 S. W. 952. Md.—*Polk v. Rose*, 25 Md. 153, 89 Am. Dec. 773. Mich.—*Byles v. Rowe*, 64 Mich. 522, 31 N. W. 463. Minn.—*Hamilton v. Batlin*, 8 Minn. 403, 83 Am. Dec. 737. Mo.—*Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326. Neb.—*Smith v. Dean*, 15 Neb. 432, 19 N. W. 642. N. J.—*Besson v. Gribble*, 39 N. J. Eq. 111. N. Y. *Remington P. Co. v. O'Dougherty*, 81 N. Y. 474; *Letson v. Letson*, 81 App. Div. 556, 80 N. Y. Supp. 1032. Ore. *Hodgkin v. Boswell*, 57 Ore. 88, 110 Pac. 487; *O'Hara v. Parker*, 27 Ore. 156, 39 Pac. 1004. Va.—*Jefferson v. Gregory*, 113 Va. 61, 73 S. E. 452; *Virginia Coal & Iron Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020. S. C.—*Du Bose v. Kell*, 76 S. C. 313, 56 S. E. 968. Wis.—*Grignon v. Black*, 76 Wis. 674, 45 N. W. 122, 938.

55. U. S.—*Elliot v. Atlantic City*, 149 Fed. 849. Ark.—*Goodrum v. Ayers*, 56 Ark. 93, 19 S. W. 97. Colo.—*Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41. Ill.—*Adams v. Black*, 183 Ill. 377, 55 N. E. 887. Kan. *Hoffman v. Woods*, 40 Kan. 382, 19

unless made so by statute.⁵⁶ The plaintiff need not, however, actually live upon the lands, since it is sufficient that he have possession by his tenant,⁵⁷ agent,⁵⁸ or vendee to whom no conveyance has been made.⁵⁹

b. *Application of Rules to Particular Persons.*⁶⁰—The foregoing rules in respect to the interest necessary to sustain a proceeding to quiet title or remove a cloud therefrom have been construed to permit such suit by remaindermen,⁶¹ reversioners,⁶² one having an inchoate right of dower,⁶³ judgment creditors,⁶⁴ a vendor or grantor,⁶⁵ a vendee

Pac. 805. **Ky.**—Dupoyster v. Turk, 33 Ky. L. Rep. 320, 110 S. W. 260. **Md.** Carter v. Woolfork, 71 Md. 283, 17 Atl. 1041. **Mass.**—Russell v. Barstow, 144 Mass. 130, 10 N. E. 746. **Mich.**—Watson v. Lion Brew. Co., 61 Mich. 595, 23 N. W. 726. **Minn.**—Conklin v. Hinds, 16 Minn. 457. **Mo.**—Cantlin v. Holladay-Klotz L. & L. Co., 151 Mo. 159, 52 S. W. 247. **Nev.**—Scorpion Silver Min. Co. v. Marsano, 10 Nev. 370. **N. J.**—Sheppard v. Nixon, 43 N. J. Eq. 627, 13 Atl. 617. **N. Y.**—Boylston v. Wheeler, 61 N. Y. 521. **N. C.**—Byerly v. Humphrey, 95 N. C. 151. **Ohio.** Clark v. Hubbard, 8 Ohio 382. **Ore.** Lovelady v. Burgess, 32 Ore. 418, 52 Pac. 25. **W. Va.**—Big Huff Co. v. Thomas, 76 W. Va. 161, 85 S. E. 171. **Wis.**—Stridde v. Saroni, 21 Wis. 173.

56. Moore v. Empire Land Co., 181 Ala. 344, 61 So. 940.

57. **U. S.**—Miller v. Ahrens, 150 Fed. 644; Davis' Heirs v. Hineckley, 141 Fed. 708. **Ala.**—Campbell v. Davis, 85 Ala. 56, 4 So. 140. **Colo.**—American Bond & Inv. Co. v. Hopkins, 46 Colo. 460, 104 Pac. 1040. **Kan.**—Smith v. Cooper, 38 Kan. 446, 16 Pac. 958. **Md.** Stewart v. May, 111 Md. 162, 73 Atl. 400. **Mich.**—Butler v. Grand Rapids & I. R. Co., 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84; Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57. **N. Y.** Clason v. Stewart, 23 Misc. 177, 51 N. Y. Supp. 1100. **Vt.**—Langdon v. Templeton, 61 Vt. 119, 17 Atl. 839. **Wis.** Krebs v. Dodge, 9 Wis. 1.

[a] *By Statutory Provision.*—**Cal.** Warren Co. v. All Persons, 153 Cal. 771, 96 Pac. 807. **Colo.**—Walker v. Porne, 2 Colo. App. 149, 29 Pac. 1017. **Ohio.** State v. Griffin, 61 Ohio St. 261, 55 N. E. 612. **Ore.**—Slater v. Reed, 37 Ore. 274, 69 Pac. 709. **Wash.** Moran & Co. v. Palmer, 36 Wash. 681, 79 Pac. 476.

[b] *A bona fide relationship of landlord and tenant required.* **U. S.** Van Deventer v. Lott, 172 Fed. 574.

Ala.—Collier v. Carlisle, 133 Ala. 478, 31 So. 970. **Ill.**—Hardin v. Jones, 86 Ill. 313. **Mich.**—Stetson v. Cook, 39 Mich. 750. **Va.**—Meade v. King, 111 Va. 283, 68 S. E. 997.

58. **Cal.**—Warren Co. v. All Persons, 153 Cal. 771, 96 Pac. 807. **Fla.**—Sloan v. Sloan, 25 Fla. 53, 5 So. 603. **Ill.** Gage v. Williams, 119 Ill. 563, 9 N. E. 193. **Mo.**—Root v. Mead, 58 Mo. App. 477.

59. Thomas v. White, 2 Ohio St. 540.

60. Life tenant, see 18 STANDARD PROC. 624.

61. Aiken v. Suttle, 4 Lea (Tenn.) 103. See 18 STANDARD PROC. 630.

[a] *Against Life Tenant.*—Elam v. Alexander, 174 Ky. 39, 191 S. W. 666.

62. Lewis v. Alston, 184 Ala. 339, 63 So. 1008; Haley v. Goodheart, 58 N. J. Eq. 368, 44 Atl. 193. See 18 STANDARD PROC. 630.

63. Huntzieker v. Crocker, 135 Wis. 38, 115 N. W. 340; Madigan v. Walsh, 22 Wis. 501.

64. Ledyard v. Chapin, 6 Ind. 320.

[a] *Where the debtor has no other property out of which the judgment can be satisfied the judgment creditor has been permitted to maintain a suit to remove a cloud from his realty.* Ledyard v. Chapin, 6 Ind. 320.

65. See *infra*, this note.

[a] *By Vendor Who Has Warranted the Title.*—Van Brundt v. Hartford, 21 Conn. 500. **Ill.**—Coel v. Glos, 232 Ill. 142, 82 N. E. 529, 15 L. R. A. (N. S.) 413; Langlois v. Stewart, 156 Ill. 609, 41 N. E. 177. **Kan.**—Farmers' & M. Bank v. Tipton, 98 Kan. 34, 159 Pac. 1016; Suttill v. Smith, 58 Kan. 559, 50 Pac. 455. **Tenn.**—Jones v. Nixon, 102 Tenn. 95, 50 S. W. 740. **W. Va.**—Dudley v. Browning, 79 W. Va. 331, 90 S. E. 878. **Wis.**—Jackson Mill Co. v. Scott, 120 Wis. 267, 110 N. W. 184.

[b] *After re-entry upon breach of condition by grantee.* Papet v. Hamilton, 133 Cal. 631, 66 Pac. 101; Co.

or grantee,⁶⁶ a mortgagor⁶⁷ or mortgagee,⁶⁸ or an executor or administrator.⁶⁹

v. Sherfy, 138 Ind. 354, 37 N. E. 787.

[c] A party who has contracted to sell the property to another but who is still the owner of the legal title has a right to maintain an action to quiet title. *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429.

[d] Where grantor stipulates to quiet title, and payment of a portion of the consideration is conditioned upon his so doing. *Sutliff v. Smith*, 58 Kan. 559, 50 Pac. 455; *Styer v. Sprague*, 63 Minn. 414, 65 N. W. 659. But see *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643.

[e] The conveyance of property after the commencement of the action is not fatal to the maintenance of an action to quiet title where the defense of want of interest is not raised in the answer. *Begole v. Hershey*, 86 Mich. 130, 48 N. W. 790.

[f] But generally the action cannot be maintained by one who has conveyed the property in question prior to the commencement of the suit. *Ill. Johnson v. McChesney*, 33 Ill. App. 526. *Ia.*—*Page v. Burlington & M. R. Co.*, 40 Iowa 520. *Minn.*—*Styer v. Sprague*, 63 Minn. 414, 65 N. W. 659. *N. Y.*—*Townsend v. Goelet*, 11 Abb. Pr. 187. *Wis.*—*Pier v. Fond du Lac*, 53 Wis. 421, 10 N. W. 686.

66. See *infra*, this note.

[a] A vendee who has taken possession of the property may maintain an action to quiet title although the property is incorrectly described in the deed. *Isaacks v. Wright*, 50 Tex. Civ. App. 312, 110 S. W. 970.

[b] A purchaser at a judicial or execution sale taking all the rights of the parties whose interests are sold may bring a suit to quiet title to the real estate purchased by him. *U. S. Sowles v. Rugg*, 55 Fed. 163. *Ala.* *Craney v. White*, 164 Ala. 411, 51 So. 236. *Ariz.*—*Copper B. Min. Co. v. Gleeson*, 14 Ariz. 548, 134 Pac. 285, 48 L. R. A. (N. S.) 481; *Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 553. *Cal.* *Horn v. Jones*, 28 Cal. 194. *Colo.* *Pueblo Stock Growers' Bank v. Newton*, 13 Colo. 245, 22 Pac. 444. *Ill.* *Gould v. Steinburg*, 84 Ill. 170. *Ind.* *Sanders v. Muegge*, 91 Ind. 214. *La.* *Gray v. Spring*, 129 La. 345, 56 So. 305, Ann. Cas. 1913B, 372. *Miss.*—*Gall-*

man v. Perrie, 47 Miss. 131. *N. Y.* *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474. *Ohio.*—*Gormley v. Potter*, 29 Ohio St. 597. *Wash.*—*McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786. *Wis.*—*Siedschlag v. Griffin*, 132 Wis. 106, 112 N. W. 18.

[c] But a vendee who has not acquired the legal title though in possession of the land, cannot maintain such action. *Thomas v. White*, 2 Ohio St. 540.

[d] An action against the vendor to quiet title, cannot be maintained by one who at an execution sale has acquired an executory contract to purchase the property. *Chase v. Cameron*, 133 Cal. 231, 65 Pac. 460.

67. *Sheffield v. Day*, 28 Ky. L. Rep. 754, 90 S. W. 545.

[a] As against the holder of a deed which in fact is a mortgage, the mortgagor in possession of the property may maintain the action. *Sheffield v. Day*, 28 Ky. L. Rep. 754, 90 S. W. 545.

[b] But before paying his debt a mortgagor has no right to maintain an action to quiet his title against the mortgagee upon the ground that the right to foreclose the mortgage is barred by the statute of limitations. *Faxon v. All Persons*, 166 Cal. 707, 137 Pac. 919, L. R. A. 1916B, 1209; *Gibson v. Johnson*, 73 Kan. 261, 84 Pac. 982.

68. *Ark.*—*Love v. Bryson*, 57 Ark. 589, 22 S. W. 341. *Ind.*—*Indianapolis v. Board of Church Extension*, 28 Ind. App. 319, 62 N. E. 715. *S. D.*—*Newton v. McGee*, 31 S. D. 216, 140 N. W. 252.

69. See *infra*, this note.

[a] If entitled to possession of the property of the decedent during the settlement of the estate such possessory right is sufficient to sustain an action to quiet title. *U. S.*—*Quinton v. Neville*, 152 Fed. 879, 81 C. C. A. 673. *Cal.*—*Collins v. O'Laverty*, 136 Cal. 31, 68 Pac. 327. *Conn.*—*Munger v. Doolan*, 75 Conn. 656, 55 Atl. 169. *Ia.*—*Laverty v. Sexton & Son*, 41 Iowa 435. *Mont.*—*In re Higgins' Est.*, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116. *N. D.*—*Blakemore v. Roberts*, 12 N. D. 394, 96 N. W. 1029. *Ore.*—*Ladd v. Mills*, 44 Ore. 224, 75 Pac. 141. *S. D.*

3. Defendant.⁷⁰ — The suit or action is maintainable only against one asserting adversely to plaintiff,⁷¹ an interest in the property which may affect plaintiff's title,⁷² or against one who is determined to cast a cloud upon plaintiff's title and who is in position so to do.⁷³

Berry v. Howard, 26 S. D. 29, 127 N. W. 526, Ann. Cas. 1913A, 994.

[b] Some statutes expressly confer (1) upon personal representatives the right to maintain an action to quiet title (*Wheeler v. Single*, 62 Wis. 380, 22 N. W. 569), but (2) such statutes being in derogation of the common law must be strictly construed. *Paine v. First Division St. P. & Pac. R. Co.*, 14 Minn. 65; *King v. Boyd*, 4 Ore. 326.

[c] Where a personal representative is directed to sell the decedent's property he is thereby authorized to maintain an action to quiet title preliminary to such sale in order to properly protect the interests of the estate. *Conn.*—Hall v. Pierson, 63 Conn. 332, 28 Atl. 544. *Mich.*—Marshall v. Blass, 82 Mich. 518, 46 N. W. 947, 47 N. W. 516. *Pa.*—Sears v. Scranton Trust Co., 228 Pa. 126, 77 Atl. 423. But see *Le Moyne v. Quimby*, 70 Ill. 399.

[d] That the action is not maintainable by the personal representative, see *Ala.*—Nashville, C. & St. L. Ry. v. Proctor, 152 Ala. 482, 44 So. 669. *Colo.*—McKee v. Howe, 17 Colo. 538, 31 Pac. 115. *Ill.*—Emmerson v. Merritt, 249 Ill. 538, 94 N. E. 955; *Bailey v. Larrance*, 104 Ill. App. 662; *Stark v. Brown*, 101 Ill. 395. *Mich.*—Jenkins v. Bacon, 30 Mich. 154. *Miss.*—McCa v. Russom, 52 Miss. 639. *Mo.*—Thorp v. Miller, 137 Mo. 231, 38 S. W. 929. *N. Y.*—Stevens v. Fogle, 73 Misc. 417, 130 N. Y. Supp. 1082.

70. Nature of adverse claim, see *supra*, I, B.

71. *Cal.*—Yoakam v. Kingery, 126 Cal. 30, 58 Pac. 324. *Colo.*—Smith v. Schlink, 15 Colo. App. 325, 62 Pac. 1044. *Mass.*—Gilman v. Gilman, 171 Mass. 46, 50 N. E. 452; *Loring v. Hildreth*, 170 Mass. 328, 49 N. E. 652, 64 Am. St. Rep. 301, 40 L. R. A. 127. *Mo.*—Garrison v. Frazier, 165 Mo. 40, 65 S. W. 229. *N. Y.*—Onderdonk v. Mott, 34 Barb. 106. *Pa.*—Kimmel v. Shaffer, 219 Pa. 375, 68 Atl. 1017.

72. *U. S.*—Devine v. Los Angeles, 202 U. S. 313, 26 Sup. Ct. 652, 50 L. ed. 1046; *Ashburn v. Graves*, 149 Fed. 968, 79 C. C. A. 478. *Ala.*—Henderson

v. Holman, 193 Ala. 262, 69 So. 424. *Fla.*—Sloan v. Sloan, 25 Fla. 53, 5 So. 603. *Ill.*—Eagleston v. Goodykoontz, 182 Ill. App. 318. *Kan.*—Douglass v. Nuzum, 16 Kan. 515. *Md.*—Rosenthal v. Donnelly, 126 Md. 147, 94 Atl. 1030. *Mass.*—McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162. *Minn.*—Maloney v. Finnegan, 38 Minn. 70, 35 N. W. 723. *Mo.*—Scharff v. Kirkwood Lumb. Co. (Mo. App.), 184 S. W. 494. *Mont.*—Hicks v. Rupp, 49 Mont. 40, 140 Pac. 97. *Nev.*—Low v. Staples, 2 Nev. 209. *N. Y.*—Whitney v. Considine Inv. Co., 176 App. Div. 157, 162 N. Y. Supp. 507. *N. C.*—McArthur v. Griffith, 147 N. C. 545, 61 S. E. 519. *Tex.*—Heath v. First Nat. Bank (Tex. Civ. App.), 32 S. W. 778. *Wash.*—Pacific Coast Pipe Co. v. Hedican, 61 Wash. 576, 112 Pac. 655, Ann. Cas. 1912C, 833. *W. Va.*—Whitehouse v. Jones, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49.

[a] The interest of a mortgagee is an interest adverse to the holder of the legal title. *Pettengill v. Blackman*, 30 Idaho 241, 164 Pac. 358.

[b] Where inferiority of defendant's title appears of record no action to quiet title can be maintained. *Morgan v. Carter*, 48 Minn. 501, 51 N. W. 614; *Scharff v. Kirkwood Lumber Co.* (Mo. App.), 184 S. W. 494.

73. *Ala.*—Martin v. Hewitt, 44 Ala. 418. *Ark.*—Maynard v. Henderson, 117 Ark. 24, 173 S. W. 831, Ann. Cas. 1917A, 1157. *Cal.*—Metropolis Tr. & Sav. Bank v. Barnet, 165 Cal. 419, 132 Pac. 833. *Del.*—Messick v. Johnson, 98 Atl. 218. *Fla.*—Sloan v. Sloan, 25 Fla. 53, 5 So. 603. *Ill.*—Barnard v. Hoyt, 63 Ill. 341; *Glos v. Cannata*, 121 Ill. App. 215. *Ind.*—Knightstown First Nat. Bank v. Deitch, 83 Ind. 131. *Ia.*—Palo Alto Bkg. & Inv. Co. v. Mahar, 65 Iowa 74, 21 N. W. 187. *Me.*—Gerry v. Stinson, 60 Me. 186. *Md.*—Holland v. Baltimore, 11 Md. 186, 69 Am. Dec. 195. *Mass.*—O'Hare v. Downing, 130 Mass. 16. *Mich.*—Folkerts v. Power, 42 Mich. 283, 3 N. W. 857. *Minn.*—Conkey v. Dike, 17 Minn. 457. *Miss.*—Irwin v. Lewis, 50 Miss. 263. *Mo.*—Tucker v. Wadlow, 184 S. W. 69. *Neb.*

4. **Intervenor.**—The general rules governing the right to intervene in an action apply to actions to quiet title.⁷⁴ Persons interested in the property should be permitted to intervene.⁷⁵ An intervenor must recover on the strength of his own title and not on the weakness of that of his adversary.⁷⁶

5. **Joinder of Parties.**—a. *Plaintiff.*⁷⁷—Joint tenants may join in an action to quiet title to their joint property.⁷⁸ But one tenant in common need not join his cotenant.⁷⁹ It has been held that several parties who own separate pieces of property may join in an action to remove a cloud created by defendant's claim of interest which affects the properties of all of them.⁸⁰ Under some statutes any two or more persons claiming any estate or interest in lands under a common source of title may unite in an action to remove a cloud upon the same;⁸¹ heirs at law may maintain an action without joining the personal representatives,⁸² or the personal representatives may maintain such action without joining the heirs.⁸³

b. *Defendants.*—Who are necessary parties defendant depends upon the general rules elsewhere treated.⁸⁴ All adverse claimants may

Fox v. Kountze, 58 Neb. 439, 78 N. W. 712. **N. H.**—*Brooks v. Howland*, 58 N. H. 98. **N. J.**—*Morris Canal & Bkg. Co. v. Jersey City*, 12 N. J. Eq. 227. **N. Y.**—*King v. Townshend*, 141 N. Y. 358, 36 N. E. 513; *Clark v. Davenport*, 95 N. Y. 477; *Scott v. Onderdonk*, 14 N. Y. 9, 67 Am. Dec. 106. **Ohio.** *Culbertson v. Cincinnati*, 16 Ohio 574. **Ore.**—*White v. Espey*, 21 Ore. 328, 28 Pac. 71. **S. C.**—*Ketchin v. McCarley*, 26 S. C. 1, 11 S. E. 1099, 4 Am. St. Rep. 674. **Tex.**—*Red v. Johnson*, 53 Tex. 284; *Barr v. Simpson*, 54 Tex. Civ. App. 105, 117 S. W. 1041. **Wash.** *Quincy v. Slipper*, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899. **W. Va.** *Bradley v. Swope*, 77 W. Va. 113, 87 S. E. 86. **Wis.**—*Smith v. Zimmerman*, 85 Wis. 542, 55 N. W. 956.

[a] Equity will prevent the execution of a deed which it would cancel as a cloud upon title if it were executed. *Maynard v. Henderson*, 117 Ark. 24, 173 S. W. 831, Ann. Cas. 1917A, 1157.

74. See generally the title "Intervention."

75. *Ackley v. Croucher*, 203 Ill. 530, 68 N. E. 86; *Getzelman v. Blazier*, 112 Ill. App. 648; *Miller v. Boulware*, 267 Mo. 487, 184 S. W. 1148.

[a] A mortgagee of the land may intervene. *Switz v. Black*, 45 Iowa 597.

76. *Rood v. Wallace*, 109 Iowa 5, 79 N. W. 449.

[a] Where plaintiff is in possession

and the intervenor has no title, the petition in intervention must be dismissed regardless of the character of plaintiff's title. *Rood v. Wallace*, 109 Iowa 5, 79 N. W. 449.

77. See generally the title "Parties."

78. *Cornwell v. Lee*, 14 Conn. 524. 79. *O'Donnell v. McIntyre*, 37 Hun (N. Y.) 615. But see the title "Tenants in Common."

80. *Hinchman v. Ripinsky*, 3 Alaska 543.

81. *Prentice v. Duluth Storage & F. Co.*, 58 Fed. 437, 7 C. C. A. 293; *Superior Calif. Fruit Land Co. v. Grossman*, 32 Cal. App. 357, 162 Pac. 1046.

82. *Tryon v. Huntton*, 67 Cal. 325, 7 Pac. 741.

83. *Russell v. Texas & P. Ry. Co.*, 68 Tex. 646, 5 S. W. 686.

84. See the title "Parties," and *infra*, this note.

[a] In an action to remove a cloud and to cancel a conveyance on the ground of fraud all the parties to such conveyance are necessary parties to the action. *Florida Land Rock P. Co. v. Anderson*, 50 Fla. 501, 516, 39 So. 392; *Crow v. Hardridge*, 43 Okla. 463, 143 Pac. 183.

[b] A mortgagee of the defendant is not a necessary party to an action to quiet title against the defendant asserting an unfounded claim. *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429.

[c] The trustee need not be joined

be made parties defendant even though there is no privity between them.⁸⁵ It has been held that where various claimants assert title to separate parts of the property they may all be joined as defendants,⁸⁶ though there is authority to the contrary.⁸⁷ Generally, a party who has conveyed his interest to another is not a necessary party.⁸⁸ And where plaintiff acquired the property at an execution sale the judgment debtor is not a necessary or proper party.⁸⁹

D. PROCESS. — The general rules as to process,⁹⁰ and the service thereof,⁹¹ are applicable where the suit is regarded as one in rem, or substantially so; service by publication upon a non-resident will suffice.⁹² As to unknown claimants, service by publication is sufficient,⁹³ but to authorize such service the persons must be unknown in fact and not merely designated as such in the pleading.⁹⁴

E. PLEADING. — 1. **Bill, Petition or Complaint.** — a. *In General.* The bill or petition should be drawn in accordance with the rules governing bills in equity generally.⁹⁵ Sufficient must appear to give the court jurisdiction,⁹⁶ and to show plaintiff entitled to the relief prayed for.⁹⁷

as party defendant in an action to remove a trust deed as a cloud upon title. *Wells v. Brown*, 23 Colo. App. 190, 128 Pac. 869.

[d] In an action against a subsequent grantee with notice of plaintiff's equities it is not necessary to join any other parties as defendants. *McQuitty v. Steckdaub* (Mo.), 190 S. W. 590.

85. *Wells v. Brown*, 23 Colo. App. 190, 128 Pac. 869; *Carlson v. Curren*, 48 Wash. 249, 93 Pac. 315.

[a] All the holders of an adverse record title must be joined. *Johnson v. Thomas*, 23 App. Cas. (D. C.) 141.

86. *Stemmler v. McNeill*, 102 Fed. 660; *Berger v. Butler*, 159 Ala. 539, 48 So. 685.

87. *Moore v. Wilson*, 1 Utah 187.

88. *Cunningham v. Cunningham*, 125 Iowa 681, 101 N. W. 470; *Castle Brook Carbon Block Co. v. Ferrell*, 76 W. Va. 300, 85 S. E. 544.

[a] The original lessee is not a necessary party to an action to quiet title brought against assignees of the lease. *Allen v. Indianapolis Oil Co.*, 27 Ind. App. 158, 60 N. E. 1003.

89. *Mitchell v. Lyons*, 163 Wis. 399, 158 N. W. 70.

90. See the title "Process."

91. See the title "Service of Process and Papers."

92. U. S.—*Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918. Cal.—*McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421. Ill.—*Cloyd v. Trotter*, 115 Ill. 391, 9 N. E. 507. Ind.—*Essig*

v. Lower, 120 Ind. 239, 21 N. E. 1090. La.—*Robbins v. Martin*, 43 La. Ann. 488, 9 So. 108. Mo.—*Mitchner v. Holmes*, 117 Mo. 185, 22 S. W. 1070. Wash.—*Phillips v. Thompson*, 73 Wash. 78, 131 Pac. 461, Ann. Cas. 1914D, 672. W. Va.—*Tennant's Heirs v. Fretts*, 67 W. Va. 569, 68 S. E. 387, 140 Am. St. Rep. 979, 29 L. R. A. (N. S.) 625. 93. See *Priest v. Trustees of Las Vegas*, 232 U. S. 604, 34 Sup. Ct. 443, 58 L. ed. 751.

[a] In addition to the publication of summons against unknown defendants some statutes require the plaintiff to file a notice of lis pendens before the publication of the summons, and a copy of the notice must be published together with the summons. Such statute must be strictly followed. *Jensen v. Anderson*, 123 Minn. 199, 143 N. W. 361.

94. *Priest v. Trustees of Las Vegas*, 232 U. S. 604, 34 Sup. Ct. 443, 58 L. ed. 751.

95. See the title "Bills and Answers."

96. *Hicks v. Rupp*, 49 Mont. 40, 140 Pac. 97.

97. U. S.—*Richardson v. Pennsylvania Coal Co.*, 203 Fed. 743. Ariz.—*Arizona Mine Supply Co. v. Bolman*, 15 Ariz. 504, 140 Pac. 490. Ark.—*Chaplin v. Holmes*, 27 Ark. 414. Cal.—*Aalwyn v. Cobb*, 168 Cal. 165, 142 Pac. 79. Conn.—*Welles v. Rhodes*, 59 Conn. 498, 22 Atl. 286. Ill.—*Emery v. Cochran*, 82 Ill. 65. Ind.—*Brown v.*

A complaint under the statute which substantially complies with its requirements generally is sufficient,⁹⁸ although it contains additional allegations which are not necessary under the statute,⁹⁹ or statements of legal conclusions and demands for relief not appropriate to the statutory action.¹

b. *Title*.—Title or ownership in plaintiff is usually necessary and should be averred² with sufficient certainty to inform the defendant

Cody, 115 Ind. 484, 18 N. E. 9. **Minn.** Hamilton v. Batlin, 8 Minn. 403, 83 Am. Dec. 787. **Miss.**—Gambrell Lumber Co. v. Saratoga Lumb. Co., 87 Miss. 773, 40 So. 485. **Neb.**—McDonald v. Early, 15 Neb. 63, 17 N. W. 257. **Ore.** Moores v. Clackamas, 40 Ore. 536, 67 Pac. 662.

[a] **An action to remove a cloud** may be sustained as an action to determine adverse claims if the complaint is sufficient for that purpose. Palmer v. Yorks, 77 Minn. 20, 79 N. W. 587.

98. **N. Y.**—Hamilton v. Hamilton, 78 Misc. 557, 139 N. Y. Supp. 1095. **N. D.**—Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029. **Okla.**—Gerlach Bank v. Allen, 51 Okla. 736, 152 Pac. 399; Avery v. Hays, 44 Okla. 71, 144 Pac. 624.

[a] **The jurisdictional facts** (1) required by the statute as prerequisites to the maintenance of the action must be disclosed. Birmingham v. McCormack, 145 Ala. 685, 40 So. 111; Moore v. Alabama Nat. Bank, 139 Ala. 273, 35 So. 648; Parker v. Boutwell, 119 Ala. 297, 24 So. 860. (2) An averment that the land, the subject matter of the action, is located in a certain county is sufficient to show jurisdiction and the residence of the parties need not be alleged. City Loan & Banking Co. v. Poole, 149 Ala. 164, 43 So. 13.

[b] **Statutory Provision for a Demand by Plaintiff That Defendant Specify His Title**.—See Mayer v. Calera Land Co., 133 Ala. 554, 31 So. 938.

[c] **A statute requiring the ordinary course in civil suits to be followed** does not mean that the rules of pleading in ordinary cases shall be so closely observed as to defeat the main purpose of the statute itself, but that the general civil procedure adapted to the peculiar action be followed. Huff v. Laclede Land & Imp. Co., 157 Mo. 65, 57 S. W. 715.

99. Aalwyn v. Cobe, 168 Cal. 165, 142 Pac. 79; Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029.

1. Jackson v. Johnson, 248 Mo. 680, 154 S. W. 759.

2. **Ariz.**—Arizona Mine Supply Co. v. Bolman, 15 Ariz. 504, 140 Pac. 490. **Cal.**—Cooper v. Birch, 137 Cal. 472, 70 Pac. 291. **Colo.**—Dodge v. Millett, 23 Colo. App. 64, 127 Pac. 247. **Fla.**—Hill v. Da Costa, 65 Fla. 371, 61 So. 750; Jarrell v. McRainey, 65 Fla. 141, 61 So. 240; Houston v. McKinney, 54 Fla. 600, 45 So. 480. **Ga.**—McMullen v. Cooper, 125 Ga. 435, 54 S. E. 97. **Ill.** Glos v. Miller, 213 Ill. 22, 72 N. E. 714. **Ind.**—Donaldson v. State, 182 Ind. 615, 101 N. E. 485; Corbin Oil Co. v. Searles, 36 Ind. App. 215, 75 N. E. 293. **Ia.**—Brinton v. Seever, 12 Iowa 389. **Ky.**—Henderson v. Clark, 163 Ky. 192, 173 S. W. 367. **Minn.**—Wakefield v. Day, 41 Minn. 344, 43 N. W. 71. **Miss.**—Gilchrist-Fordney Co. v. Keyes, 113 Miss. 742, 74 So. 619; Jones v. Rogers, 85 Miss. 802, 38 So. 742; Toulmin v. Heidelberg, 32 Miss. 268. **Neb.**—Brewer v. Merrick Co., 15 Neb. 180, 18 N. W. 43. **N. Y.**—Austin v. Goodrich, 49 N. Y. 266. **N. D.**—O'Leary v. Schoenfeld, 30 N. D. 374, 152 N. W. 679. **Pa.**—Andrews v. Landis, 24 Pa. Dist. 876. **Tenn.**—Wilcox v. Blackwell, 99 Tenn. 352, 41 S. W. 1061. **W. Va.** Roberts v. Gruber, 74 W. Va. 550, 82 S. E. 367; Harr v. Shaffer, 45 W. Va. 709, 31 S. E. 905. **Wis.**—Van Hessen v. Chippewa Val. Mercantile Co., 115 Wis. 443, 91 N. W. 1008.

As to the necessity of title, see *supra*, II, C, 2, a, (II).

[a] **Title at the time of bringing the action** should be alleged and an allegation that plaintiff was seized of title some time prior thereto does not justify the inference that he was so seized on the day the complaint was filed. Parke v. Brown, 12 Ill. App. 291; Clark v. Holmes, 31 Okla. 164, 120 Pac. 642, Ann. Cas. 1913D, 385.

[b] **Ownership in fee simple**, alleged. **U. S.**—Ely v. New Mexico & A. R. Co., 129 U. S. 291, 9 Sup. Ct. 293, 32 L. ed. 688. **Cal.**—Millett v. Lago-

of the nature of the action brought against him.³ A general allegation of ownership is sufficient;⁴ and neither the source of plaintiff's title,⁵ nor the links in the chain thereof,⁶ need be pleaded. But when in addition to an averment of ownership in fee the facts which constitute the title are also set out and they do not show title in the plaintiff, a demurrer to the complaint is proper.⁷

c. *Possession*.—Possession in plaintiff may, under the circumstances, be unnecessary to the maintenance of the suit,⁸ and so need not be alleged.⁹ Where, on the other hand, possession is essential it

marsino, 38 Pac. 308; *Mora v. Le Roy*, 58 Cal. 8. **Fla.**—West Coast Lumb. Co. v. Griffin, 54 Fla. 621, 45 So. 514. **Ind.**—O'Connor v. Baum, 54 Ind. App. 195, 100 N. E. 581. **Kan.**—Parker v. Conrad, 74 Kan. 111, 85 Pac. 810. **Mo.**—Spore v. Ozark Land Co., 186 Mo. 656, 85 S. W. 556. **N. Y.**—King v. Townshend, 78 Hun 380, 29 N. Y. Supp. 181, 60 N. Y. St. 739. **S. C.**—Shute v. Shute, 79 S. C. 420, 60 S. E. 961. **Wis.**—Mitchell Iron & L. Co. v. Flambeau Land Co., 120 Wis. 545, 98 N. W. 530. **Wyo.**—Durell v. Abbott, 6 Wyo. 265, 44 Pac. 647.

[c] *Ownership by a complete equitable title averred*. **D. C.**—Goodman v. Wren, 34 App. Cas. 516. **Ind.**—Stanley v. Holliday, 130 Ind. 464, 30 N. E. 634. **Ore.**—Mascall v. Murray, 76 Ore. 637, 149 Pac. 517.

3. *Houston v. McKinney*, 54 Fla. 600, 45 So. 480; *Roberts v. Gruber*, 74 W. Va. 550, 82 S. E. 367.

4. *Ala.*—Love v. Coker, 140 Ala. 249, 37 So. 92. **Cal.**—Tilton v. Russek, 171 Cal. 731, 154 Pac. 860. **Colo.**—Knight v. Boring, 38 Colo. 153, 87 Pac. 1078. **Ind.**—Jones v. Leeds, 41 Ind. App. 164, 83 N. E. 526. **Neb.**—Andersen v. Andersen, 69 Neb. 565, 96 N. W. 276. **N. M.**—Marques v. Maxwell Land Grant Co., 12 N. M. 445, 78 Pac. 40. **R. I.**—Blackstone Hall Co. v. Rhode Island Hospital Tr. Co., 39 R. I. 69, 97 Atl. 484.

[a] But see *Baker v. Briggs*, 99 Va. 360, 38 S. E. 277, holding that a mere allegation that plaintiff is the owner of the land without an averment that he has title thereto and is in possession thereof is insufficient.

[b] *An allegation of possession for a sufficient length of time to show title in the plaintiff is equivalent to a direct allegation of ownership*. *Batchelder v. Baker*, 79 Cal. 266, 21 Pac. 754.

5. *Ala.*—Love v. Coker, 140 Ala. 249, 37 So. 92. **Cal.**—Millet v. Lago-

marsino, 38 Pac. 308. **Fla.**—West Coast Lumb. Co. v. Griffin, 54 Fla. 621, 45 So. 514. **Ind.**—Lafayette v. Wabash R. Co., 28 Ind. App. 497, 63 N. E. 237.

[a] *Unnecessary allegations showing the source of title of the plaintiff do not render the pleading defective*. *Strong v. Buffalo Land & E. Co.*, 203 U. S. 582, 27 Sup. Ct. 780, 51 L. ed. 327; *Stacey v. Jones*, 180 Ala. 231, 60 So. 823; *Bledsoe v. Price*, 132 Ala. 621, 32 So. 325.

[b] *But the statute may necessitate the source to be pleaded*. *Jackson v. Port Gibson Bank*, 85 Miss. 645, 38 So. 35.

6. **Colo.**—Schlageter v. Gude, 30 Colo. 310, 70 Pac. 428. **Fla.**—West Coast Lumb. Co. v. Griffin, 54 Fla. 621, 45 So. 514. **Minn.**—Buffalo Land & Exp. Co. v. Strong, 91 Minn. 84, 97 N. W. 575. **Ore.**—Mascall v. Murray, 76 Ore. 637, 149 Pac. 517.

7. *West Coast Lumb. Co. v. Griffin*, 54 Fla. 621, 45 So. 514.

[a] *Where patent void on its face is set out*. *Lockhard v. Asher Lumber Co.*, 123 Fed. 480.

8. *Necessity for possession*, see *supra*, II, C, 2, a, (III).

9. **Ala.**—Belcher v. Scruggs, 125 Ala. 336, 27 So. 839. **Ariz.**—Ely v. New Mexico & A. R. Co., 2 Ariz. 420, 19 Pac. 6. **Ark.**—Chaplin v. Holmes, 27 Ark. 414. **Ind.**—McCaslin v. State, 99 Ind. 428.

[a] *Possession Not Required by Statute*.—*McCaslin v. State*, 99 Ind. 428.

[b] *Where complaint shows property unimproved and vacant, possession need not be pleaded*. **Ark.**—Mathews v. Marks, 44 Ark. 436. **Fla.**—Reid v. Grantham, 65 Fla. 500, 62 So. 480; *Clem v. Moserole*, 44 Fla. 191, 32 So. 783. **Ill.**—Delancy v. O'Donnell, 234 Ill. 109, 84 N. E. 668; *Glos v. Miller*, 213 Ill. 22, 72 N. E. 714. **Miss.**—Cambrell Lumber Co. v. Saratoga Lumber

should appear from the bill or complaint,¹⁰ either by alleging it in

Co., 87 Miss. 773, 40 So. 485. **N. Y.**—Whitman v. New York, 85 App. Div. 468, 83 N. Y. Supp. 465. **Okla.**—Christy v. Springs, 11 Okla. 710, 69 Pac. 864. **Pa.**—Heppenstall v. Leng, 217 Pa. 491, 66 Atl. 991, 12 L. R. A. (N. S.) 652.

[c] If equity has jurisdiction on other grounds, and it is sought to remove a cloud as incidental relief, possession need not be alleged. **Ill.**—Blake v. Blake, 260 Ill. 70, 102 N. E. 1007. **Ky.**—Engle v. Bond Foley Lumb Co., 173 Ky. 35, 189 S. W. 1146. **Md.**—Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773. **Mich.**—Byles v. Rowe, 64 Mich. 522, 31 N. W. 463. **Mo.**—Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326. **N. J.**—Besson v. Gribble, 39 N. J. Eq. 111. **N. Y.**—Letson v. Letson, 81 App. Div. 556, 80 N. Y. Supp. 1032. **Ore.**—O'Hara v. Parker, 27 Ore. 156, 39 Pac. 1004. **Va.**—Jefferson v. Gregory, 113 Va. 61, 73 S. E. 452. **Wis.**—Grignon v. Black, 76 Wis. 674, 45 N. W. 122, 938.

[d] Where the complainant holds an equitable title, he need not allege possession in himself. **Ala.**—Shannon v. Long, 180 Ala. 128, 60 So. 273. **Ariz.**—Ely v. New Mexico & A. R. Co., 2 Ariz. 420, 19 Pac. 6. **Colo.**—Mulock v. Wilson, 19 Colo. 296, 35 Pac. 532. **Fla.**—Sloan v. Sloan, 25 Fla. 53, 5 So. 603. **Ill.**—Mitchell v. Shortt, 113 Ill. 251, 1 N. E. 909. **Mich.**—Nisbett v. Milner, 159 Mich. 337, 124 N. W. 22. **Mo.**—Graves v. Ewart, 99 Mo. 13, 11 S. W. 971. **Vt.**—Blondin v. Brooks, 83 Vt. 472, 76 Atl. 184. **Va.**—Jefferson v. Gregory, 113 Va. 61, 73 S. E. 452. **Wash.**—Brodsky v. Nelson, 57 Wash. 671, 107 Pac. 840. **Wis.**—Siedschlag v. Griffin, 132 Wis. 106, 112 N. W. 18.

[e] Where the complaint shows the case comes within the exceptions in which the plaintiff is not required to be in possession a demurrer to the complaint does not lie. **Worthington v. Miller**, 134 Ala. 420, 32 So. 748.

10. **Ala.**—Thompson v. Brown, 76 So. 298; **Edmonds v. Cogsdill**, 182 Ala. 309, 62 So. 691; **Birmingham v. McCormack**, 145 Ala. 685, 40 So. 111. **Alaska.**—United States v. North-West Trading Co., 1 Alaska 5. **Ariz.**—Ely v. New Mexico & A. R. Co., 2 Ariz. 420, 19 Pac. 6. **Ark.**—Mathews v. Marks, 44 Ark. 436; **Chaplin v.**

Holmes, 27 Ark. 414. **Colo.**—**Dodge v. Millett**, 23 Colo. App. 64, 127 Pac. 247. **Fla.**—**Reid v. Grantham**, 65 Fla. 500, 62 So. 480; **Simmons v. Carlton**, 44 Fla. 719, 33 So. 408; **Watson v. Holliday**, 37 Fla. 488, 19 So. 640. **Ill.**—**Blake v. Blake**, 260 Ill. 70, 102 N. E. 1007; **Delaney v. O'Donnell**, 234 Ill. 109, 84 N. E. 668; **Glos v. Miller**, 213 Ill. 22, 72 N. E. 714. **Kan.**—**Douglass v. Nuzum**, 16 Kan. 515. **Ky.**—**Henderson v. Clark**, 163 Ky. 192, 173 S. W. 367; **Goff v. Lowe**, 25 Ky. L. Rep. 2176, 80 S. W. 219; **Smith v. White**, 19 Ky. L. Rep. 802, 41 S. W. 436. **Md.**—**Livingston v. Hall**, 73 Md. 386, 21 Atl. 49. **Mich.**—**Berger v. Roe**, 179 Mich. 184, 146 N. W. 200; **Kilgannon v. Jenkinson**, 51 Mich. 240, 16 N. W. 390. **Minn.**—**Conklin v. Hinds**, 16 Minn. 457. **Mo.**—**Charm Mfg. Co. v. Donovan**, 14 Mo. App. 591. **Mont.**—**Sklower v. Abbott**, 19 Mont. 228, 47 Pac. 901. **N. Y.**—**Austin v. Goodrich**, 49 N. Y. 266; **Howarth v. Howarth**, 67 App. Div. 354, 73 N. Y. Supp. 785. **Ohio.**—**Clark v. Hubbard**, 8 Ohio 382. **Ore.**—**Zumwalt v. Madden**, 23 Ore. 185, 31 Pac. 400. **Pa.**—**Andrews v. Landis**, 24 Pa. Dist. 876. **Tenn.**—**Nason v. South Memphis Land Co.**, 138 Tenn. 21, 195 S. W. 761. **Wash.**—**McKinley v. Morgan**, 36 Wash. 561, 79 Pac. 45. **W. Va.**—**Big Huff Co. v. Thomas**, 76 W. Va. 161, 85 S. E. 171; **Roberts v. Gruber**, 74 W. Va. 550, 82 S. E. 367; **Waldron v. Waldron**, 73 W. Va. 311, 80 S. E. 811. **Wis.**—**Shaffer v. Whelpley**, 37 Wis. 334.

[a] A complaint (1) showing plaintiff not in possession of the property in question is bad. **Ala.**—**Harris v. Jones**, 188 Ala. 633, 65 So. 956. **Ill.**—**Gage v. Schmidt**, 104 Ill. 106. **Minn.**—**Mitchell v. McFarland**, 47 Minn. 535, 50 N. W. 610. **Neb.**—**Snowden v. Tyler**, 21 Neb. 199, 31 N. W. 661. (2) Lack of possession must clearly appear before the complaint is demurrable. **Union Pac. Ry. Co. v. Meier**, 28 Fed. 9. (3) Such objection may be raised also by the answer (**Gage v. Schmidt**, 104 Ill. 106; **Jones v. Collins**, 16 Wis. 594), but (4) it is too late to object to the complaint upon that ground at the trial of the cause. **Jones v. Collins**, 16 Wis. 594. And (5) where the defendants by their answer ask for full affirmative relief and thus submit themselves to the jurisdiction of the

terms or by setting out facts from which it follows as a conclusion of law.¹¹ An averment of mere constructive possession ordinarily is not sufficient,¹² unless constructive possession is made sufficient by the statute to support an action to quiet title.¹³

d. *Adverse Claim*.¹⁴—It is necessary to aver that defendant claims an interest or estate adverse to plaintiff¹⁵ which constitutes a cloud that equity can remove,¹⁶ although in suits to quiet title such latter averment is not necessary.¹⁷ In some jurisdictions the nature of defendant's claim must be specifically described or a reason stated why a description cannot be given,¹⁸ but generally, under statutes, the character of defendant's adverse claim need not be pleaded,¹⁹ and the

court, they cannot avail themselves of the fact that the plaintiffs were not in the actual possession of a part of the land at the time of the commencement of the action. *Mascall v. Murray*, 76 Ore. 637, 149 Pac. 517.

[b] Where plaintiff is in possession of part of the land involved a demurrer upon the ground of want of possession as to part of the land must be overruled as the demurrer goes to the whole complaint. *Northern Pac. R. Co. v. Roberts*, 42 Fed. 734.

11. *Fowler v. Alabama I. & S. Co.*, 189 Ala. 31, 66 So. 672.

[a] An averment that plaintiff owns a fee simple is a sufficient averment of possession. **U. S.**—*Gage v. Kaufman*, 133 U. S. 471, 10 Sup. Ct. 406, 33 L. ed. 725. **D. C.**—*District of Columbia v. Hufty*, 13 App. Cas. 175. **Minn.**—*Donnelly v. Simonton*, 7 Minn. 167. **N. Y.**—*Andrus v. Wheeler*, 18 Misc. 648, 42 N. Y. Supp. 525.

[b] An allegation in the complaint that the possession had been peaceable and hostile is not objectionable on the ground that these terms conflict with each other. *Mascall v. Murray*, 76 Ore. 637, 149 Pac. 517.

12. **Ky.**—*Smith v. Gatiff*, 9 Ky. L. Rep. 553, 5 S. W. 558. **Md.**—*Carswell v. Swindell*, 102 Md. 636, 62 Atl. 956. **Mich.**—*Watson v. Lion Brew. Co.*, 61 Mich. 595, 28 N. W. 726. **N. J.**—*Sheppard v. Nixon*, 43 N. J. Eq. 627, 13 Atl. 617. **W. Va.**—*Big Huff Co. v. Thomas*, 76 W. Va. 161, 85 S. E. 171.

13. *Moore v. Empire Land Co.*, 181 Ala. 344, 61 So. 940.

14. Nature of adverse claim, see *supra*, I, B.

15. **Colo.**—*Smith v. Schlink*, 15 Colo. App. 235, 37 Pac. 1044. **Ind.**—*Brown v. Cox*, 138 Fed. 384, 63 N. E. 568; *Orin v. Gregory*, 111 Fed. 504, 13 N. E. 39; *Second Nat. Bank v. Corey*, 94 Ind.

457. **Ky.**—*Campbell v. Disney*, 93 Ky. 41, 18 S. W. 1027. **Mich.**—*Rodgers v. Beckel*, 172 Mich. 544, 138 N. W. 202. **Mont.**—*Northern Pac. Ry. Co. v. Hauswirth*, 49 Mont. 135, 140 Pac. 516. **Nev.**—*Clay v. Scheeline B. & T. Co.*, 40 Nev. 9, 159 Pac. 1081. **Ore.**—*Zumwalt v. Madden*, 23 Ore. 185, 31 Pac. 400.

16. **U. S.**—*Crocker v. Ingersoll Engineering & C. Co.*, 205 Fed. 99; *Goldsmith v. Gilliland*, 22 Fed. 865, 10 Sawy. 606. **Ariz.**—*Arizona Mine Supply Co. v. Bolman*, 15 Ariz. 504, 140 Pac. 490. **Ark.**—*Chaplin v. Holmes*, 27 Ark. 414. **Cal.**—*Hibernia Sav. & L. Soc. v. Ordway*, 38 Cal. 679. **Conn.**—*Welles v. Rhodes*, 59 Conn. 498, 22 Atl. 286. **Haw.**—*Charman v. Charman*, 17 Hawaii 171. **Ind.**—*Indiana Natural Gas & Oil Co. v. Sexton*, 31 Ind. App. 575, 68 N. E. 692. **Mich.**—*Rodgers v. Beckel*, 172 Mich. 544, 138 N. W. 202; *Jenks v. Hathaway*, 48 Mich. 536, 12 N. W. 691. **Miss.**—*Gambrell Lumber Co. v. Saratoga Lumb. Co.*, 87 Miss. 773, 40 So. 485. **Mont.**—*Hicks v. Rupp*, 49 Mont. 40, 140 Pac. 97. **Neb.**—*McDonald v. Early*, 15 Neb. 63, 17 N. W. 257. **Ohio.**—*Lamb v. Boyd*, 4 Ohio Cir. Ct. 499, 2 Ohio Cir. Dec. 672. **Pa.**—*Andrews v. Landis*, 24 Pa. Dist. 876.

[a] The bill must show that defendant's claim constitutes a cloud upon title and a conveyance void on its face is not a cloud. *Prestwood v. Horn*, 195 Ala. 450, 70 So. 134.

17. **Ind.**—*Chaplin v. Leapley*, 35 Ind. App. 511, 74 N. E. 546. **Mo.**—*Jewett v. Boardman*, 181 Mo. 647, 81 S. W. 186. **N. Y.**—*Williams v. Ayrault*, 31 Barb. 264.

18. *Douglass v. Nuzum*, 16 Kan. 515.

19. **U. S.**—*Ely v. New Mexico & A. R. Co.*, 129 U. S. 291, 9 Sup. Ct. 233, 22 L. ed. 688. **Cal.**—*Hyatt v. Colkins*, 174 Cal. 580, 163 Pac. 1007; *Moore v.*

statute sometimes provides for a demand by plaintiff in his bill or complaint that defendant specify his title in his answer.²⁰ A complaint is not multifarious merely because it makes several persons defendants whose claims have a common source.²¹

e. Description of Property.—The pleading should describe the property involved with sufficient certainty to permit of its identification,²² and, if properly applied for an amendment to set forth a more detailed description should be allowed.²³

*f. Offer To Do Equity.*²⁴—An offer to do equity by satisfying any claim which defendant may have upon the property is not necessary,²⁵ unless the bill discloses facts showing defendant to be entitled to consideration in equity.²⁶

Copp, 119 Cal. 429, 51 Pac. 630; Castro v. Barry, 79 Cal. 443, 21 Pac. 946. **Colo.** Mitchell v. Titus, 33 Colo. 385, 80 Pac. 1042; Schlageter v. Gude, 30 Colo. 310, 70 Pac. 428; Amter v. Conlon, 3 Colo. App. 185, 32 Pac. 721. **Ind.**—Tolleston Club v. Clough, 146 Ind. 93, 43 N. E. 647; Wilson v. Wilson, 124 Ind. 472, 24 N. E. 974; Rausch v. Trustees of United Church, 107 Ind. 1, 8 N. E. 25; Stumph v. Reger, 92 Ind. 286; Indiana Nat. Gas & Oil Co. v. Beales (Ind. App.), 74 N. E. 551. **Ia.**—Hunter v. Amish, 164 Iowa 397, 145 N. W. 877. **Ky.**—Whipple v. Earich, 93 Ky. 121, 19 S. W. 237, 14 Ky. L. Rep. 85; Campbell v. Campbell, 23 Ky. L. Rep. 869, 64 S. W. 458. **Mich.**—Holbrook v. Winsor, 23 Mich. 394. **Nev.**—Scorpion Silver Min. Co. v. Marsano, 10 Nev. 370. **N. J.**—Fittichauer v. Metropolitan Fire Proofing Co., 70 N. J. Eq. 429, 61 Atl. 746; Monighoff v. Sayre, 41 N. J. Eq. 113, 3 Atl. 397. **Ore.**—McMaster v. Ruby, 80 Ore. 476, 157 Pac. 782; Savage v. Savage, 51 Ore. 167, 94 Pac. 182. **Tex.**—Smith v. Taylor, 34 Tex. 589. **Wis.**—Bröderick v. Cary, 98 Wis. 419, 74 N. W. 95.

[a] **Surplusage.**—Where the complaint contains unnecessary allegations as to the defects of defendant's title they may be disregarded as surplusage. Campbell v. Equitable L. & T. Co., 14 S. D. 483, 85 N. W. 1015.

[b] **An averment upon information and belief** that the defendant makes some claim adverse to plaintiff is sufficient. Arizona Mine Supply Co. v. Bolman, 15 Ariz. 504, 140 Pac. 490.

20. Mayer v. Calera Land Co., 133 Ala. 554, 31 So. 938.

21. Hammontree v. Lott, 40 Mich. 190.

22. **U. S.**—Schultz v. Highland G.

Min. Co., 158 Fed. 337; Goldsmith v. Gilliland, 22 Fed. 865, 10 Sawy. 606. **Ala.**—Inge v. Demouy, 122 Ala. 169, 25 So. 228; Ward v. Janney, 104 Ala. 122, 16 So. 73. **Cal.**—Redd v. Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Head v. Fordyce, 17 Cal. 149; Ghiselli v. Thorstensen, 29 Cal. App. 379, 155 Pac. 1015. **Ind.**—Pitcher v. Dove, 99 Ind. 175; Carr v. Huntington Light & F. Co., 33 Ind. App. 1, 70 N. E. 552. **Ky.**—Henderson v. Clark, 163 Ky. 192, 173 S. W. 367. **Miss.**—Bynum v. Stinson, 81 Miss. 25, 32 So. 910. **N. Y.** Parmely v. Showdy, 86 Misc. 634, 148 N. Y. Supp. 1086. **Ohio.**—Howard v. Levering, 8 Ohio Cir. Ct. 614, 4 Ohio Cir. Dec. 236. **Ore.**—Kadderly v. Frazier, 38 Ore. 273, 63 Pac. 487. **Tex.** Smith v. Morgan, 28 Tex. Civ. App. 245, 67 S. W. 919.

[a] **If by the aid of persons knowing the location of the monuments named as points in the boundaries the property can be readily found, the description is sufficient.** O'Connor v. Baum, 54 Ind. App. 195, 100 N. E. 581.

23. Hitt v. Carr, 62 Ind. App. 80, 109 N. E. 456.

24. **As condition to relief**, see *infra*, II, G, 1.

25. First Ave. Coal & Lumb. Co. v. King, 193 Ala. 438, 69 So. 549; Inge v. Demouy, 122 Ala. 169, 25 So. 228; Clark v. Darlington, 7 S. D. 148, 63 N. W. 771, 58 Am. St. Rep. 835.

26. **Ala.**—Interstate B. & L. Assn. v. Stocks, 124 Ala. 109, 27 So. 506. **Cal.**—Pennie v. Hildreth, 81 Cal. 127, 22 Pac. 398. **Ill.**—Abramowitz v. Langknecht, 195 Ill. App. 484.

[a] **Where defendant claims as a mortgagee and plaintiff's pleading shows such fact a court of equity will**

g. *Prayer for Relief*.²⁷—A prayer for the relief sought is necessary.²⁸

2. *Plea or Answer*.²⁹—The defendant in an action to quiet title, in accordance with the general equity rule, may plead as many defenses as he has.³⁰ A general denial in an action to quiet title puts plaintiff's title in issue,³¹ and a denial of plaintiff's ownership,³² or an averment inconsistent therewith,³³ raises the issue of ownership. Affirmative defenses must be specially pleaded.³⁴ Where defendant claims title to the property he must set forth the facts upon which his claim is based.³⁵

not grant relief unless the complaint contains an offer to repay the consideration received from the mortgagee. *Kelly v. Coke*, 193 Ala. 271, 69 So. 576; *Grunder v. American F. L. Mtg. Co.*, 99 Ala. 281, 12 So. 775, 42 Am. St. Rep. 58; *Provident Mut. Bldg.-Loan Assn. v. Schwertner*, 15 Ariz. 517, 140 Pac. 495.

[b] Where plaintiff seeks to have certain instruments canceled as constituting a cloud upon his title, and does not offer to return the consideration for the instruments a demurrer is proper. *Sloss-Sheffield Steel & Iron Co. v. Board of Trustees*, 130 Ala. 403, 30 So. 433. See also *Hays v. Carr*, 83 Ind. 275.

27. See generally the title "*Prayer*."

28. **U. S.**—*Kennedy v. Elliott*, 85 Fed. 832. **Ind.**—*Cooper v. Jackson*, 71 Ind. 244. **Tex.**—*Walters v. Wells*, 8 Tex. 202.

[a] *Prayer for Injunction*.—**U. S.** *New Jersey & N. C. Land & Lumb. Co. v. Gardner-Lacy Lumber Co.*, 113 Fed. 395. **Kan.**—*Long v. Kasebeer*, 28 Kan. 226. **N. M.**—*Marquez v. Maxwell Land Grant Co.*, 12 N. M. 445, 78 Pac. 40. **S. D.**—*Grant v. Colonial & U. S. Mtg. Co.*, 3 S. D. 390, 53 N. W. 746. **Tex.**—*Weaver v. Emison* (Tex. Civ. App.), 153 S. W. 923. See also the title "*Injunctions*."

[b] *Prayer for Receiver*.—*Miller v. Oliver*, 174 Cal. 407, 163 Pac. 355; *Harrington v. Foley*, 108 Iowa 287, 79 N. W. 64. See also the title "*Receivers*."

[c] *Cancellation of the instrument* which casts a cloud upon his title prayed for in action to quiet title. *Pettengill v. Blackman*, 30 Idaho 241, 164 Pac. 358; *Lees v. Wetmore*, 58 Iowa 170, 12 N. W. 238.

[d] *Damages as Incidental Relief*. *Sherrin v. Flinn*, 155 Ind. 422, 58 N. E. 549.

[e] Unless the action is brought under the code, in which case the court may award the appropriate relief though no special prayer therefor is made. *Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174; *Stockton v. Lockwood*, 82 Ind. 158.

29. See the titles "*Bills and Answers*," "*Answers*," "*Pleas*," "*Pleas in Equity*," and other titles dealing with particular pleas.

30. *Flint v. Dulany*, 37 Kan. 332, 15 Pac. 208. See 4 STANDARD PROC. 169.

[a] *Must Be Consistent*.—*Empire Ranch & C. Co. v. Chapin*, 22 Colo. App. 538, 126 Pac. 1107. See also 4 STANDARD PROC. 169. Compare 2 STANDARD PROC. 26.

[b] A general denial and a defense of estoppel may be joined. *Blodgett v. McMurtry*, 39 Neb. 210, 57 N. W. 985.

31. *O'Leary v. Schoenfeld*, 30 N. D. 374, 152 N. W. 679.

32. *Butterfield v. Graves*, 138 Cal. 155, 71 Pac. 510, though possession is not specifically denied.

33. See 7 STANDARD PROC. 36.

[a] An allegation that the defendant is the owner of the property (1) is sufficient to raise an issue on plaintiff's claim of title. *Foster v. Gray*, 24 Colo. App. 247, 133 Pac. 146. (2) An answer showing that the defendant is the owner of part of the property described in the complaint and disclaiming any interest in the residue is sufficient. *Porter v. Mitchell*, 82 Ind. 144.

34. *Pettengill v. Blackman*, 30 Idaho 241, 164 Pac. 358; *Johnson v. Barton*, 23 N. D. 629, 137 N. W. 1092, 44 L. R. A. (N. S.) 557, that the property is a homestead.

35. **Colo.**—*Lewis v. Weithree*, 58 Colo. 117, 113 Pac. 1037; *McCroskey v. Mills*, 32 Colo. 271, 75 Pac. 910. **Ill.** *Gage v. Smith*, 142 Ill. 191, 31 N. E.

3. Cross-Complaint and Counterclaim.³⁶ — The defendant in an action to quiet title may interpose a cross-complaint or counterclaim asserting legal title to the property and asking for a determination thereof.³⁷ Such cross-complaint must set forth all the facts which are required to be alleged in a complaint,³⁸ and must show that defendant is entitled to such affirmative relief against the plaintiff as will defeat the latter's right either in whole or in part to have the cloud upon his title removed.³⁹

4. Replication or Reply.⁴⁰ — Only where new matter is set up by defendant need plaintiff reply,⁴¹ and even in such case the defendant

430. Ind.—*Young v. Wiley* (Ind. App.), 102 N. E. 54. Mich.—*McKenzie v. A. P. Cook Co.*, 113 Mich. 452, 71 N. W. 868. Mo.—*Bryan v. McCaskill*, 175 S. W. 961. S. D.—*Grace v. Ballou*, 4 S. D. 333, 56 N. W. 1075. Tex.—*Harle v. Texas So. Ry. Co.*, 39 Tex. Civ. App. 43, 86 S. W. 1048.

[a] Where the plaintiff alleges that he does not know the exact nature or extent of the defendant's claim the duty is placed upon the defendant to state his claim, whatever it might be. *Parker v. Conrad*, 74 Kan. 111, 85 Pac. 810.

[b] Where defendant intends to avail himself of an equitable title as against the legal title of the plaintiff, such title must be specifically pleaded. *United Land Assn. v. Pacific Imp. Co.*, 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988.

[c] A title acquired by the defendant subsequently to the commencement of the action must be set forth in the answer. *Rucker v. Jackson*, 180 Ala. 109, 60 So. 139, Ann. Cas. 1915C, 1058.

36. See the titles "Cross-Bill;" "Cross-Complaint;" "Set-Off, Counterclaim and Recoupment."

37. U. S.—*Greenwalt v. Duncan*, 16 Fed. 35, 5 McCrary 132. Ala.—*Jenkins v. Jonas Schwab Co.*, 138 Ala. 664, 35 So. 649. But see *Mayer v. Calera Land Co.*, 133 Ala. 554, 31 So. 938. Cal.—*Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; *Brooks v. White*, 22 Cal. App. 719, 136 Pac. 500. Ind.—*Barnes v. Union School*, 91 Ind. 301. Mich.—*McKenzie v. A. P. Cook Co.*, 113 Mich. 452, 71 N. W. 868. N. D.—*Betts v. Signor*, 7 N. D. 399, 75 N. W. 781. Wis.—*Wille v. Maas*, 156 Wis. 274, 145 N. W. 783.

[a] A defendant out of possession cannot maintain a cross-complaint after dismissal of the complaint, since he

has an adequate remedy at law. *Mayer v. Calera Land Co.*, 133 Ala. 554, 31 So. 938.

[b] As Conferring Jurisdiction.—The filing of a cross-bill in a suit to quiet title alleging possession in defendant and praying that his own title be established and quieted, confers jurisdiction on a court of equity to determine the question of title, although the fact that plaintiff was not in possession would have defeated the jurisdiction upon the original bill. U. S.—*Sanders v. Riverside*, 118 Fed. 720, 55 C. C. A. 240. Ark.—*Goodrum v. Ayers*, 56 Ark. 93, 19 S. W. 97. Neb.—*Mollie E. Peters*, 28 Neb. 670, 44 N. W. 872. Okla.—*Davenport v. Wolf*, 158 Pac. 382. Wis.—*Siedschlag v. Griffin*, 132 Wis. 106, 112 N. W. 18.

38. U. S.—*Jackson v. Simmons*, 98 Fed. 768, 39 C. C. A. 514. Ala.—*Drennen v. White*, 191 Ala. 274, 68 So. 41. Colo.—*Tucker v. McCoy*, 3 Colo. 284. Ind.—*Conger v. Miller*, 104 Ind. 592, 4 N. E. 300.

[a] That the plaintiff's claim is adverse to the defendant's claim must appear. *Kitts v. Wilson*, 106 Ind. 147, 5 N. E. 400; *Allen v. Douglass*, 29 Kan. 412.

39. Colo.—*Lewis v. Weitbree*, 58 Colo. 147, 143 Pac. 1037. Ind.—*Donaldson v. State*, 182 Ind. 615, 101 N. E. 485. Utah.—*Glasmann v. O'Donnell*, 6 Utah 446, 24 Pac. 537. Wis.—*Wilson v. Hooser*, 76 Wis. 387, 45 N. W. 316.

40. See the title "Replication and Reply."

41. *Messenger v. Peter*, 129 Mich. 93, 88 N. W. 209.

[a] Where defendant asserts title in himself and denies plaintiff's title, the plaintiff under some statutes must reply. *Messenger v. Peter*, 129 Mich. 93, 88 N. W. 209; *Bailey v. Galpin*, 40 Minn. 319, 41 N. W. 1054.

[b] No reply is necessary where de-

may waive a reply by treating the new matter as traversed and at issue.⁴² In his reply the plaintiff should avoid a departure.⁴³

F. TRIAL OR HEARING.⁴⁴ — **1. Variance.** — The general rules as to variance, elsewhere treated,⁴⁵ are fully applicable to proceedings to quiet title. Some particular rulings as to what have been considered immaterial,⁴⁶ as well as material⁴⁷ variances are collected in the notes.

2. Directing Issues to Jury.⁴⁸ — Under some statutes whenever a defendant asserts possession in himself or otherwise denies the jurisdictional requirements named in the statute and demands an issue of law on the question of title, a preliminary hearing to determine

defendant merely sets forth facts in his answer showing the invalidity of plaintiff and asks for affirmative relief. *Walker v. Sioux City, etc. Land Co.*, 66 Iowa 751, 24 N. W. 563.

42. *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328.

43. *Mascall v. Murray*, 76 Ore. 637, 149 Pac. 517. See the title "Departure."

[a] There is no departure where (1) the reply states facts which tend to defeat the title set up by the defendant (*Schlageter v. Gude*, 30 Colo. 310, 70 Pac. 428), even though (2) the plaintiff in the reply admits the legal title asserted by defendant and states facts showing that he is entitled to equitable relief as against such legal title. *Neve v. Allen*, 55 Kan. 638, 41 Pac. 966; *School District No. 73 v. Wra-beek*, 31 Minn. 77, 16 N. W. 493.

44. See generally the titles "Hearing;" "Trial."

45. See the title "Variance and Failure of Proof."

46. *Smith v. Prall*, 133 Ill. 308, 24 N. E. 521.

[a] A variance in the description of the conveyance as put in evidence, from the allegations of the complaint in regard thereto, is not material where the description given in the complaint is sufficiently certain to identify the property. *Berrendo Stock Co. v. Kaiser*, 66 Tex. 352, 13 S. W. 257.

[b] Proof of ownership less than in fee under an allegation of ownership. *Gordon v. Cadwalader*, 172 Cal. 251, 156 Pac. 471.

[c] Time of Ownership.—And an averment that plaintiff was the owner of land from a certain date and up to the time of the commencement of the action is sufficient to warrant proof of his ownership at any time within

that period. *Erwin v. Perego*, 93 Fed. 608, 35 C. C. A. 482.

[d] Possession by plaintiff's tenants will sustain an allegation of possession in plaintiff. *Krebs v. Dodge*, 9 Wis. 1.

[e] Proof of title by adverse possession is sufficient under an allegation of ownership in fee. *Mascall v. Murray*, 76 Ore. 637, 149 Pac. 517.

[f] Proof of a trust agreement under an allegation that the defendant holds a deed which in fact is a mortgage, creates no material variance. *Halloran v. Holmes*, 13 N. D. 411, 101 N. W. 310.

47. *Sears v. Willard*, 165 Cal. 12, 130 Pac. 869; *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421.

[a] Proof that the premises were vacant and unoccupied is a fatal variance, where possession is alleged and is necessary. *Glos v. Bouton*, 170 Ill. 249, 48 N. E. 949; *Messerschmidt v. Baker*, 22 Minn. 81.

[b] An averment that the land is vacant and has always been so, is not sustained by proof that it was vacant several months before the commencement of the action. *Johnson v. Huling*, 127 Ill. 14, 18 N. E. 786.

[c] Proof of an equitable title under an allegation of ownership in fee constitutes a fatal variance. *Hersey v. Lambert*, 50 Minn. 273, 52 N. W. 963; *Mascall v. Murray*, 76 Ore. 637, 149 Pac. 517. But see *Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 572.

[d] Proof that the property was purchased by defendant and several other persons does not sustain an allegation of the complaint that the property was purchased by the defendant. *O'Neal v. Boone*, 34 Ill. 589.

48. Right of trial by jury in suits to quiet title, see 16 STANDARD PROC. 891.

Submission of issues to jury in equity generally, see 14 STANDARD PROC. 526.

the jurisdictional facts becomes a necessity.⁴⁹ Where it appears that plaintiff has no title to the property it is not necessary to pass upon defendant's title.⁵⁰

3. Dismissal and Disclaimer.⁵¹—The suit may properly be dismissed where defendant disclaims any interest in the property,⁵² or where it appears that the possession in plaintiff requisite to the court's jurisdiction is wanting.⁵³

4. Findings.⁵⁴—The court need but find the ultimate facts⁵⁵ upon all the material issues raised by the pleadings.⁵⁶ It is necessary that the findings be within the issues thus raised,⁵⁷ and be supported by

49. *Pioneer Min. Co. v. Pacific Coal Co.*, 4 Alaska 388; *McGrath v. Norcross*, 83 N. J. Eq. 355, 93 Atl. 801; *Fittichauer v. Metropolitan Fire Proofing Co.*, 70 N. J. Eq. 429, 61 Atl. 746; *Beale v. Blake*, 45 N. J. Eq. 668, 18 Atl. 300.

50. *San Francisco v. Ellis*, 54 Cal. 72.

51. See the title "Dismissal, Discontinuance and Nonsuit."

52. *New American Oil & Min. Co. v. Troyer*, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; *Howard v. Davis*, 6 Tex. 174.

As to disclaimer generally, see 7 STANDARD PROC. 491, et seq.

[a] A disclaimer as to part of the property involved will authorize a dismissal of the action as to the part so disclaimed. *Packer v. Doray*, 100 Cal. xviii, 34 Pac. 628; *Lahaina Agr. Co. v. Poaha*, 18 Hawaii 494.

[b] But the fact that a defendant claims no interest in the property is not sufficient ground for dismissal where instead of filing a disclaimer the defendant answers denying plaintiff's ownership and right to the possession of the property. *Johnston v. Baker*, 167 Cal. 260, 139 Pac. 86.

53. *Gage v. Schmidt*, 104 Ill. 106; *McRee v. Gardner*, 131 Mo. 599, 33 S. W. 166.

54. See the title "Findings and Conclusions."

55. Cal.—*Dam v. Zink*, 112 Cal. 91, 44 Pac. 331. Minn.—*Fitchette v. Victoria Land Co.*, 93 Minn. 485, 101 N. W. 655; *Mitchell v. McFarland*, 47 Minn. 535, 50 N. W. 610. N. D. *Chaffee Miller Land Co. v. Barber*, 12 N. D. 478, 97 N. W. 850. S. D.—*Naddy v. Dietze*, 15 S. D. 26, 86 N. W. 753.

[a] Incidental and evidentiary matters which go to prove or disprove the ultimate questions at issue need not be recited. Cal.—*Dam v. Zink*, 112 Cal.

91, 44 Pac. 331; *Traverso v. Tate*, 82 Cal. 170, 22 Pac. 1082. Ind.—*Lytton v. Baird*, 141 Ind. 446, 40 N. E. 1063. Minn.—*Fitchette v. Victoria Land Co.*, 93 Minn. 485, 101 N. W. 655.

[b] A finding that the plaintiff was not the owner of the property in controversy at the time the action was commenced and was not entitled to the possession thereof is sufficient and the facts going to prove such ownership need not be found. *Daly v. Sorocco*, 80 Cal. 367, 22 Pac. 211.

[c] More specific findings must be requested in the trial court and the party cannot raise the question of additional findings for the first time on appeal. *Naddy v. Dietze*, 15 S. D. 26, 86 N. W. 753.

56. *Smith v. James*, 131 Ind. 131, 30 N. E. 902; *Hall v. Sauntry*, 72 Minn. 420, 75 N. W. 720, 71 Am. St. Rep. 497. But see 8 STANDARD PROC. 1045.

[a] It is not prejudicial error to refuse to make a particular finding where there are sufficient findings to which no exception has been taken to support the judgment. *Naddy v. Dietze*, 15 S. D. 26, 86 N. W. 753.

[b] A general finding that all the allegations of the complaint are true is sufficient to support a decree. *Meyer v. O'Rourke*, 150 Cal. 177, 88 Pac. 706.

[c] That defendant had no interest in the property need not be found where the defendant denied the allegations of the complaint but set up no claim or title to the property. *Batchelder v. Baker*, 79 Cal. 266, 21 Pac. 754.

[d] If plaintiff fails to establish ownership in himself, as alleged, a finding as to defendant's title or defenses, is unnecessary. *San Jose Land & W. Co. v. San Jose Ranch Co.*, 129 Cal. 673, 62 Pac. 269.

57. *Daly v. Sorocco*, 80 Cal. 367, 22 Pac. 211.

the evidence.⁵⁸

G. JUDGMENT OR DECREE.⁵⁹ — 1. **In General.** — The judgment or decree must be predicated upon the pleadings and issues raised and be supported by the proof,⁶⁰ and under some statutes should be in favor of the party showing the best title.⁶¹ As in equity proceedings generally,⁶² a decree quieting title may be conditioned upon the prevailing party doing equity.⁶³ For example the owner may be compelled to reimburse the innocent holder of a tax title,⁶⁴ or of a mort-

[a] Where title in fee is pleaded by plaintiff the court may find a right or ownership in the nature of an easement as the greater title includes the lesser. *Bashore v. Mooney*, 4 Cal. App. 276, 87 Pac. 553.

58. *Reid v. Robrecht*, 102 Cal. 520, 36 Pac. 875.

59. See the titles "Decrees;" "Judgments."

60. **U. S.**—*Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. ed. 532. **Ala.**—*Fowler v. Alabama Iron & Steel Co.*, 154 Ala. 497, 45 So. 635. **Ark.**—*Liston v. Chapman & D. Land Co.*, 77 Ark. 116, 91 C. W. 27. **Conn.**—*Munson v. Munson*, 28 Conn. 582, 73 Am. Dec. 693. **Ill.**—*Gage v. Curtis*, 122 Ill. 520, 14 N. E. 30. **Ind.**—*Satterwhite v. Shirley*, 127 Ind. 59, 25 N. E. 1100; *Hunter v. McCoy*, 14 Ind. 528. **Ia.**—*Bolton v. Eggleston*, 61 Iowa 163, 16 N. W. 62. **Kan.**—*English v. English*, 53 Kan. 173, 35 Pac. 1107. **Mo.**—*McGuire v. Nugent*, 103 Mo. 161, 15 S. W. 551. **Neb.**—*McCauley v. Ohenstein*, 44 Neb. 89, 62 N. W. 232. **N. C.**—*Peacock v. Stott*, 104 N. C. 154, 10 S. E. 456. **S. D.**—*Farm & Colonization Co. v. Meloy*, 11 S. D. 7, 75 N. W. 207. **Tenn.**—*Wilcox v. Blackwell*, 99 Tenn. 352, 41 S. W. 1061. **Wis.**—*Magnuson v. Clithero*, 101 Wis. 551, 77 N. W. 882.

[a] Where the title to part only of the property in question is put in issue by the pleadings, the title to such part only can be determined and adjudicated in the action. *Taylor v. McConigle*, 120 Cal. 123, 52 Pac. 159.

61. *Collier v. Alexander*, 138 Ala. 245, 26 So. 367; *Brooks v. Roberts* (Mo.), 195 S. W. 1019.

[a] The title of defendant may in a proper case be quieted. **Ala.**—*Collier v. Alexander*, 138 Ala. 245, 26 So. 367. **Ia.**—*Kraft v. James*, 64 Iowa 159, 19 N. W. 804. **Ky.**—*Lipps v. Turner*, 161 Ky. 626, 176 S. W. 42. **Mich.**—*Miller v. Steele*, 146 Mich. 123, 109 N. W. 37. **Miss.**—*People's Bank v. West*, 67

Miss. 729, 7 So. 513, 8 L. R. A. 727 N. J.—*Blatchford v. Conover*, 40 N. J. Eq. 205, 1 Atl. 16, 7 Atl. 354.

[b] Where both parties establish a valid interest in the property in controversy, the respective interests must be determined and defined by the court. *Peterson v. Gibbs*, 147 Cal. 1, 81 Pac. 121, 109 Am. St. Rep. 107.

62. See 6 STANDARD PROC. 774.

63. **Ariz.**—*Provident Mut. Bldg.-Loan Assn. v. Schwertner*, 15 Ariz. 517, 140 Pac. 495. **Cal.**—*Boyce v. Fisk*, 110 Cal. 107, 42 Pac. 473; *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. 249; *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225. **D. C.**—*Buchanan v. MacFarland*, 31 App. Cas. 6. **Ill.**—*Ames v. Sankey*, 128 Ill. 523, 21 N. E. 579; *Abramowitz v. Langknecht*, 195 Ill. App. 484. **Ind.**—*Reed v. Kalfsbeck*, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466. **Ia.**—*Buckley v. Early*, 72 Iowa 289, 33 N. W. 769. **Ky.**—*Penn v. Rhoades*, 124 Ky. 798, 100 S. W. 288. **Neb.**—*Henry v. Henry*, 73 Neb. 746, 103 N. W. 441, 107 N. W. 789. **N. Y.**—*Williams v. Fitzhugh*, 37 N. Y. 444. **Ohio.**—*Butler v. Brown's Heirs*, 5 Ohio St. 211. **Wash.**—*Kane v. Borthwick*, 50 Wash. 8, 96 Pac. 516, 18 L. R. A. (N. S.) 486. **Wis.**—*Krugmeier v. Hackett*, 134 Wis. 57, 113 N. W. 1103.

64. **U. S.**—*Whitehead v. Farmer*,^{*} L. & T. Co., 98 Fed. 10, 39 C. C. A. 34. **Ark.**—*Coats v. Hill*, 41 Ark. 149. **Cal.**—*Grant v. Cornell*, 147 Cal. 565, 82 Pac. 193, 109 Am. St. Rep. 173. **Colo.**—*Buchanan v. Griswold*, 37 Colo. 18, 86 Pac. 1041. **Conn.**—*Adams v. Castle*, 30 Conn. 404. **Ga.**—*Piequet v. Augusta*, 64 Ga. 254. **Idaho.**—*Hole v. Van Duzer*, 11 Idaho 79, 81 Pac. 109. **Ind.**—*Reed v. Kalfsbeck*, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466. **Ia.**—*Buckley v. Early*, 72 Iowa 289, 33 N. W. 769; *Gardner v. Early*, 69 Iowa 42, 28 N. W. 437. **Kan.**—*Black v. Johnson*, 63 Kan. 47, 61 Pac. 988. **Me.**—*Briggs v. Johnson*, 71 Me. 235. **Md.**—*Stewart v. May-*

gage,⁶⁵ or the purchaser at an execution sale,⁶⁶ or one who in good faith has incurred expenses in connection with the property.⁶⁷

2. Nature and Extent of Relief.—The relief will be adapted to the circumstances of the case,⁶⁸ but it cannot go beyond the scope of the statute under which the action is brought.⁶⁹ The rights of the parties in the premises should be fixed and settled by the decree,⁷⁰ and if necessary to complete relief, possession may be awarded to the party entitled thereto.⁷¹ As an incident to the relief sought, the

er, 54 Md. 454. **Mich.**—Aztec Copper Co. v. Auditor General, 128 Mich. 615, 87 N. W. 895. **Minn.**—Ryan v. Ruff, 90 Minn. 169, 95 N. W. 1114. **Miss.**—Ragsdale v. Alabama G. S. R. Co., 67 Miss. 106, 6 So. 630. **Mo.**—Yeaman v. Lepp, 167 Mo. 61, 66 S. W. 957. **Neb.**—Payne v. Anderson, 80 Neb. 216, 114 N. W. 148. **N. J.**—Baldwin v. Elizabeth, 42 N. J. Eq. 11, 6 Atl. 275. **N. D.**—Fenton v. Minnesota Title Ins. & Tr. Co., 15 N. D. 365, 109 N. W. 363, 125, Am. St. Rep. 599. **S. D.**—Pettigrew v. Moody, 17 S. D. 275, 96 N. W. 94. **Tenn.**—Hamilton v. Brownsville G. Co., 115 Tenn. 150, 90 S. W. 159. **Wash.**—Cordiner v. Finch Inv. Co., 54 Wash. 574, 103 Pac. 829. **W. Va.**—Collins v. Reger, 62 W. Va. 195, 57 S. E. 743. **Wis.**—Maxey v. Simonson, 130 Wis. 650, 110 N. W. 803.

[a] But not where the tax sale is void ab initio. **U. S.**—Gage v. Kaufman, 133 U. S. 471, 10 Sup. Ct. 406, 33 L. ed. 725; Barnes v. Bee, 138 Fed. 476. **Cal.**—Harper v. Rowe, 53 Cal. 233. **Ill.**—Glos v. Shedd, 218 Ill. 209, 75 N. E. 887. **Kan.**—West v. Cameron, 39 Kan. 736, 18 Pac. 894. **Me.**—Morrill v. Lovett, 95 Me. 165, 49 Atl. 666, 56 L. R. A. 634. **Mich.**—Kent v. Auditor General, 138 Mich. 605, 101 N. W. 805. **Minn.**—Burdick v. Bingham, 38 Minn. 482, 38 N. W. 489. **Mo.**—Nichols v. Russell, 141 Mo. App. 140, 123 S. W. 1032. **N. D.**—State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984. **Ore.**—Ferguson v. Kaboth, 43 Ore. 414, 73 Pac. 200, 74 Pac. 466.

65. Boyce v. Fisk, 110 Cal. 107, 42 Pac. 473.

66. Herndon v. Rice, 21 Tex. 455.

67. Clark v. Brown, 70 Iowa 139, 30 N. W. 46.

[a] One who has made repairs and improvements in an honest belief that he owned the property. Clark v. Brown, 70 Iowa 139, 30 N. W. 46; Thomas v. Evans, 105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519.

[b] But a defendant who pays taxes on the property without being in possession is not entitled to be reimbursed for such payments. Dawson v. Girard L. Ins. A. & T. Co., 27 Minn. 411, 8 N. W. 142.

68. Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720, 36 L. ed. 532.

[a] Under a prayer for general relief (1) the court in an action to quiet title may grant any relief consistent with the issues made in the case (Van Zanten v. Van Zanten, 269 Ill. 491, 109 N. E. 986; Primm v. Raboteau, 56 Mo. 407), unless (2) it is expressly provided by the statute that where plaintiff seeks further relief beyond the determination of title he must specifically ask for it in the pleadings. Regal Realty & Inv. Co. v. Gallagher (Mo.), 188 S. W. 151.

[b] It will set aside the instruments which constitute the alleged cloud upon title. Schultz v. Schultz, 274 Ill. 341, 113 N. E. 638; Conwell v. Watkins, 71 Ill. 488; Rucker v. Dooley, 49 Ill. 377, 95 Am. Dec. 614.

[c] Where a mortgage has been satisfied the mortgagee may be compelled to execute a release thereof. Brown v. Stewart, 56 Md. 421.

[d] Specific performance of an agreement to convey the property in question will not be decreed. Killey v. Wilson, 33 Cal. 690.

[e] Refusal to decree the execution of a conveyance to plaintiff by defendant who holds the property in trust for him. Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518.

69. Powell v. Crow, 204 Mo. 481, 102 S. W. 1024.

70. Cal.—Quint v. McMullin, 103 Cal. 381, 37 Pac. 381. Idaho.—Petten-gill v. Blackman, 30 Idaho 241, 164 Pac. 358. Neb.—Dolen v. Black, 48 Neb. 688, 67 N. W. 760. N. J.—Blatchford v. Conover, 40 N. J. Eq. 205, 1 Atl. 16, 7 Atl. 354. N. C.—Smith v. Smith, 173 N. C. 124, 91 S. E. 721.

71. Landregan v. Peppin, 94 Cal.

court may require an accounting for damages to the land in controversy,⁷² but the value of the use and occupation of the disputed premises for the time defendant was in possession can ordinarily not be recovered.⁷³

3. Costs.⁷⁴—The prevailing party ordinarily is entitled to judgment for costs of suit,⁷⁵ but where defendant has filed a disclaimer the court has no right to render a decree against him for costs.⁷⁶

4. Operation and Effect.—A decree quieting plaintiff's title against the defendant does not add his claim to that already possessed by the plaintiff and brings plaintiff no new and independent right which he may assert against a stranger.⁷⁷ It is not binding upon one who was not a party or in privity with a party.⁷⁸ But such decree destroys all liens and claims of the parties to the action unless expressly excepted therein,⁷⁹ and a decree which determines the invalidity of the conveyances in question has the effect to remove the cloud resulting from their execution and it is not necessary to expressly set them aside.⁸⁰

H. ENFORCEMENT OF JUDGMENT OR DECREE.⁸¹—Where a judgment declares the rights of the respective parties the court may make such

465, 29 Pac. 771; *Kitts v. Austin*, 83 Cal. 167, 23 Pac. 290; *Wyland v. Mendel*, 78 Iowa 739, 37 N. W. 160; *Lees v. Wetmore*, 58 Iowa 170, 12 N. W. 238.

[a] Where defendant seeks no affirmative relief it is error to render a decree giving defendant possession of the property involved in an action to quiet title. *Hungarian Hill G. Min. Co. v. Moses*, 58 Cal. 168; *Spradlin v. Patrick*, 23 Ky. L. Rep. 1156, 64 S. W. 840.

72. Ala.—*Lockett v. Hurt*, 57 Ala. 198. **Fla.**—*Gasque v. Ball*, 65 Fla. 383, 62 So. 215. **Ill.**—*Haworth v. Taylor*, 108 Ill. 275. **Ia.**—*Buckley v. Early*, 72 Iowa 289, 33 N. W. 769. **Tenn.**—*Bains v. Perry*, 1 Lea 37. **Tex.**—*Bryson v. Boyce*, 41 Tex. Civ. App. 415, 92 S. W. 820.

73. Polack v. Gurnee, 66 Cal. 266, 5 Pac. 229, 610; *Robinson v. Jones*, 65 Miss. 520, 5 So. 102.

[a] The decree cannot go farther than to quiet the title and inquire into the rents and profits received during the wrongful possession of the defendant; but such possession is a trespass for which there is a remedy at law. *Fitzhugh v. Barnard*, 12 Mich. 104.

74. See the title "Costs."

75. Ill.—*Converse v. Rankin*, 115 Ill. 398, 4 N. E. 594. **Ind.**—*Bothwell v. Millikan*, 101 Ind. 162, 2 N. E. 959. **3 N. E. 816. Ky.**—*Moore v. Boner*, 7

Bush 26. N. Y.—*Rugen v. Collins*, 8 Hun 384. **Utah.**—*Dudley v. Facer*, 8 Utah 403, 32 Pac. 668.

76. Cal.—*Summerville v. Marsh*, 142 Cal. 554, 76 Pac. 388, 100 Am. St. Rep. 145. **Conn.**—*Foot v. Brown*, 78 Conn. 369, 62 Atl. 667. **Ind.**—*New American Oil & M. Co. v. Troyer*, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739. **Ia.**—*Deacon v. Central Iowa Inv. Co.*, 95 Iowa 180, 63 N. W. 673. **Mich.**—*Munroe v. Winegar*, 128 Mich. 309, 87 N. W. 396.

[a] The disclaimer must be unqualified and refer to the whole property in controversy. *Moore v. Wallace*, 16 Okla. 114, 82 Pac. 825.

77. Lockwood v. Meade Land & C. Co., 71 Kan. 739, 81 Pac. 496.

78. Weed Sewing Machine Co. v. Baker, 40 Fed. 56 (one in possession under contract to purchase from defendant, not bound if not a party); *Jasper v. Sparham*, 155 Iowa 404, 101 N. W. 134. See generally the titles "Judgments," "Res Judicata."

[a] Not binding on a mortgagee who was not made a party to the action. *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 424.

79. Watkins v. Winnings, 102 Ind. 330, 1 N. E. 648.

80. Gildborg v. Paralta, 31 Cal. 627; *Empire Ranch & C. Co. v. Wilson*, 24 Cal. App. 82, 131 Pac. 370.

81. See the title "Judgments and Decrees, Enforcement of."

orders as may be necessary to carry its judgment into execution.⁸²

III. STATUTORY PROCEEDING TO COMPEL CLAIMANT TO TRY TITLE.—Under some statutes an adverse claimant may be summoned to show cause why he should not bring an action to try his alleged title to real property.⁸³ Such a proceeding is preliminary merely and the court cannot try the title or make a decree which will operate as a conclusive adjudication thereon.⁸⁴ Plaintiff must be in possession of the real property;⁸⁵ constructive possession,⁸⁶ or merely nominal possession obtained under circumstances tending to show a trespass,⁸⁷ is not sufficient. The petitioner must show exclusive possession.⁸⁸ It must be made to appear that the defendant's claim is such that it may be conclusively adjudicated in the suit or action which may be directed,⁸⁹ though the form of action in which such

82. *Smith v. Miller*, 66 Tex. 74, 17 S. W. 399.

[a] **Injunction.**—While a decree in an action to quiet title need not take the form of an injunction, the latter is a proper remedy to enforce the decree. *Cal.*—*Wolf v. Gall*, 174 Cal. 140, 162 Pac. 115. *La.*—*Craig v. Lambert*, 44 La. Ann. 885, 11 So. 464. *Minn.*—*Conkey v. Dike*, 17 Minn. 457. *Neb.*—*Whitaker v. McBride*, 5 Neb. (Unof.) 411, 98 N. W. 877. *N. Y.*—*Stamm v. Bostwick*, 30 Hun 70, 65 How. Pr. 358, 2 McCarty Civ. Proc. 467. *Ohio.*—*Bartholomew v. Lutheran Congregation*, 35 Ohio St. 567.

[b] **Writ of Assistance.**—The court may enforce a decree awarding possession to defendant by a writ of assistance. *Brady v. Carteret Realty Co.*, 82 N. J. Eq. 620, 90 Atl. 257, Ann. Cas. 1915B, 1093. See generally the title "Assistance, Writs of."

83. *Me.*—*Ginn v. Ulmer*, 105 Me. 286, 74 Atl. 635; *Poor v. Lord*, 84 Me. 98, 24 Atl. 583. *Mass.*—*Weld v. Clarke*, 209 Mass. 9, 95 N. E. 651. *Mo.*—*Colline Real Estate & B. Assn. v. Johnson*, 120 Mo. 299, 25 S. W. 190; *Webb v. Donaldson*, 60 Mo. 394. *Pa.*—*Clark v. Clark*, 255 Pa. 574, 100 Atl. 457; *Putt v. Africa*, 232 Pa. 182, 81 Atl. 203; *Pifer v. Berkey*, 229 Pa. 394, 78 Atl. 990.

[a] **The object of such statutory proceeding being to enable a party in possession who can bring no possessory action to compel an adverse claimant to institute an action to determine the title.** *Webb v. Donaldson*, 60 Mo. 394.

84. *Weld v. Clarke*, 209 Mass. 9, 95 N. E. 651; *Dyer v. Baumeister*, 87 Mo. 134.

[a] **The inquiry is confined to the**

questions of plaintiff's title and possession and the existence of the adverse claim, but the validity of defendant's claim is not in issue in such proceeding. *Colline Real Estate & B. Assn. v. Johnson*, 120 Mo. 299, 25 S. W. 190.

85. *First Baptist Church v. Harper*, 191 Mass. 196, 77 N. E. 778; *Munroe v. Ward*, 4 Allen (Mass.) 150; *Dyer v. Baumeister*, 87 Mo. 134; *Rutherford v. Ullman*, 42 Mo. 216.

[a] **A mere right or title to an easement or to any other interest without possession is not enough to compel an adverse claimant to bring an action to determine the claim and interest.** *Boston Mfg. Co. v. Burgin*, 114 Mass. 340; *Bowditch v. Gardner*, 113 Mass. 315.

86. *Von Phul v. Penn*, 31 Mo. 333.

87. *Dyer v. Baumeister*, 87 Mo. 134.

88. *Orthodox Cong. Soc. v. Greenwich*, 145 Mass. 112, 13 N. E. 380; *Leary v. Duff*, 137 Mass. 147; *India Wharf v. Central Wharf & W. D. Corp.*, 117 Mass. 504.

89. *Me.*—*Smith v. Libby*, 101 Me. 338, 64 Atl. 612. *Mass.*—*Boston Mfg. Co. v. Burgin*, 114 Mass. 340. *Mo.*—*Burt v. Warren*, 30 Mo. App. 332; *Bredell v. Alexander*, 8 Mo. App. 110.

[a] **The defendant must have a subsisting right of action by which he can have his right adjudicated, but suit may be required upon a claim to an equitable as well as a legal title.** *Colline Real Estate & B. Assn. v. Johnson*, 120 Mo. 299, 25 S. W. 190.

[b] **Where the adverse claim is merely of a remainder and does not conflict with plaintiff's possession, the case is not within the provisions of such statute.** *Tisdale v. Brabrook*, 102

title or claim of adverse interest can be asserted is immaterial.⁹⁰

The statutory proceeding being only preliminary to a suit to be brought the rules of pleading which govern actions to quiet title need not be strictly followed.⁹¹ The adverse claim may be alleged in the language of the statute,⁹² and an averment of petitioner's information and belief that the defendant makes an adverse claim is sufficient.⁹³ The description of the property need not be exact,⁹⁴ provided that it be sufficiently definite to give notice to the defendant to what property the petition refers.⁹⁵ Where defendant disclaims all right and title to the land the proceeding thereby is put to an end.⁹⁶ Where defendant does not disclaim, he may by answer show cause why he should not be compelled to bring an action to try title.⁹⁷

Mass. 374; *Webb v. Donaldson*, 60 Mo. 394.

[c] **A party who has only an easement** and who does not complain that his rights have been interfered with cannot be compelled under such statute to bring an action to try his alleged right. *Smith v. Libby*, 101 Me. 338, 64 Atl. 612; *May v. New England R. Co.*, 171 Mass. 367, 50 N. E. 652.

[d] **An unassigned dower interest** is an adverse claim within the meaning of the statute. *Benoist v. Murrin*, 47 Mo. 537.

90. *Cook v. Von Phul*, 55 Mo. App. 487.

91. *Ginn v. Ulmer*, 105 Me. 286, 74

Atl. 635; *Blanchard v. Lowell*, 177 Mass. 501, 59 N. E. 114.

92. *Ginn v. Ulmer*, 105 Me. 286, 74 Atl. 635.

93. *Oliver v. Look*, 77 Me. 585, 1 Atl. 833.

94. *Ginn v. Ulmer*, 105 Me. 286, 74 Atl. 635.

95. *Oliver v. Look*, 77 Me. 585, 1 Atl. 833.

96. *Jordan v. Stevens*, 55 Mo. 361.

[a] **A denial of plaintiff's title by defendant who disclaims any adverse right or title is surplusage and does not call for a determination of such issue.** *Jordan v. Stevens*, 55 Mo. 361.

97. *Cook v. Von Phul*, 55 Mo. App. 487.

QUI TAM ACTION. — See Penalties, Forfeitures and Fines.

LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES

UC SOUTHERN REGIONAL LIBRARY FACILITY



AA 000 798 428 9

